United States Court of Appeals
For The First Circuit

No. 08-2457

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

v.

Gailon Arthur Joy and Robert Pickle,
Appellants.

APPELLEES' RESPONSE TO APPELLANTS' MOTION TO ENLARGE THE RECORD AND TO FILE UNDER SEAL

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INTRODUCTION

Appellants Robert Pickle ("Pickle") and Gailon Arthur Joy ("Joy"), who were defendants in the district court, attempt a sleight of hand with their motion to enlarge the record and file the Remnant and Westphal documents under seal. The United States District Court for the District of Massachusetts, the Honorable Dennis F. Saylor presiding, has already concluded that these documents do not belong in the record. Nevertheless, Pickle and Joy ignore the district court's orders on their motions below and ask this Court to independently review these documents *de novo*, to make factual findings concerning their relevance, and to allow them into the appellate record — despite the fact that they are not part of the district court record. Pickle and Joy should be prohibited from using this tactic to have this Court review *de novo* evidence that was excluded from the record by rulings that themselves must be reviewed under an abuse of discretion standard. Pickle and Joy will have the opportunity to make the argument that these documents should have been allowed into the district court record in their appeal from the district court's recent order denying them reconsideration.

Moreover, FRAP 10(e) and Fed. R. Evid. 201 simply do not allow the Remnant or Westphal documents into the record here. A motion to enlarge the record under Rule 10(e) is designed to supplement the record on appeal so that it accurately reflects what occurred before the district court. It cannot be used to put

additional evidence before the court of appeals that was not admitted in the district court. Nor does Rule 201 allow a court of appeals to judicially notice hundreds of pages of documents. These proposed exhibits are simply not admissible to this Court under the appellate or evidentiary rules. Thus, Pickle and Joy's motion to enlarge the record and to file under seal must be denied.

STATEMENT OF RELEVANT FACTS

This case arises from a lawsuit by Appellees (Plaintiffs in the district court) Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to as "3ABN") alleging trade infringement, dilution of trademark, defamation, and intentional interference with advantageous economic relations against Pickle and Joy. (Docket #1).[1] The allegations in the Complaint were that Pickle and Joy had been operating a web site that used the "3ABN" logo to attract viewers and then bombarded them with disparaging and defamatory statements about 3ABN. When Joy filed for bankruptcy protection, 3ABN acquired the offending web site from the bankruptcy trustee and shut it down. It soon became apparent to 3ABN that no further relief could be obtained by continuing the litigation. Pickle and Joy controlled no other web sites and had no apparent assets from which a judgment could be paid. In addition, as their appeal to this Court reflects, they had an apparently inexhaustible taste for litigation even though they

1 "Docket #" refers to the United States District Court District of Massachusetts Civil Docket number of the document.

were defendants with no counterclaims.

Therefore, on October 23, 2008, 3ABN moved to voluntarily dismiss this lawsuit under Fed. R. Civ. P. 41(a)(2) because it believed that it had obtained through other means all of the tangible relief that it could expect and that the lawsuit could not achieve additional meaningful relief. (Docket # 120, 121). The district court dismissed this case on October 30, 2008. (Docket #129).

Pickle and Joy then filed a Notice of Appeal with this Court on November 13, 2008. (Docket #133). On the same day, Pickle and Joy filed a motion for costs. (Docket #130). It was only in conjunction with Pickle and Joy's reply brief in support of their motion for costs that they first made a motion to file documents under seal. (Docket #153). In Robert Pickle's affidavit in support of that motion, he failed to specifically identify what he now identifies as the "Remnant documents:"

> The Defendants will seek to file under seal as Exhibit A a selection of the documents from Remnant pertaining to payments of kickbacks and/or royalties from Remnant to DLS Publishing Inc. (hereafter "DLS") from 2005 through 2007.

(Docket # 152). The unspecified documents of Exhibit A were never identified by Bates number.

On April 13, 2009, the district court denied Pickle and Joy's motion for costs and attorneys fees. (Docket # 166). Two days later, the court also denied their motion for leave to file under seal. (Electronic Order dated 4/15/09).

