No. 09-2615; 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

NOTICE OF RULING IN DISTRICT COURT; DEFENDANTS' MOTION TO FORWARD PART OF DISTRICT COURT RECORD; AND DEFENDANTS' MOTION TO STAY YET UNEXECUTED ORDER TO RETURN MIDCOUNTRY RECORDS TO MIDCOUNTRY

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INTRODUCTION

Defendants hereby give notice of the lower court's October 19, 2010, ruling (Record on Appeal Docket Entry # ("RA") 261) overruling Defendants' objections (RA 229) to the magistrate judge's January 29, 2010, orders. Those orders concerned Defendants' motions to (a) forward copies of bank statements produced by MidCountry Bank ("MidCountry") ("MidCountry records") to this Court as part of the record on appeal, properly certified pursuant to the Fed. R. Evid., (b) compel Plaintiffs to return the MidCountry records unlawfully obtained by them from the courthouse on December 16, 2008, and (c) stay the yet unexecuted October 30, 2008, order to return the MidCountry records to MidCountry, if a stay be required to prevent that order's execution during the pending appeals. (RA 204; RA 210).

Having first sought relief in the lower court, Defendants hereby move this Court, pursuant to Fed. R. App. P. 10(e)(2)(C) and 8(a)(2), to correct a material omission in the record on appeal by issuing whatever orders are necessary in order to have the MidCountry records properly certified and forwarded to this Court, and to stay the yet unexecuted October 30, 2008, order to return those records to MidCountry, if a stay be required to prevent that order's execution.

In resolving this matter whether below or here, four primary issues must be determined: (a) Are the MidCountry records part of the record on appeal? (b) Did the lower court on October 30, 2008, order the MidCountry records to be returned to MidCountry? (c) Does the lower court have authority to eliminate material from

the record during an appeal? (d) Will irreparable harm occur if the records are returned to MidCountry? Other issues are secondary. Some issues are irrelevant.

The magistrate judge's electronic orders contained no findings of fact or conclusions of law, and thus do not address these four issues. The ruling on Defendants' objections nowhere addresses these four critical issues.

I. FACTUAL HISTORY CONCERNING MIDCOUNTRY RECORDS

Defendants subpoenaed the bank statements comprising the MidCountry records using two subpoenas dated December 6 and 12, 2007. (RA 76-3 pp. 10, 12). 56% of these bank statements, and 60% of the accounts they pertain to, are for accounts owned by DLS Publishing, Inc. ("DLS") and Three Angels Broadcasting Network, Inc. ("3ABN"), not Danny Lee Shelton ("Shelton").[1] (RA 223 p. 8; RA 63-30 p. 5). Because MidCountry was going to comply without objection, Shelton moved to quash the second subpoena in the District of Minnesota (RA 208-2 p. 4), but DLS and 3ABN have never objected to either subpoena. (RA 223 p. 8).

Believing Shelton lacked standing to challenge the subpoena (RA 212 pp 1–3; RA 185 pp. 4–5), the court enforced it. Nevertheless, to prevent conflicts with the not-yet-issued confidentiality order, the court ordered MidCountry, upon payment from Defendants, to produce its records under seal to the magistrate judge in Massachusetts for review, and forbade MidCountry to give copies to any party,

[1]On the list of ten accounts, Shelton's name appears after the semicolon if he is only a signatory, not an owner. (RA 63-30 p. 5). The accounts that he did not own are business accounts. (*Id.* pp. 6–7).

including Plaintiffs, until further order of the court. (RA 63-36 pp. 2–3).

The confidentiality order issued on April 17, 2008, did not prohibit discovery of the MidCountry records, and requires *non-parties* to sign Exhibit A. (RA 60). Exhibit A requires only *non-parties* to return confidential documents, within 30 days after the conclusion of *all* appeals. (*Id.* p. 8). Parties may attack a confidentiality designation after the litigation has ended. (*Id.* p. 6).

