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

REPLY BRIEF OF DEFENDANTS-APPELLANTS, GAILON ARTHUR JOY AND ROBERT PICKLE

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REPLY TO RESPONSE TO JURISDICTIONAL STATEMENT

Plaintiffs dispute the finality of the November 3, 2008, order of dismissal. Yet Plaintiffs maintain:

> The district court further conditioned dismissal on payment of costs that the court indicated might be imposed following briefing by the parties.

(Plaintiffs' Brief ("PB") 11). Since the order of dismissal already included the condition of possible payment of costs, the inclusion of which Plaintiffs never objected to, the resolution of Defendants' motion for costs didn't alter the November 3 order. Thus, finality is not prevented. *Budinich v. Becton Dickinson & Co.*, 486 U.S. 196, 199 (1988).

The original judgment, not a judgment amended solely to award costs, is the order by which a timely appeal is determined. *Collard v. United States*, 10 F.3d 718, 719 (10th Cir. 1993).

The court's October 30 order was already entered in the Electronic Clerk's Notes of October 31. Yet the clerk drafted, signed, and filed a separate document ordering dismissal on November 3, 2008, presumably pursuant to Fed.R.Civ.P. 58(a)–(b). Therefore, Fed.R.Civ.P. 58(e) applies, which prohibits the extension of time for appeal "in order to tax costs or award fees."

Potential spoliation of evidence consisting of documents critical to the defense makes later review impossible, and irreparable injury would result. Defendants' claims of right in this regard are separable from and collateral to the

rights asserted in the action. The dismissal order(s) is/are appealable on these grounds if upon no other. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949); *Sears, Roebuck & Co. v. Mackey*, 351 U.S. 427, 441 (1956).

REPLY TO RESPONSE TO STATEMENT OF THE ISSUES

Plaintiffs express the issues as if they filed two separate motions, one for voluntary dismissal and a second for return of documents. (PB 3–4). But Plaintiffs' single motion requested a single order. (Joint Appendix ("JA") 299–300).

REPLY TO RESPONSE TO STATEMENT OF THE CASE

The record unquestionably demonstrates that Plaintiffs commenced and prosecuted a frivolous lawsuit in bad faith, vexatiously multiplied proceedings, and abusively designated documents as confidential. (Defendants' Brief ("DB") 2–32, 44–46, 49–52, 58). Most relevant facts remain undisputed[1] and the law can be applied even where the district court did not make findings of fact. *Conservation Law Found. v. Busey*, 79 F.3d 1250, 1271 (1st Cir.1996).

Plaintiffs decry Defendants' characterization of Plaintiffs' actions, but offer no alternative theories to explain Plaintiffs' discrepancies and fallacious arguments. Instead Plaintiffs repeat assertions that are indisputably false.

For example, Plaintiffs' complaint doesn't concern only "specific

[1] To illustrate, the record contains no rebuttal to Defendants' analysis of Plaintiffs' confidentiality designations. (see citations at DB 24–26).

statements" or "pinpoint allegations." (PB 5; JA 241). A court found on October 22, 2008, that ¶ 46(g) of Plaintiffs' complaint is "pretty broad"; Plaintiffs' counsel on the record agreed that some allegations are "broad." (Record on Appeal Doc. ("RA") 152-6 pp. 9–11; RA 126 pp. 10–11; JA 37). This admission justifies Defendants' attempts to seek discovery to defend against these broad allegations.

Plaintiffs' continued insistence that Defendants' subpoenas were an end run around Plaintiffs' motions for protective orders is inexcusable since the original subpoenas *predate* those motions, as already pointed out. (PB 7–8; DB 19). Because Plaintiffs' stay of discovery request was denied, Defendants weren't supposed to wait until the resolution of these *yet unfiled* motions. (JA 362, 370).

Plaintiffs, not "the parties," sought protective orders. (PB 6). Amazingly, Plaintiffs admit that their motions for protective orders and opposition to Defendants' subpoenas[2] are what protracted the litigation.[3] (PB 6, 9). Plaintiffs wrongly waited until 5½ months after the expiration of Rule 34's 30-day time limit and almost a year after the Rule 26(f) conference to file their second such motion. (Exhibits for Appendix ("EX") 156, 160; JA 117, 12). *Burlington N. &. Santa Fe Ry. Co. v. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005).

[2] Discussion about Plaintiffs' opposition to Defendants' subpoenas is immediately followed by the words "Additional delays." (PB 9).

[3] Plaintiffs invoked the automatic stay on September 13, 2007; that stay was lifted on November 21, a mere 69 days later. (EX 66, 733). Thus, the bankruptcy case did not delay litigation much at all, and Plaintiffs violated the stay in the meantime. (DB 27–28).

Plaintiffs never "obtained" an order limiting the scope of discovery, for that aspect of their motion was denied. (PB 6; JA 285).

Plaintiffs' argument that Defendants might publish sensitive discovery materials was rebutted on January 2, 2008: Defendants have never published the tax returns of Danny Lee Shelton ("Shelton"), or embarrassing correspondence regarding Shelton's daughter and sister. (JA 153; RA 48 p. 9).