Pickle and Joy then filed a motion to reconsider and to amend findings on April 27, 2009. (Docket # 169). That motion sought reconsideration of the district court's Orders of April 13 and 15, 2009, amendment or alteration of the judgment under Fed. R. Civ. P. 59(e), and relief from judgment under Fed. R. Civ. P. 60(b). (Docket #170). Pickle and Joy concurrently filed another motion for leave to file under seal — attaching separate and additional documentation from the first motion to file under seal. (Docket #173). This motion included the three pages of the "Westphal documents" — referenced in Pickle's April 24, 2009 affidavit as Exhibits X and Y. (Docket #171). Pickle and Joy then filed a motion for sanctions on June 24, 2009. (Docket #183).

In the meantime, the appellate briefing schedule continued. Both Pickle and Joy and 3ABN filed briefs concerning the district court's October 2008 order. On August 19, 2009, this Court ordered the appeal held in abeyance pending the disposition of the motion for reconsideration by the district court. (Order dated 8/19/09). This Court stated that, "[i]n the event that defendants are dissatisfied with the district court's rulings on their motion for reconsideration, they should file a new timely notice of appeal." (*Id.*).

On October 26, 2009, the district court denied Pickle and Joy's motion for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions. (Docket #193). In doing so, the court noted that,

"to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago*." (*Id.* at 3) (emphasis added). Pickle and Joy appealed from this order on November 23, 2009.

Pickle and Joy have now brought a third motion to file documents under seal with this Court. Attached to the motion is the affidavit of Robert Pickle and Bates-stamped portions of documents produced by Remnant Publications. The Pickle Affidavit — dated November 17, 2009 — is entirely new and was never submitted to the district court. Furthermore, the Remnant documents were never specifically identified to the district court; they were merely referred to as "a selection of the documents from Remnant." (Document #152). Finally, the "Westphal documents" are three pages of documentation that Pickle and Joy attempted to introduce as Exhibits X and Y to Pickle's April 24, 2009 affidavit in support of defendants' motion to reconsider and amend findings. (Docket #171, 173). The district court has denied all of Pickle and Joy's motions to add these documents to the record. (Docket #166, Electronic Order dated 4/15/09, # 193).

ARGUMENT

I. Pickle and Joy's motion is procedurally improper and should be denied.

a. FRAP 10(e) does not allow Pickle and Joy to enlarge the record to include documents that were specifically rejected by the district

court in lower court proceedings.

Generally, only documents and evidence presented to the district court can be included in the record on appeal. *See, e.g., 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.). The record on appeal generally is made up of: (1) the original papers and exhibits *filed* in the district court; (2) transcripts of the proceedings; and (3) a certified copy of the docket entries provided by the district court. FRAP 10(a). Pickle and Joy argue that the district court had an opportunity to examine the Remnant and Westphal documents because Pickle and Joy argued for their admission under seal below. (Def. Brf. at 6). But these documents were never filed with the court because the district court denied their admission. Thus, the district court never reviewed these documents and they are not part of the district court record.

A motion to enlarge the record under Rule 10(e) is designed to supplement the record on appeal so that it accurately reflects what occurred before the district court. *United States v. Rivera-Rosario*, 300 F.3d 1, 9 (1st Cir. 2002). The rule attempts to confirm that the proceedings in the district court are accurately reflected on appeal:

> **(2)** If anything material to either party is *omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected* and a supplemental record may be certified and forwarded:
>
> **(A)** on stipulation of the parties;

> **(B)** by the district court before or after the record has been forwarded; or
> **(C)** by the court of appeals.

FRAP 10(e)(2) (emphasis added). Thus, the purpose of Rule 10(e) is to correct inadvertent errors or accidents. FRAP 10(e) cannot be used to put additional evidence — no matter how relevant — before the court of appeals that was not before the district court. *Rivera-Rosario*, 300 F.2d at 9.