On June 25, 2008, Plaintiffs moved for an *in camera* review prior to MidCountry's records being given to Defendants. (RA 75 pp. 16–17). That request was denied on September 11. (RA 107 p. 5). The MidCountry records arrived at the federal courthouse in Worcester on September 12, and were signed for by the district judge's docket clerk.[2] (RA 206-2; RA 214-12 p. 1). The clerks of the district judge and magistrate judge repeatedly told Defendants that the MidCountry records could not be found (RA 206 pp. 2–4), an undisputed fact that remains unexplained. As of October 1, 2008, not even Plaintiffs' counsel could locate the MidCountry records at the courthouse.[3] (*Id.* p. 4; RA 206-7; RA 205 p. 4).

Plaintiffs moved to dismiss on October 23, 2008, asserting that the MidCountry records were "records of MidCountry Bank" that had been "supplied

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[2]The clerks did not seem to know if the records had even arrived. With some difficulty, on October 8, Defendants obtained a tracking number from MidCountry, and proof of delivery from DHL. (RA 206 p. 3; RA 206-6; RA 206-2 p. 3 footer).

[3]In retrospect, by October 23, 2008, apparently the court had informed Plaintiffs *ex parte* that the court had the MidCountry records. (RA 120 p. 1). Defendants were never given such notice, and object to having been treated differently than represented parties in this matter.

to Defendants," and asking the court to give the MidCountry records to Plaintiffs. (RA 120 p. 1). On October 30, the district judge instead orally ordered that the MidCountry records be "returned to the party that produced those documents" (RA 141 p. 13), which party is clearly MidCountry.[4] The district judge intended that his order reflect the requirements of the confidentiality order, the precise terms of which he was uncertain. (RA 141 pp. 12–15).

On November 11, 2008, Plaintiffs' counsel threatened to obtain a court order forcing Defendants to "consent" to the return of the MidCountry records, as if the court's October 30 order was invalid or insufficient.[5]

On December 9, 2008, this Court declared the record on appeal for Case No. 08-2457 to be complete. (Appellant's Briefing Notice). The ambiguous receipt[6] (dated December 16 and filed on December 23, 2008) and accompanying ambiguous docket text were the first clear indication Defendants had that the lower court had finally located the MidCountry records.[7] (RA 160; RA 212 pp. 3–4).

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[4]The November 3, 2008, written dismissal order says nothing about the return of any documents. (RA 129). The oral order is all there is, and according to it, the courthouse's surrender of the sealed MidCountry records to Plaintiffs instead of MidCountry was a clear, indisputable error and security breach.

[5]"I will be filing a motion to require you both to ... consent to the return of the MidCountry Bank records ...." (RA 162-6).

[6]Why does RA 160 exist? LR, D.Mass 5.1(e) requires that when "papers filed in the office of the clerk" are removed "from the office of the clerk" by someone other than a judge, official, or court employee, that person must "prepare, sign and furnish to the clerk a descriptive receipt therefor."

Yet RA 160 violated this local rule in that it was not adequately descriptive.

[7]Defendants' belief that the records had been lost, and that RA 160's wording "received of the clerk" meant "received by the clerk," not "received from

Up until the week of December 4, 2009, Defendants still believed the sealed MidCountry records to be in the lower court's custody rather than having been given to the wrong party. (RA 212 p. 4). This Court's December 4, 2009, ruling on Defendants' motion to enlarge the record made Defendants realize that the MidCountry records were also part of the record on appeal; Defendants therefore moved the lower court to forward the MidCountry records. (RA 229 p. 4; RA 204). When the clerk stated that the court no longer had the records, and Plaintiffs' counsel refused to return the records to the court, Defendants moved for an order compelling Plaintiffs to return the records, and for a stay of the yet unexecuted order to return them to MidCountry. (RA 210; RA 212 p. 4; RA 212-6 p. 1).

Whether rightly or wrongly, the blame for the security breach at the federal courthouse whereby sealed records were given to a different party than whom the district judge had ordered has been laid at the feet of the magistrate judge by Plaintiffs,[8] the D.Mass. clerk of court,[9] and the newly assigned district judge.[10]

The lower court concealed the location of the MidCountry records from

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the clerk," is memorialized in a May 20, 2009, filing: "It should also be noted that the loss of these documents at the courthouse until about December 16, 2008 ([RA] 160) is why Defendants did not pursue the matter further." (RA 177 p. 5 n.4).