None of Defendants' subpoenas were quashed. The Illinois court ordered the matter transferred to Massachusetts because Plaintiffs misled that court into thinking that the question of scope of discovery had not yet been resolved. (JA 322; RA 152-6 pp. 36–37). Regarding the subpoena of MidCountry Bank ("MidCountry"), the district judge instructed Defendants to seek relief from the Minnesota court because he could not alter that judge's order, but the Minnesota court then directed Defendants back to the Massachusetts court to obtain relief.[4] (JA 222–223; RA 92 pp. 30–31).

Defendant Pickle's second motion to compel failed because he didn't comply with D.Mass.Loc.R. 37.1(b)(3). (JA 283). Plaintiffs' objections to Defendant Pickle's requests to produce were overly general, and thus Defendant Pickle couldn't figure out how to itemize what exactly Plaintiffs objected to. (RA 62 p. 11).

[4] Defendants did not pursue the matter further since the documents were lost at the courthouse until December 16, 2008. (RA 160).

Since a specific instance of private inurement in 1998 was identifiable, requests for financial records went back to 1998 in these requests to produce. (EX 151–152). Other requests, unless otherwise stated, were limited in time by Definition 16. (EX 141). Plaintiffs unsuccessfully tried to restrict the timespan sought for to but 2001 to January 2007, which would have prevented discovery concerning key issues. (RA 80 pp. 9–10). The only thing Plaintiffs "won" in their second motion for a protective order was the imposition upon all parties, including themselves, of the requirement to take leave before issuing subpoenas. (JA 284–285).

The question wasn't whether Defendants were willing to dismiss, but upon what terms Plaintiffs were offering to settle. (JA 344).

Recent Activity in Underlying Case

On April 13, 2009, the district court denied Defendants' motion to impose costs, and on April 15 denied Defendants' collateral motion to file under seal. On April 27, regarding these denials, Defendants filed motions to reconsider and to amend findings, pursuant to Fed.R.Civ.P. 59(e) and 52(b).

REPLY TO RESPONSE TO STATEMENT OF FACTS

The Court has before it two very different stories, only one of which can be true, only one of which harmonizes with the evidence, testimony, and facts in the record.

As in the underlying case, Plaintiffs make little or no effort in their brief to rebut the facts laid out by Defendants, even though their brief could have been about 4,000 words longer. Rebuttal simply isn't possible.

Plaintiffs' Sweeping Admission

Quite telling is Plaintiffs' sweeping admission:

> It should also be noted that there was never an occasion for 3ABN and Shelton to submit evidence in support of the merits of their claims to the district court, and therefore there is nothing available in the district court record from which 3ABN and Shelton can respond to the web of innuendo and speculation that infests the appellants' brief.

(PB 18).[5] The implications are four-fold.

First, if Plaintiffs need evidence in support of Plaintiffs' claims to rebut Defendants' many citations to the voluminous record, the exhibits and testimony[6] that Defendants cite are relevant to Plaintiffs' claims.

Second, if in more than 18 months, Plaintiffs' seven well-paid attorneys of record can't find evidence to rebut the exhibits and testimony filed by two defendants *pro se*, then *no such evidence exists,* and Plaintiffs' lawsuit is baseless.

Third, most or all of Plaintiffs' exhibits concerning Defendants' pre-lawsuit activities were filed by May 24, 2007. On that day, Three Angels Broadcasting Network, Inc. ("3ABN") corporate secretary Mollie Steenson ("Steenson") filed an

[5] "Never an occasion ... to submit evidence"? Defendants twice explicitly invited Plaintiffs to do so. (RA 113 p. 9; RA 161 p. 13).

[6] Often, these were but Plaintiffs' own statements, or public, government records.

affidavit which asserted that her exhibits supported Plaintiffs' case. (JA 96–98, RA 10 p. 6). Plaintiffs now deny that assertion; thus, the underlying suit was baseless from the very beginning, and Steenson's affidavit contains misstatements of material fact.

Fourth, and most importantly: Defendants' brief repeatedly cited the voluminous record to demonstrate that Plaintiffs filed their suit in bad faith, and Plaintiffs admit that there is nothing in the record to rebut Defendants on this point. No other finding is therefore possible.

District Court's Findings

While the district court dismissed the case "based on the representation of the plaintiff," the court never made a finding that such representations were in fact true.

A Fatal Flaw

Plaintiffs rely upon the affidavits submitted with their motion to dismiss (PB 14), a fatal flaw since those affidavits contradict the record and thus stand impeached.

For example, on September 4, 2008, Plaintiffs' counsel wrote, "I do oppose that motion," referring to Defendants' motion to extend discovery deadlines. (EX 671). Nonetheless, Plaintiffs still use their affidavit to prove that Plaintiffs stipulated to an extension of discovery! (PB 14; DB 31).

On September 16, 2008, Defendants informed the district court of

"Plaintiffs' on site conversion of the Rule 2004 examination into a deposition consisting of questions pertaining to ... the instant case." (RA 108 pp. 1–2; DB 29). The record contains no rebuttal from Plaintiffs. Therefore, Plaintiffs' mere assertion that "[n]o depositions had been taken" is fallacious. (PB 14; JA 313–314).

