

No. 09-2615

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

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

DEFENDANTS' MOTION TO FILE UNDER SEAL

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INTRODUCTION

Defendants seek to file under seal: (a) a supplemental sealed appendix comprised of exhibits, (b) a less-than-three-page supplemental brief explicitly addressing those exhibits, and (c) the affidavit provisionally filed under seal in 1st Cir. Case No. 08-2415. The exhibits and affidavit were offered to the lower court. (Record on Appeal Docket Entry # (“RA”) 153; RA 173). The first four exhibits were filed below as part of sealed RA 93, and have already been forwarded as part of the record on appeal.

Defendants are filing these materials provisionally under seal with this motion: one copy each for this motion, five additional copies of the supplemental appendix, and ten additional copies of the supplemental brief.

RELEVANT FACTS

A blanket confidentiality order was entered in the underlying case. (RA 60). That order permitted parties to designate as confidential non-public, confidential business or trade secret information. (RA 60 p. 1). Plaintiffs abused this order by designating as confidential, *inter alia*, purchase orders for sticky notes and pens, a book with over 5 million copies in print, and publicly available magazines and government filings (financial statements, IRS Form 990’s, Illinois Form AG990-IL’s, and Oregon Form CT-12F). (RA 92 p. 7; RA 68-2 p. 3; RA 162-8; RA 81 p. 8).

Two of Defendants’ motions to file under seal were denied below (Electronic

order dated April 15, 2008; RA 193 p. 3), and are now under review in the instant appeal.

Defendants conferred with Plaintiffs about the filing in this Court of two purchase orders for printing, which were offered to the lower court. (Affidavit of Robert Pickle (“Pickle Aff.”) Ex. A; RA 173). Plaintiffs designated these purchase orders as confidential. (RA 81-2 p. 118). Defendants expressed the opinion that this Court would not be impressed if Plaintiffs required Defendants to file under seal purchase orders that contain nothing worthy of protection: The date the printing was ordered, the date the *3ABN World* issue was received, the number of copies printed, and the total cost for the print job. (Pickle Aff. Ex. A p. 5).

Plaintiffs responded that they opposed the filing of these purchase orders at all, but if they were filed, they must be filed under seal. (Pickle Aff. Ex. A p. 2). Plaintiffs twice threatened sanctions over the matter, even if these documents are filed under seal. (Pickle Aff. Ex. A p. 5; Ex. B p. 2).

The materials Defendants seek to file under seal consist of: (a) a supplemental sealed appendix comprised of exhibits, (b) a less-than-three-page supplemental brief explicitly addressing those exhibits, and (c) the affidavit provisionally filed under seal in 1st Cir. Case No. 08-2415. The exhibits and affidavit were proffered to the lower court. (RA 153; RA 173).

The exhibits are comprised of:

- Selected pages from Danny Lee Shelton’s (“Shelton”) 2001, 2002, and

2003 tax returns.

- Bill Otterson's Oct. 21, 2005, report to the Three Angels Broadcasting Network, Inc. ("3ABN") Board.
- Selections from the Remnant documents.
- Purchase orders for printing of two *3ABN World* issues.
- Mollie Steenson and Walter Thompson's notes concerning allegations against Leonard Westphal ("Westphal documents").
- A CD or DVD containing all of Plaintiffs' document productions designated by Plaintiffs as being confidential.

Defendants have endeavored to redact social security numbers, birthdates, and financial account numbers from all of these materials. (Pickle Aff. p. 1).

ARGUMENT

The proffered exhibits must be before this Court in order for this Court to review the denial of their admissibility. *Chicago & Eastern Illinois R. Co. v. Southern Ry. Co.*, 261 F.2d 394, 402 (7th Cir. 1958); *Texas and Pacific Railway Company v. Buckles*, 232 F.2d 257, 261 (5th Cir. 1956).

LR, D.Mass. 7.2(d) prohibited Defendants from filing under seal any documents Plaintiffs designated confidential until after obtaining leave of court. For this reason, a denial of Defendants' motions to file under seal below meant that these materials would not be forwarded to this Court with the record on appeal, and Defendants would have to forward them separately.

In 1st Cir. Case No. 08-2457, Defendants previously filed documents produced by Remnant Publications, Inc. (Remnant documents) and Plaintiffs with a motion to expand the record on appeal. (Motion filed November 19, 2009). That motion was denied on December 4, 2009, in an order which pointed out that these documents were properly part of the record on appeal for the instant appeal, since they had been offered to the lower court before Defendants filed their second notice of appeal.

Therefore, despite Plaintiffs' contentions to the contrary, the documents that are the subject of this motion are properly considered part of the record on appeal.

Defendants' quandary is how to present these documents here. Because of the confidentiality order (RA 60), and Plaintiffs' confidentiality designation even when erroneous, Defendants can only file these documents under seal, or else risk contempt proceedings instigated by Plaintiffs. (RA 224-11).

1st.Cir.Loc.R. 11(c)(2) states that if the instant motion is denied (which it should be for items that do not qualify for such protection), then the proffered materials provisionally filed under seal are to be returned to the movant. This ensures that most litigation takes place under public scrutiny, and prevents litigants from abusing the exception by making it the rule.