[8]"Therefore, Judge Hillman obeyed it and delivered the records to counsel for 3ABN ...." (RA 212-6 p. 1). "Judge Hillman obeyed the order and returned the MidCountry records to counsel for the Plaintiffs." (RA 231 p. 2).

[9]"At all times thereafter [after September 12, 2008], Judge Hillman remained in possession of the documents until December 16, 2008." (Ex. A pp. 2–3, filed in this case on May 5, 2010).

[10]"Magistrate Judge Hillman returned the records to plaintiffs." (RA 261 p. 2).

Defendants even though that court had already denied Plaintiffs' request to conduct an *in camera* review before Defendants received these records. The lower court failed to forward these records to this Court with the rest of the record, and gave these sealed records to the wrong party, an adverse party. This withholding of evidence from Defendants adversely affected Defendants' response to Plaintiffs' motion to dismiss, Defendants' motion for costs, Defendants' motion to reconsider and amend findings, Defendants' motion for sanctions, and Defendants' appeals.

II. SUMMARY OF DEFENDANTS' OBJECTIONS (RA 229)

Because the motions at issue in the magistrate judge's orders did not concern pre-trial, non-dispositive matters but rather (a) the forwarding of the record, (b) the remedying of a post-dismissal violation of the order of dismissal, and (c) the stay of part of that order of dismissal, and because the parties' consent for referral was not obtained, Defendants requested a *de novo* review of the magistrate judge's orders. (RA 229 pp. 1–2, 5)

Defendants incorporated the facts and arguments of their previous submissions (RA 205; RA 211; RA 213; RA 223) in their objections (RA 229 p. 2), and do hereby incorporate the same in the instant motions.

The magistrate judge could not lawfully approve the courthouse's security breach by altering the terms of the dismissal and confidentiality orders since the terms of these orders are at issue in the pending appeals. (RA 229 p. 3).

Defendants incorporated all the arguments Defendants had previously made

concerning why the MidCountry records are part of the record on appeal (RA 229 p. 4), and do emphasize here in summary most of those arguments.

The MidCountry records are original papers which, by court order due to Plaintiffs' production dispute, were *presented to the court* for review, making them part of the record. *In re Arthur Andersen & Co,* 621 F.2d 37, 39 (1st Cir. 1980). (RA 205 pp. 5–6; RA 213 p. 9; RA 223 p. 8). Analogously, when resolving production disputes under the confidentiality order, disputed documents must be filed under seal with the court, making them part of the record. (RA 60 pp. 2–3; RA 213 p. 9; RA 223 p. 8). Plaintiffs also moved for an *in camera* review of the MidCountry records. (RA 74 p. 3; RA 75 pp. 16–17).

The MidCountry records are part of the record because they were filed with the court on September 12, 2008, when they were delivered to (and signed for by) the district judge's docket clerk. Fed. R. Civ. P. 5(d)(2). *Hernandez v. C Aldridge III*, 902 F.2d 386, 388 (5th Cir. 1990). (RA 205 p. 6; RA 206-2). Since they were filed prior to the filing of both of Defendants' notices of appeal (RA 133; RA 196), they are part of the record for both appeals. (RA 205 p. 8).

District courts are without authority to eliminate material from the record on appeal. 20 *Moore's Federal Practice* §310.40[2]; *Belt v. Holton*, 197 F.2d 579, 581 (D.C. Cir. 1952); *U.S. v. Forness*, 125 F.2d 928, 932 n.3 (2nd Cir. 1942). (RA 211 pp. 8–9; RA 213 p. 9; RA 233 p. 4).

The MidCountry records are directly relevant to the pleadings of all parties.

(RA 205 pp. 6–8).