"The Most Serious ... Damaging Statements"

Plaintiffs assert that Save3ABN.com "contained false accusations of the commission of crimes," originally identified by Plaintiffs as Shelton's cover up of the child molestation allegations against Tommy Shelton ("Tommy allegations"). (PB 14; EX 135). Plaintiffs contended that Defendants affected 2006 donation levels, particularly in December. (JA 101–102). Defendants' release regarding Shelton's cover up, and the negligence of Walter Thompson ("Thompson") and the 3ABN Board in the matter, was published at the beginning of the 2006 Christmas donation season. (EX 127–130). By the end of December 2006, Shelton threatened suit. (JA 195). In February 2007, while reacting to the Tommy allegations, Tommy Shelton publicized that Defendant Joy would be sued. (EX 138). Plaintiffs' complaint alludes to Defendants' release. (JA 36 at ¶ 46(e), 38 at ¶ 48(c)).

Shelton's allowing Tommy Shelton to work with children put those children at risk, and put 3ABN at serious financial risk. (EX 128–129). Thus, Shelton's cover up was more serious and damaging than Shelton's dumping of his wife, falsely accusing her of adultery, laundering 3ABN money through Remnant Publications, Inc. ("Remnant") book deals into his own pockets, document fraud,

perjury in his divorce-related proceedings, etc.

Therefore, the IRS and EEOC never exonerated Shelton of "the most serious ... damaging statements" (PB 17), but Plaintiffs wish the Court to think otherwise to justify their motion to dismiss.

Voluntarily Surrendered Claims

Plaintiffs assert that "the bankruptcy court order that lifted the automatic stay [on November 21, 2007] had required 3ABN to give up its right to seek damages against Joy," and that this justified dismissal nearly a year later. (PB 15). In actuality, Plaintiffs voluntarily chose to surrender their claims[7] so that they could seek injunctive relief against Defendant Joy (EX 733), and then never sought that relief. Thus, to this day, Save-3ABN.com and its 15 siblings are available for all the world to see.

REPLY TO RESPONSE TO ARGUMENT

Since this brief is limited to 7,000 words, Plaintiffs' repetitive assertions are not rebutted at every place they occur. Therefore, Defendants incorporate Defendants' various rebuttals in whichever sections they may apply.

Reply to Response to Standard of Review

Plaintiffs by their silence acknowledge that there has never been a finding of good cause for the protection of any individual documents. Thus, an independent

[7] No big deal if the suit was about revenge, not money.

determination of whether good cause exists is required for continued judicial protection. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994). A finding of good cause for a blanket order does not negate this requirement. *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 142, 145, 147–148 (2d Cir. 1987).

Reply to Response to Discussion of the Issues

I. Issues Pertaining More or Less to Procedure

A. The District Court Erred by Granting the Motion Without Becoming Familiar with Relevant Facets of the Case

On September 11, 2008, the district judge said he did not have "a handle really on where matters stand," and, "I am not immersed in the ins and outs of the disputes." (JA 376, 383). Plaintiffs apply these statements to only "cross-motions on permissible scope of discovery that he had recently referred to" the district magistrate, and uncertainty regarding whether to extend discovery. (PB 22).

One of those "cross-motions" was Defendant Pickle's motion to compel filed nearly four months earlier on May 15, 2008, referred to the district magistrate on June 23, and the other was Plaintiffs' June 25 motion to limit the scope of discovery. (JA 10–12). As exhibits to Defendants' filings pertaining to these two motions, Defendants filed over 420 pages of motions, memoranda, affidavits, and exhibits from the related cases in Michigan, Minnesota, and Illinois; some of these related case filings had been filed in February. (RA 63-28 through 63-33; RA 81-2

pp. 121-143; RA 81-3 through 81-9; RA 93 pp. 1-37; EX 217).

Thus, Plaintiffs' interpretation applies the district judge's words to a large portion of the case.

In the status conference of December 14, 2007, in responding to a question regarding the number of allowable depositions, the district judge stated, "I just simply don't have a good enough handle on the case, particularly in its current posture, to make a ruling in the abstract." (RA 144 p. 26). Between that date and the status conference of May 7, 2008, the district judge suggested that the case may have fallen "through the cracks" for a number of months due to a heavy case load. (RA 77 p. 4).

Toward the end of the October 30, 2008, status conference, the district judge made clear his uncertainty about whether or not the April 17, 2008, confidentiality order entered in the case ("Confidentiality Order") allowed the transfer of discovery or destruction of documents, required the return of documents, or permitted retention of copies of confidential materials. (Defendants' Addendum ("DA") 14, 16). Thus, the district judge was unfamiliar with the Confidentiality Order which was explicitly at issue in Plaintiffs' motion to dismiss.

Given the above statements taken from the last four status conferences, Plaintiffs' reference to the number of status conferences held by the district judge means absolutely nothing.

B. The District Court Erred by Granting the Motion Without Reading Defendants' Opposition Brief

Plaintiffs do not dispute the timing of the filing of Defendants' opposition. (DB 35). Plaintiffs thus suggest that the court, between 1:55 pm and 3:00 pm, read and digested Defendants' memorandum, affidavit, and exhibits totaling 255 pages, of which 235 pages were not filed until 2:23 pm.

In the September 11, 2008, status conference scheduled for 3:30 pm, the district judge deferred ruling on an issue because, while he had "quickly reviewed" a five-page order filed by the district magistrate at 10:52 am[8], he had not "really ha[d] time to digest" it. (Defendants' Supplemental Addendum 1; JA 281–285, 376). The stark contrast between this characteristic care and the ruling on the motion to dismiss is explainable as a desire to clear the docket.