Circuit Courts have confirmed that the purpose of Rule 10(e) is to provide an accurate reflection of events, not to provide an opportunity for retroactive alteration of these events. *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981). "New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the breach of [Rule 10(e)]." *Id.* Only in rare circumstances will the court of appeals supplement the record to add material not presented to the district court. *See e.g., Schwartz v. Millon Air, Inc.*, 341 F.3d 1220, 1225 n. 4 (11th Cir. 2003) (stating that supplementation is rare, but granting motion to provide better understanding of documents in record).

Here, Pickle and Joy are not asking this Court to supplement the record with documents mistakenly omitted from the record. Rather, they are asking this Court to admit records in the appellate court *where the district court specifically — and twice — denied their admission.* Thus, Pickle and Joy improperly attempt to challenge the district court's orders denying their motion for reconsideration and

denying their motion for leave to file the documents under seal under FRAP 10(e) when this matter should be addressed through the appeal from these orders.

Pickle and Joy admit that they "have repeatedly been prevented from bringing the information in these materials before the district court." (Def. Brf. at 2). They first attempted to file the Remnant documents under seal in support of their motion for costs. (Docket #153). It was only in conjunction with their reply brief on their motion for costs — a motion not dispositive of the main issues in the case — that Pickle and Joy first attempted to add to the record the Remnant documents under seal. (*Id*).[2] On April 13, 2009, the district court denied Pickle and Joy's motion for costs and attorneys fees. (Docket # 166). Two days later, the court also denied their motion for leave to file under seal. (Electronic Order dated 4/15/09). The district court similarly rejected the Westphal documents. The Westphal documents are three pages of documentation that Pickle and Joy attempted to introduce as Exhibits X and Y to Pickle's April 24, 2009 affidavit in support of Pickle and Joy's motion to reconsider and amend findings. (Docket #171, 173). The district court also denied this motion. (Docket #193). Thus, Pickle and Joy have attempted to submit these records below, and the district court

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2 It is not even clear if the documents attached to Pickle and Joy motion are the same documents brought to the district court's attention because defendant never specifically identified the documents by Bates number at the district court level. (Docket #152). Instead, Robert Pickle stated in his affidavit that defendants attempted to file "a selection" of the Remnant documents. (*Id.*). It is unclear to what "selection" Pickle and Joy were referring.

has rejected them.

Now, Pickle and Joy attempt to get these documents into the appellate record without any deference to the district court's orders below. Pickle even attempts to add affidavit material — containing his own personal opinion and factual "findings" — that was never filed in the district court. (*Pickle Aff.* dated 11/17/09). In doing so, Pickle and Joy argue that this Court should add Pickle's affidavit and the attached documents to the record based upon 3ABN's allegedly unsupported and deceptive assertions of exoneration by the IRS and the EEOC as a basis for dismissal. (Def. Brf. at 7). This is — at bottom — a request to add documents for impeachment purposes. To do so, this Court would have to find additional facts — contrary to the district court's order — that 3ABN made unsupported and deceptive allegations below. But this Court cannot act as a fact-finder and add materials for impeachment purposes. *See, e.g., Sovereign News Co. v. United States*, 690 F.2d 569, 571 (6th Cir. 1982) ("A party may not by-pass the fact-finding process of the lower court and introduce new facts in the brief on appeal."); *Crawford v. Runyon*, 79 F.3d 743, 744 (8th Cir. 1996) (denying motion to supplement record because materials were for impeachment purposes). Furthermore, Pickle and Joy cannot ask this Court to review *de novo* decisions by the district court that must properly be reviewed on appeal under an abuse-of-discretion standard. *See Nyer v. Winterthur Intl'l*, 290 F.3d 456, 460-61 (1st Cir.

2002) (stating that First Circuit reviews district court decisions on sanctions under abuse-of-discretion standard); *Davignon v. Hodgson*, 524 F.3d 91, 113 (1st Cir. 2008) (stating that court of appeals reviews district court's decision to admit evidence under abuse-of-discretion standard). Rule 10(e) simply does not provide Pickle and Joy with a remedy. The proper procedure is for them to argue this matter in their appeal from the motion for reconsideration.