The contents of the MidCountry records speak to whether (a) Plaintiffs knew that the claims in their lawsuit were frivolous, (b) Plaintiffs obstructed discovery of documents containing relevant information, (c) Plaintiffs moved to dismiss their case as a ploy to prevent Defendants' obtaining the incriminating information in the MidCountry records, (d) Plaintiffs seek to burden Defendants with duplicative costs for obtaining relevant documents, (e) Plaintiffs' Rule 41(a)(2) dismissal should have been conditioned on payment of costs and/or transfer of discovery, (f) the information in the MidCountry records is not prevented from discovery by the confidentiality order, (g) most of the MidCountry records pertain to accounts not owned by Shelton, and (h) the district court, without due process, mishandled and purposely withheld relevant, material evidence from Defendants which handicapped Defendants' defense, motion for costs, appeals, etc. (RA 205 pp. 8–12; RA 211 pp. 7–8; RA 213 p. 10; RA 223 pp. 8–9). Defendants already have or will put at issue in their appeals all these issues, as well as whether Defendants' property was *de facto* expropriated, without due process. (RA 229 p. 5).

Given the seriousness of a federal court giving sealed records to the wrong party, the magistrate judge's denial of Defendants' motions without any findings weakens public confidence in the integrity of the judicial system. Plaintiffs' blaming the magistrate judge for the error (RA 212-6 p. 1), the existence of two misconduct investigations involving questioning the magistrate judge and his staff

(RA 230), and the district judge recusing himself on the basis that his "impartiality might reasonably be questioned by an objective observer" (RA 226) all draw attention to the fact that the magistrate judge should have recused himself pursuant to 28 U.S.C. § 455(a) rather than rule on the motions. (RA 229 pp. 2–3).

If a stay is required to prevent the return of the MidCountry records to MidCountry, and if a stay is not issued, Defendants will suffer irreparable harm in future litigation for abuse of process and/or malicious prosecution.[11] (RA 229 p. 3).

III. PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTIONS, AND DEFENDANTS' REPLY

Plaintiffs filed a response that indisputably misrepresented the record, hoping to prejudice the newly assigned judge against Defendants. (RA 231; RA 233 pp. 10–11, 4–10). In that response, Plaintiffs asserted that Defendants objected under Fed.R.Civ.P. 72(a) (RA 231 p. 3), but under that rule, Plaintiffs' response was unauthorized. (RA 242 p. 6–8). Defendants filed a reply. (RA 233).

Plaintiffs' response admitted, "Not surprisingly, [the magistrate judge] also recused himself after ruling on the motions." (RA 231 p. 7). Thus, the magistrate judge should have recused himself *before* ruling on the motions. (RA 233 pp. 2–3).

Plaintiffs' response admitted, "... these documents, which were filed under seal ...." (RA 231 p. 7). Since they were filed, according to Fed. R. App. P. 10(a)(1), the MidCountry records must be part of the record on appeal. (RA 233 p. 4).

[11]Defendants explain why they would suffer irreparable harm at *infra* 17–18, using the same arguments as their objections. (RA 229 p. 3).

Plaintiffs' response admitted that Defendants have an "interest in these records" during "the litigation to which they relate." (RA 231 p. 9). Thus, Plaintiffs acknowledge Defendants' interest in the MidCountry records until the conclusion of future litigation for abuse of process and malicious prosecution pertaining to the underlying case. (RA 233 p. 5).

In a subsequent, collateral filing, Defendants cited LR, D.Mass. 5.1(e) (RA 258 pp. 5–6), which requires descriptive receipts when documents filed with the clerk are removed from the clerk's office. Thus, RA 160's existence proves that the MidCountry records were indeed filed. (*Id.*). Yet RA 160 violated Rule 5.1(e)'s requirement of descriptiveness. (*Id.*). The ambiguous RA 160 differs greatly from the descriptive receipts filed in another D.Mass. Case; that case also docketed receipts for the court's *reception* of documents. (*Id.* p. 6).