In the October 30 status conference, Defendant Joy said that Defendants had filed opposition to Plaintiffs' motion. The court responded, "When was that filed?" (DA 6), an unnecessary question if the court had just spent an hour pouring through 255 pages. Therefore, the court's earlier statement, "I've read the papers," must refer only to Plaintiffs' papers, and its later statement, "Yes, I did see it," must refer to seeing a notice of filing, not to reading the contents of what was filed. (DA 5–6).

Defendants repeatedly referred to their opposition brief as if the court was

[8] RA 106 was filed at 10:52 am, and amended by RA 107 at 2:22 pm. The sole correction was that "August 15" replaced "September 26" on page 4.

unfamiliar with its contents, and the court never stated that it had already read it. (DA 6–7, 11, 15).

The transcript speaks for itself: Defendants had opportunity to cover very few issues prior to the granting of the motion, and little opportunity to cover more issues before the court ended the conference with, "I've heard enough." (DA 5–20).

The district court therefore failed to exercise the judicial discretion required by a motion under Rule 41(a)(2). *Alamance Indus., Inc., v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).

C. Given the Complexity of the Case, the District Court Erred by Not Allowing for a Normal Briefing Schedule

Plaintiffs unreasonably argue that Defendants should have refused to file anything before the October 30 status conference, and refused to be heard during that conference. But Defendants knew that the district judge tended to clear his docket whenever possible.

The briefing schedule permitted movants to file reply memoranda. (RA 20 p. 3). A normal schedule would thus have given Defendants time to seek leave to supplement their opposition. Having filed their opposition, Defendants did not know that the motion to dismiss would be ruled on before the conclusion of a normal briefing schedule, and thus Defendants had no occasion to raise this issue heretofore.

D. The District Court Erred by Granting the Motion Because Plaintiffs Failed to Comply with D.Mass.Loc.R. 7.1(a)(2).

Plaintiffs argue that mere certification, whether true or false, satisfies D.Mass.Loc.R. 7.1(a)(2).

Plaintiffs do not deny that Plaintiffs' counsel said he would not file a motion to dismiss. Plaintiffs' counsel admitted that he never conferred with Defendant Joy. (EX 745–748).

In a hearing on October 22, 2008, Plaintiffs' counsel represented that he intended to meet the court-ordered deadline of October 27 for responding to Defendant Pickle's revised document requests. (RA 152-6 p. 35; JA 284). But the dismissal motion of October 23 was already in the works on October 22, and was immediately followed by a refusal to comply with the court-ordered deadline. (JA 320; EX 823). Thus, counsel's false representation in the October 22 hearing coincided with counsel's October 17 statement that he would not file a motion to dismiss, and verifies his bad faith.

II. Issues Pertaining More or Less to Evidence and Testimony

A. The District Court Erred by Relying upon Walt Thompson's Uncorroborated, Hearsay Testimony

Fed.R.Civ.P. 52(a)(5) permits a party to later question evidentiary support.

Contrary to Plaintiffs' contention, Thompson's own statements which Defendants cited to impeach him (EX 507–508, 660, 663, 689, 691, 695, 718, 869) are not hearsay, since Thompson is 3ABN's agent or representative as well as

Shelton's coconspirator. Fed.R.Evid. 801(d)(2). By the same rule, 3ABN's government filings and promotional materials are not hearsay. (EX 867–868, 874–877). Administrative Law Judge Barbara Rowe's opinion (EX 870–872) is not excluded by the hearsay rule. Fed.R.Evid. 803(8); *Zeus Enter. Inc. v. Alphin Aircraft, Inc.*, 190 F.3d 238, 242 (4th Cir. 1999).

All this evidence was filed from July 9 through October 30, 2008. Defendants explicitly pointed out Thompson's lack of veracity on September 8–9 and October 1, 2008. (RA 105 p. 5; RA 113 pp. 3–4). Once a liar, always a liar.

Plaintiffs fault Defendants for not rehashing in Defendants' opposition to Plaintiffs' motion to dismiss every detail raised on September 8–9 and October 1, implying that the district judge was unfamiliar with these aspects of the case. (PB 26–27). Nevertheless, Defendants conclusively demonstrated in their opposition that:

- Thompson's stated objectives of the suit contradicted his earlier statements. (JA 324).
- Thompson's assertion that 3ABN's acquiring of two domain names accomplished the suit's objective is contradicted by Plaintiffs' wanting to shut down 16 other Save 3ABN websites containing the same material. (JA 338).
- Thompson's similar, earlier claims of a governmental agency conducting a thorough review of 3ABN's finances were fallacious. (JA 338–339).

- Thompson's assertion that donations are back up is contradicted by 3ABN's own promotional material. (JA 339).

Due to conflicting evidence and Thompson's lack of veracity, Defendants requested an evidentiary hearing where cross-examination of witnesses might be had. (JA 342). Plaintiffs admit that disallowing such cross-examination under such circumstances "may be an abuse of discretion." (PB 27).

Plaintiffs make no attempt to refute Defendants' specific arguments and evidence. (PB 27).

Thompson's affidavit speaks for itself: Thompson merely repeats what unidentified attorneys and accountants allegedly told him. (JA 318–319). Thompson therefore has no first-hand knowledge of the results of the IRS criminal investigation, the EEOC inquiry, and 3ABN's finances, and makes no claims otherwise. No case closure letters were filed. No copy of the alleged financial figures was provided to the court, much less the foundation for those figures.