In sum, Pickle and Joy are attempting to get in through the back door documents that were specifically rejected by the district court — twice. An appellate court cannot make new findings of fact or add material for impeachment purposes that should have been presented to the lower court. "Rule 10(e) allows a party to supplement the record on appeal but does not grant a license to build a new record." *United States v. Kennedy*, 225 F.3d 1187, 1190-91 (10th Cir. 2000) (quotation omitted). If Pickle and Joy are dissatisfied with the district court's orders, they must present these arguments on appeal from the order denying their motion for reconsideration — which they have recently appealed.[3] Pickle and Joy cannot ask this court to independently review documents under a *de novo* standard when the proper standard for review is abuse of discretion. Thus, this court must reject Pickle and Joy's motion for leave to enlarge the record and to file the

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3 It is unclear why Pickle and Joy argue that enlargement will cure a "due process defect" based upon First Circuit Local Rule 11. They had the opportunity to argue that these documents should be included in the record to the district court. The district court simply denied their motion.

Remnant and Westphal documents under seal.

b. Federal Rule of Evidence 201 does not allow for judicial notice of disputed facts.

Pickle and Joy further confirm that they are asking this court to do what is procedurally impossible when they ask that this court take judicial notice of alleged facts in these additional documents — presumably "facts" contained in Pickle's affidavit — under Federal Rule of Evidence 201. (Def. Brf. at 8). The Federal Rules of Evidence define a judicially noticed fact as one that is common and undisputed:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.

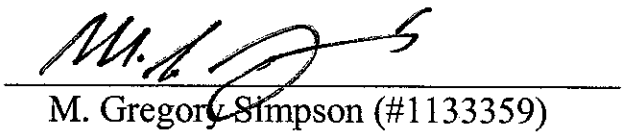
Fed. R. Evid. 201(b). In other words, courts that take judicial notice do so of commonly known facts, not stacks of documentation from which a party hopes to make factual conclusions that will undoubtedly be disputed by the opposing side. Pickle and Joy argue that the "facts" in the documents cannot reasonably be questioned because 3ABN produced these documents. (*Id.*). Yet if this were so, all documents produced during discovery would be subject to judicial notice. Of course, the rule is not so broad and does not encompass stacks of documentation. The Remnant and Westphal documents cannot come into the record as judicially noticed "facts." This Court must deny Pickle and Joy's motion to enlarge the

record and file the Remnant and Westphal documents under seal.

CONCLUSION

Neither FRAP 10(e) nor Federal Rule of Evidence 201 provides Pickle and Joy with a remedy here. Rule 10(e) is only used to correct accidental errors in the record. It is not a route to creating an entirely new record when a party is dissatisfied with the district court's orders. Furthermore, Rule 201 does not allow a court of appeals to judicially notice entire exhibits. The appropriate procedure for challenging the district court's refusal to allow the Remnant and Westphal documents into the records is the appeal from the October 2009 order. Thus, 3ABN respectfully requests that this Court deny Pickle and Joy's motion to enlarge the record and file under seal documents that should have already been returned to 3ABN under the confidentiality order.

Respectfully submitted,

Dated: November 25, 2009 By 

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AFFIDAVIT OF SERVICE BY U.S. MAIL

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Jeannette Evans, being first duly sworn upon oath, deposes and states that on the 25th day of November 2009, she served the following:

Appellees' Response to Appellants' Motion to Enlarge the Record and To File Under Seal

in the above-referenced matter, on the below person(s) by placing a copy thereof in an envelope properly addressed to said person(s) at the below address(es), the last address(es) of said person(s) known to her.

Mr. Robert Pickle
1354 County Highway 21
Halstad, MN 56548

Mr. Gailon Arthur Joy
PO Box 37
Sterling, MA 01564

Jeannette Evans

Subscribed and sworn to before me
on the 25th day of November 2009

Notary Public

7154094.1

LAURA E. WHITE
Notary Public-Minnesota
My Commission Expires Jan 31, 2010