But Defendants do not want to risk the denial of this motion simply because some of the materials do not qualify for protection. Therefore, rather than having the materials returned to the movants because they do not qualify for protection,

Defendants seek a sealing order with a duration that expires for the materials when they are deemed to not qualify for protection. Since some materials may indeed qualify, Defendants ask that the duration of the sealing order for those materials be for whatever length of time is customary.

Since Defendants are submitting a single supplemental volume of exhibits, if some materials qualify and some do not, Defendants can, upon request, separately resubmit whichever materials are deemed to not qualify for protection in another supplemental volume.

Regarding the documents in question:

- **Selected pages from Shelton's tax returns from RA 93:** Defendants obtained these from other sources than discovery, and have never published them. (RA 171 p. 2). Defendants filed them under seal below in order to keep them off of PACER, but have freely referenced the information they contain in court filings. (RA 63-29 pp. 4–5). Defendants are not sure if or when tax returns become part of the public record during litigation.
- **Bill Otterson's Oct. 21, 2005, report from RA 93:** From Plaintiffs' Rule 26(a)(1) materials and responses to Defendant Pickle's requests to produce. The basic story within this document was published three years ago, before Defendants received it, and is already part of the public record. (RA 63-33 p. 16). But some of the details within the document

may be embarrassing. Defendants use the document to prove that Shelton used 3ABN to pay his personal legal expenses, a matter at issue in the underlying litigation. (RA 81-5 p. 21; RA 1 p. 13; RA 9 p. 5).

- **Remnant documents:** Produced by Remnant. Plaintiffs put at issue in their complaint the issue of whether Shelton privately inured himself at 3ABN's expense, contrary to the Internal Revenue Code, and whether he failed to disclose royalty income on his July 2006 financial affidavit. (RA 1 pp. 13, 15). Most of the information within these documents can be derived from Remnant's publicly available Form 990's. (RA 154 p. 3). The fact that Shelton must have received kickbacks from Remnant for sales of his Pacific Press Publishing Association booklets to 3ABN was briefed before Defendants received these documents. (RA 96-9 p. 3). Plaintiffs have admitted that payments for these booklets were made. (RA 174 p. 4). Plaintiffs filed a document that asserts that Shelton received "a good deal more" in royalties than what Defendants' sources alleged. (RA 159-2 p. 11).
- **Purchase orders for printing:** From Plaintiffs' response to Pickle's requests to produce. Defendants cannot fathom how these can be confidential. Defendants use them to show when the articles for *3ABN World* issues were written by. (RA 171 p. 5).
- **Westphal documents:** From Plaintiffs' response to Pickle's requests to

produce. Plaintiffs told the court they were not wanting to designate as confidential employment-related information (RA 89 p. 25), and thus these documents should not have been so designated. This smoking gun makes clear that Plaintiffs believed the whistleblowers' allegations against Westphal, which Plaintiffs put at issue in their complaint, were indeed true. (RA 1 p. 14; RA 173 p. 1).

- **CD or DVD of Plaintiffs' "confidential" productions:** Contains Plaintiffs' "confidential" Rule 26(a)(1) materials and responses to Pickle's requests to produce. Most of the material on this CD or DVD is (a) illegible, (b) publicly available, (c) employment-related information pertaining to two of the terminated whistleblowers, (d) redacted by Plaintiffs to the point that nothing much remains, and (e) documents pertaining to purchases of books, common office supplies, printing, furniture, inventory, and fixed assets. (RA 103 p. 2; RA 81 p. 8). Except for the 3ABN's brief tax returns filed in California, 3ABN's tax returns and financial statements are statutorily all public record. 26 U.S.C. §6104(d)(1); 225 ILCS 460/2(f), 4(a); ORS 128.670(1), (6), 192.005(5) 192.420(1). There are some bank statements. If this CD or DVD were filed not under seal, it wouldn't be on PACER, and thus access to it would be extremely limited.

Defendants have done their best to ensure that all the above materials were

redacted in compliance with Fed.R.App.P. 25(a)(5) and Fed.R.Civ.P. 5.2(a), including 3ABN's taxpayer-identification number, which is a matter of public record. (Pickle Aff. p. 1). To Defendants' knowledge, these documents do not contain the names of minor children. (*Id.*).

CONCLUSION

In order for this Court to review the denial of Defendants' motions to file under seal, Defendants must submit the instant materials to this Court. Due to Plaintiffs' confidentiality designations, Defendants must file them under seal. But some of Plaintiffs' documents do not qualify for such protection.

Therefore, Defendants seek a sealing order with a duration that expires for the materials when they are deemed to not qualify for protection, at which point they would become a part of the public record. Since some materials may indeed qualify for protection, Defendants ask that the duration of the sealing order for those materials be for whatever length of time is customary. Upon request, Defendants can file as an additional supplemental volume any materials deemed not to qualify for protection, in order to segregate materials that qualify for protection from materials that do not qualify.

PRAYER FOR RELIEF

WHEREFORE, Defendants pray the Court to allow these documents to be filed under seal, with the sealing order having a duration that expires when the materials are deemed not to qualify for such protection.

Respectfully submitted,

Dated: December 13, 2010

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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on December 13, 2010, I served copies of this motion, accompanying affidavit, and accompanying documents on the following parties and the Clerk of the Court of Appeals by way of U.S. mail:

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