Attorneys seeking to avoid counterclaims for abuse of process and malicious prosecution have an interest in persuading Thompson to drop the suit, regardless of how the IRS investigation actually turned out.

Thompson summed up his problem when he said, "I am reporting only what I believe I was told." (EX 660; RA 105 p. 5).

B. The District Court Erred by Relying upon Deceptive and/or False Testimony

Contrary to Plaintiffs' fallacious assertions, Defendants raised these concerns before the lower court. (JA 338–339). Nevertheless, Fed.R.Civ.P. 52(a)(5) permits a party to later question evidentiary support.

In their complaint, Plaintiffs sought two different permanent injunctions against Defendants' use of "3ABN," particularly regarding domain names. (JA 44 at ¶¶ 2–3). Plaintiffs make no attempt to explain how these two objectives have already been met, but instead pretend that 16 other Save 3ABN websites with the same content never existed, websites that the record proves Plaintiffs also had in their sights. (JA 254, 286–287; EX 867–868).

Plaintiffs sought the relief of having Defendants remove and retract their statements. (JA 45 at ¶¶ 6–7). Nothing has been removed or retracted.

The EEOC and the IRS never exonerated Plaintiffs of the most serious allegations. (*supra* 8–9).

Plaintiffs make no attempt to explain how the IRS could conclude that there was nothing unethical, illegal, or improper about the 1998 house deal, the 2003 horse donation(s), the Remnant book deals, Shelton's personal use of the 3ABN jet, and 3ABN's payment for personal legal expenses and vacation travel. (DB 10–11). Plaintiffs wish these matters had never been raised.

Plaintiffs ignore Defendants' evidence that Thompson falsely claimed that

the state of Illinois had also conducted a "thorough review" of 3ABN's finances during 3ABN's property tax case, when in actuality 3ABN refused to produce its Form 990's as requested by the intervenors. (EX 871–872).

Plaintiffs consistently refused to produce any documents that would distinguish true donations from sales, and that would establish what historical donation levels have been, with and without the gifts of insiders. (EX 151, 155, 167, 168, 179; JA 275–276). But, Plaintiffs maintain that the suit had to be dismissed to save expense, which contradicts Plaintiffs' assertion that donations are back up. (PB 18, 28; JA 344).

C. The District Court Erred by Failing to Schedule an Evidentiary Hearing

Plaintiffs agree that where there are "conflicting affidavits," "a credibility determination is necessary," or "material facts are in dispute," an evidentiary hearing is called for. (PB 30). Plaintiffs pretend that such was not the situation here.

III. Issues Pertaining More or Less to Relevant Factors That Should Have Been Considered

A. The District Court Erred by Granting the Motion Despite the Insufficiency and Falsity of 3ABN's Reasons for the Need to Dismiss

Plaintiffs do not dispute the fact that not obtaining a "substantial award of damages" isn't a sufficient reason for dismissal when the suit was never initiated for that purpose anyway.

Besides not explaining IRS-related questions (*supra* 17), Plaintiffs never affirm that the Thompson memo was produced to the EEOC, and never explain how the Thompson memo doesn't establish probable cause. (JA 325, 337, 339, 342; DB 41).

Plaintiffs admit that Defendants' fact section "regurgitate[d]" the very allegations "that gave rise to the lawsuit in the first place," but never suggest that Plaintiffs have already obtained relief regarding most of those allegations.

B. The District Court Erred by Dismissing Both Plaintiffs When Shelton Gave No Reasons Whatsoever for His Need to Dismiss

An entire section of Plaintiffs' complaint concerns defamation claims belonging to Shelton alone, pertaining to the grounds for his divorce, his inappropriate relationships with Brandy Elswick, Brenda Walsh, and other women, his lie about being on the title of Linda Shelton's car, and his perjury in his divorce-related proceedings. (JA 38–39). Therefore, Plaintiffs' assertion that Shelton's claims are identical to 3ABN's is a fraud upon the court.

Plaintiffs' motion to dismiss contained no assertions that Shelton has already obtained relief concerning any of these allegations.

In their brief, Plaintiffs first assert that "3ABN" collectively refers to 3ABN and Shelton (PB 1), and then use the phrase "3ABN and Shelton" 65 times. Shelton, individually, is not a 501(c)(3) organization.

C. The District Court Erred by Granting the Motion Despite Plaintiffs' Bad Faith and Vexatiousness

Statements in Defendants' exhibits which were made by Plaintiffs or their coconspirators or agents are not hearsay. Fed.R.Evid. 801(d)(2). Plaintiffs cite no specific examples of exhibits Plaintiffs object to.

Plaintiffs cite no authority to counter that of *Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 291 (D.N.H.1993) and *Catanzano v. Wing*, 277 F.3d 99, 109–110 (2d Cir. 2001) regarding the relevance of bad faith and undue vexatiousness when "evaluating whether defendant has or will suffer substantial prejudice."

The district court found "that plaintiffs are taking much too narrow a view as to whether documents or other things in their possession may be relevant to their claims and/or defendants' defenses," and that Plaintiffs failed to comply with Rule 34(b)(2)(E)(i) when they produced "volumes of documents" without indexes. (JA 283–284). The Michigan court found that "the relevance of the [Remnant] documents seems clear," a finding Plaintiffs reject. (EX 861–862; RA 158 p. 2). The Illinois court found that Plaintiffs were "obviously ... trying to back [Defendants] down for some reason," and that the "defamation action" was "a nice public way of refuting those statements" about the Tommy allegations, "saying it ain't so, Joe." (RA 152-6 pp. 13, 23).

If the district court truly ruled in Plaintiffs' favor on the major points, Plaintiffs would not oppose Defendants' efforts to transfer those rulings to other

litigation.

D. The District Court Erred by Granting the Motion Despite Plaintiffs' Lack of Diligence to Litigate the Case

Incredibly, Plaintiffs use their "affidavit of counsel" as evidence of diligence, quoting that affidavit's false claim that the parties stipulated to a 90-day extension of discovery, when that same counsel *opposed* that extension. (PB 34–35; EX 671). Given the reckless disregard of truth displayed by that counsel, no court should take any thing he says at face value.

The district court repeatedly stated that it wanted the case to move forward expeditiously. (JA 107, 112, 362, 370, 382–383). The record lays the blame for the case failing to do so squarely at the feet of Plaintiffs.

Plaintiffs do not dispute any of the items in Defendants' lengthy list demonstrating Plaintiffs' lack of diligence. (DB 46–47).

E. The District Court Erred by Granting the Motion Despite Plaintiffs' Lack of Diligence to Bring the Motion

Except for Thompson's contested affidavit, Plaintiffs cite nothing at all to support their assertions about donation levels and governmental favorable rulings.

Notably, Plaintiffs do not dispute the evidence that Shelton committed perjury, evaded taxes, and engaged in private inurement via kickbacks and royalties, and that Plaintiffs thus knew as early as July 2007 that their case was doomed. (DB 48–49). Neither do Plaintiffs dispute that the public never knew about the EEOC investigation. (DB 48).

The real reason for the long delay in filing for dismissal may be that it took that long to fabricate excuses for dismissal that just might sound convincing.

F. The District Court Erred by Granting a Motion Which Was a Ploy to Evade Discovery

Plaintiffs don't deny that their motion to dismiss was a ploy to evade discovery.

The question is a matter of law. Plaintiffs' complaint contained allegations concerning which Defendants sought discovery, and to evade that discovery Plaintiffs sought dismissal of the case. That is impermissible. (DB 50).

G. The District Court Erred by Granting the Motion Despite Defendants' Tremendous Effort and Expense in the Case

If Plaintiffs are correct that Defendants sought irrelevant discovery for non-litigation purposes, the district court would not have denied their motion to limit the scope of discovery. Plaintiffs cite nothing in the record as examples to support their mere assertion.

In the case of Defendants' subpoena *duces tecum* of Gray Hunter Stenn LLP, the Illinois court found that Defendants' subpoena, as characterized by Plaintiffs, was reasonable, and Plaintiffs' counsel admitted on the record that he would himself seek the same information Defendants sought. (RA 152-6 pp. 8, 11, 22–24, 32). That court also found that Defendants needed to "force [Plaintiffs] to narrow" the allegations in their complaint. (RA 152-6 p. 12).

H. The District Court Erred by Granting the Motion So Late in the Case, and at a Critical Juncture in the Case

Since Plaintiffs admit that it was their obstruction of discovery that protracted the case (*supra* 3), Defendants' contention that obtaining documents was a major portion of the case is valid.

Plaintiffs do not dispute that the case was at a critical juncture because Defendants now had a solid basis for counterclaims, Plaintiffs had to finally produce documents on October 27, and Plaintiffs could no longer delay the dismissal or discharge of Defendant Joy's bankruptcy.

IV. Issues Pertaining More or Less to the Terms of Dismissal

A. The District Court Erred by Imposing Terms That Protected Plaintiffs and Their Counsel Instead of Defendants

The district court gave reasons as to why it dismissed the case, but gave no reasons why the dismissal was *without prejudice*. While Plaintiffs ask this Court to ignore Plaintiffs' counsel's arguments in the lower court that dismissal be without prejudice to protect Plaintiffs and their counsel from malicious prosecution liability, the record reveals no other substantive reason for the dismissal being without prejudice.

Plaintiffs argue that the stripping from Defendants of their legal right to sue for malicious prosecution is a mere "technical advantage," not plain legal prejudice, but cite no authority to counter that of *Selas Corp.Corp. v. Wilshire Oil Co.*, 57 F.R.D. 3, 5–7 (E.D.Pa.1972); *Kappa Publishing Group, Inc. v. Poltrack*,

No. 94-7687, 1996 U.S. Dist. LEXIS 3844, at *4 (E.D.Pa. 1996); and *In re Sizzler Restaurants International Inc.*, 262 B.R. 811, 821–823 (Bankr.C.D.Cal. 2000).

Both D.Mass.Loc.R. 7.1(a)(2) and 15.1(b) oppose such a result. These rules require giving notice to opposing counsel before a motion that adds parties is filed.[9] If, whenever defendants obtain conclusive evidence of malicious prosecution and abuse of process, opposing counsel could use that notice to obtain a voluntary dismissal without prejudice, and the removal from defendants all their evidence, defendants would lose their legal rights without due process.

B. The District Court's Only Condition Imposed upon Plaintiffs May Not Be Enforcible

Plaintiffs found Defendants' argument so convincing, they decided to totally ignore it. Thus, Defendants are correct in concluding that the only dismissal condition may be unenforcible if Defendants must file their claims in state court, leaving Defendants without any curative conditions to alleviate prejudice.

C. The District Court Erred by Failing to Impose Terms That Preserve Evidence from Spoliation

Plaintiffs don't deny ordering the destruction of documents by the IRS (PB 42), documents which are the only certain proof of what Plaintiffs actually produced to the IRS. Without these documents, it is impossible to determine whether Plaintiffs acquired an allegedly favorable ruling by fraud.

Plaintiffs do not dispute allegations of document fraud and document

[9] D.Mass.Loc.R. 15.1(b) requires service of the motion 10 days before filing.

destruction by Defendants' confidential source and Kathy Bottomley. (*Id.*; DB 56).

The various allegations of Nicholas Miller ("Miller") of November 2, 2006, which include document fraud, are mostly verified by a document Plaintiffs themselves produced as part of their Rule 26(a)(1) materials, a document Defendants filed in the lower court on July 21, 2008. (Sealed Exhibits for Appendix 30–35; JA 15). Since the document falls under Rule 26(a)(1), Plaintiffs cannot suggest the matter is not germane to the case. Defendants repeatedly used Miller's allegation of document fraud as good cause for challenging any document Plaintiffs eventually produced. (RA 63-28 p. 10; RA 81-5 p. 21; RA 96-9 p. 9; EX 216, 374, 568).

On July 9, 2009, Defendants told the court that discovery was "essential to ... establish the Defendants' affirmative defenses and counterclaims." (RA 79 pp. 2–3). Defendants couldn't file counterclaims against Plaintiffs' counsel until Defendants had an adequate foundation for doing so. The Remnant documents gave that foundation.

Plaintiffs propose that if there is no indictment, no arraignment, no case, no counterclaims, there is no need to protect evidence from spoliation.

Evidentiary standards for judicial protection of evidence are not the same as those for conviction.

D. The District Court Erred by Not Imposing Terms That Adequately Protect Defendants

Defendants raised the issue of transfer of discovery in the lower court. (JA 341; DA 16).

Knowing ahead of time what issues future litigation will entail isn't required: Discovery may be ordered usable "in any future proceeding regarding these same matters," or "for any purpose permitted by the court in which a second action may be brought." *Lopez v. Ross Stores, Inc.*, 2006 U.S. Dist. LEXIS 83069, at *9 (S.D.Tex. 2006); *Bready v. Geist*, 85 F.R.D. 36, 38 (E.D.Pa. 1979).

All parties realize that the issues of future litigation include Plaintiffs' resurrected claims, and Defendants' claims of abuse of process and malicious prosecution. (DA 8, 10–12; JA 326–327).

Defendants asked the lower court to prevent the loss of favorable rulings. (JA 341). A transfer of those rulings would have accomplished this.

Requiring Plaintiffs to refile their claims in the same district court in no way alleviates Defendants' prejudice of duplicative discovery expense. Neither does it alleviate duplicative expense incurred in obtaining similar favorable rulings if Plaintiffs can file their claims as counterclaims in state court anyway. (DB 54–55).

Fed.R.Civ.P. 41(a)(2) by itself gives courts statutory authority to award costs, expenses, and fees, unaffected by the American Rule. *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 n.16 (D.C. Cir. 1981); *Yoffe v. Keller Industries, Inc.*,

580 F.2d 126, 129 n.9 (5th Cir. 1978) ("reimbursing costs expended at the behest of a plaintiff who does not wish to continue his suit, but who faces no legal barrier to bringing the same action again at a later date"). Plaintiffs, who "face no legal barrier," cite no authority for using 28 U.S.C. § 1920, Fed.R.Civ.P. 54, or the American Rule to restrict the statutory authority of Fed.R.Civ.P. 41(a)(2).

Dismissals are "typically" conditioned upon payment of defendant's expenses, "which usually includes reasonable attorneys' fees," "the purpose" for doing so being "to compensate the defendant for the unnecessary expense that the litigation has caused." *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir.1994); *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985).

In this particular case, additional authority for awarding costs, expenses, and fees may properly be found in 28 U.S.C. § 1927 and the court's inherent power, a fact Plaintiffs intentionally omit. (PB 3; RA 149 pp. 16–18).

E. The District Court Erred by Imposing Terms upon Defendants

Nowhere in their brief do Plaintiffs quote language from the Confidentiality Order to support their contention that parties are required by that order to return anything at all. Thus, rather than an enforcement of that order, the return of documents was a *de facto* condition of dismissal imposed upon Defendants.

V. Issues Pertaining More or Less to the Confidentiality Order

All discovery, whether designated confidential or not, is subject to the Confidentiality Order. (DA 22). Thus, just being subject to that order does not

automatically make documents confidential. Disturbingly, Plaintiffs repeatedly refuse to recognize this distinction (PB 19, 46–47, 49–51), as if they hope to force the return of even non-confidential documents by urging the return of all documents subject to the Confidentiality Order.

A. The District Court Erred by Revoking, Without Due Process, Terms of the Confidentiality Order of April 17, 2008

Rather than admit that they tried to alter the Confidentiality Order, Plaintiffs instead pretend that they sought an order merely enforcing the Confidentiality Order. However:

- The order itself says nothing about returning documents. (DA 22–27).
- Only non-parties must sign Exhibit A. (DA 26–27).
- Defendants never signed Exhibit A.
- Plaintiffs never asked Defendants to sign Exhibit A.[10]

Exhibit A states:

> Upon the earlier of: (i) demand of counsel of record for the party who supplied the Confidential Information to me or (ii) within 30 days after the final termination of instant litigation, including appeal, I will return all Confidential Information ... to the person or party from whom I received the Confidential Information.

(DA 29).

By requiring non-parties to sign Exhibit A, the court obtains personal

[10] Defendants believe Plaintiffs used Remnant's counsel to unsuccessfully try to fool Defendants into signing Exhibit A. (RA 161 p. 6).

jurisdiction over non-party recipients of confidential documents in order to enforce the Confidentiality Order. (*Id.*). Parties don't need to sign Exhibit A since the court already has such personal jurisdiction.

Exhibit A requires non-parties to return confidential documents to the person or party they received the documents from. (*Id.*). Since Plaintiffs instead requested the MidCountry and Remnant documents to be given to Plaintiffs, not MidCountry and Remnant (JA 299), their motion was not a motion to enforce the Confidentiality Order.

If Exhibit A applied to parties, then Plaintiffs' counsel could demand the return of confidential documents months ***before*** dismissal, for such would be the earlier of demand of counsel or termination of litigation. Such a possibility is utterly ludicrous.

Plaintiffs acknowledge Defendants' concern of undue, duplicative expense if Defendants must reacquire the same documents in future litigation. (PB 47).

B. The District Court Erred by Depriving Defendants of Property Without Due Process

While Plaintiffs pretend that the district court's order can effect the surrender of MidCountry's records, Plaintiffs already admitted otherwise. On November 11, 2008, Plaintiffs threatened to seek a court order compelling Defendants to "consent" to the surrender of MidCountry's records, records which are in the district court's possession. (RA 162-6). If the court's order is valid and sufficient,

Defendants' consent is unnecessary.

MidCountry's records are relevant to questions of private inurement and perjury put at issue in Plaintiffs' complaint. (JA 36–37, 39; DB 14–15). Thus, they are also relevant to Defendants' claims of malicious prosecution and abuse of process, since these records would further prove Plaintiffs' allegations to be baseless. Therefore, there is no legitimate reason to surrender MidCountry's records to a party who neither produced nor paid for them.

Because reimbursement of MidCountry's records was denied, Defendants are deprived without due process of $3,534 for the reasons Defendants stated in their brief. (RA 166; DB 59–60).

C. The District Court Erred by Imposing Terms That Threaten Defendants' First Amendment Freedoms of Speech and Press

Plaintiffs misstate the issues.

The public has a statutory right under Fed.R.Civ.P. 26(c) to access discovery materials, not a First Amendment right. *Agent Orange,* 821 F.2d at 145–6. As a 501(c)(3) corporation, 3ABN depends upon the public for support. Therefore, it is of public interest whether Shelton used donations to line his own pockets via kickbacks and royalties.

About 90 minutes after obtaining dismissal, Plaintiffs' counsel tried to use the Confidentiality Order to impound all third-party documents, even those never designated confidential. Plaintiffs' counsel said that if any of Defendants'

statements were traceable to confidential material, there would be more court action. (RA 149 pp. 6–7; RA 152-8).

The next day, Plaintiffs' counsel threatened Defendants over Defendants' public suggestion that Shelton received $300,000 a year in book deals, as if that information came from the Remnant documents produced in September 2008. (RA 152-9 p. 1). But Plaintiffs already knew that $300,000 was the figure Miller gave in 2006, and the Remnant documents must give a much higher figure for that year. (EX 5, EX 245; RA 149 pp. 8–9).

Thus, Plaintiffs make it clear that they intend to misuse the Confidentiality Order to stifle Defendants' First Amendment free speech rights, without showing good cause or obtaining a favorable verdict at trial. Allowing Defendants to invoke ¶ 7 of that order will minimize Plaintiffs' continued, ongoing harassment of Defendants.

CONCLUSION

Defendants Joy and Pickle still seek the reversal of the order(s) granting 3ABN and Shelton's motion for voluntary dismissal. By such reversal Defendants seek the outright denial of that motion as to one or both Plaintiffs, or, to the extent that dismissal is not denied, that dismissal be with prejudice and include curative conditions that preserve evidence, protect Defendants, prevent exhaustion of Defendants' resources, do not revoke ¶ 7 of the Confidentiality Order, and do not impose the Confidentiality Order's non-party return requirements upon parties.

Respectfully submitted,

Dated: April 30, 2009

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,996 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using OpenOffice 3.0.0 in 14pt Times.

Dated: April 30, 2009

/s/ Bob Pickle
Bob Pickle

CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on April 30, 2009, I served two copies of this brief and addendum on the following represented parties by way of First Class U.S. Mail, postage paid:

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

Dated: April 30, 2009

/s/ Bob Pickle
Bob Pickle

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' SUPPLEMENTAL ADDENDUM — PAGE DSA001

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DEFENDANTS' SUPPLEMENTAL ADDENDUM
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