IV. LOWER COURT'S RULING ON DEFENDANTS' OBJECTIONS

A. Standard of Review Applied by the Lower Court

Defendants requested a *de novo* review, but the lower court applied a different standard, asserting that Defendants' objections concerned "pretrial discovery." (RA 261 p. 3). Yet a motion to stay part of an order of dismissal, a motion to forward part of the record on appeal, and a motion to undo the damage of the courthouse unlawfully surrendering sealed records to the wrong party are not pretrial discovery matters.

Regardless, the magistrate judge issued no findings of fact or conclusions of

law, and conducted no hearing, leaving nothing to review unless the district court conducted what would amount to a *de novo* review. Without that review, without at least reading the original motion papers, memorandums, affidavits, and exhibits filed with the motions in question, the lower court had no basis for determining that "[t]he magistrate judge committed no error." (RA 261 p. 3).

B. What the District Judge Ordered re: MidCountry Records

The lower court's ruling states, "The district judge ... orally ... ordered all confidential records to be returned to plaintiffs." (RA 261 p. 2). If the phrase "confidential records" does not include the MidCountry records, then the statement is irrelevant to the matter at hand. If the phrase does include the MidCountry records, then the statement is patently false.

Plaintiffs requested that "the records of MidCountry Bank" be surrendered to them (RA 120 p. 1), but the district judge instead ordered that the MidCountry records be "returned to the party that produced those documents" (RA 141 p. 13), which party is indisputably MidCountry.

C. "Obtain," "Keep," "See," and "Distribute" MidCountry Records

The district court's ruling refers to "defendants' efforts to obtain, and keep" the MidCountry records, and refers to the April 17, 2008, confidentiality order of the underlying case. (RA 261 p. 2). By default, the issue of obtaining the MidCountry records was settled on September 11, 2008, since the lower court denied Plaintiffs' request to conduct an *in camera* review before giving them to

Defendants. (RA 75 pp. 16–17; RA 107 p. 5). The issue of keeping the MidCountry records was settled on April 17, 2008, when the lower court required only non-parties to return documents after the conclusion of appeals. (RA 60). Neither Plaintiffs nor the lower court ever gave notice to Defendants that the terms of either court order, RA 107 or RA 60, were going to be altered.

With that in mind, we note the following from the district court ruling:

> ... until a ruling by the magistrate judge that defendants were entitled to these documents, plaintiff Shelton's right to this private information trumped defendants' right to see and distribute them.

(RA 261 p. 3). Two points should be noted.

First, by default, the magistrate judge's September 11, 2008, ruling determined that Defendants were entitled to the MidCountry records. (RA 107).

Second, in the motions and objections at issue, Defendants did not ask the lower court to let them "see"[12] or "distribute"[13] the MidCountry records, and so the order's point is irrelevant. The questions of examination and use in future litigation are presently confined to the appeals themselves. Therefore the district court is

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[12]Defendants reserve the right to ask the Court to let them see these records in order to prepare their appeal briefs. It is inequitable for this Court to only consider these records *in camera* when the lower court denied Plaintiffs' request for an *in camera* review. (RA 75 pp. 16, 17; RA 107 p. 5). Plaintiffs never appealed that ruling. But such considerations are irrelevant to the immediate issues at hand.

[13]Defendants have never published Shelton's tax returns, and voluntarily filed them under seal. (RA 49 p. 5; RA 171 p. 2; RA 93 pp. 4–31). These facts speak against the bare assertion that Defendants have ever contemplated distributing the MidCountry records.

without jurisdiction to decide such questions, which aren't before it anyway.

D. MidCountry Records Are Not Shelton's Records

The lower court cannot justify the surrender of sealed records to the wrong party by asserting that the MidCountry records are Shelton's records merely stored at MidCountry. (RA 261 p. 2). Doing so would overturn Supreme Court precedent established since 1976: Bank statements subpoenaed from banks are the "business records of the banks," not the private papers of a party, and the Fourth Amendment does not apply. *United States v. Miller*, 425 U.S. 435 (1976). Therefore, the MidCountry records are "the records of MidCountry Bank," not Shelton, as Plaintiffs admitted on October 23, 2008. (RA 120 p. 1).

Besides, 56% of the bank records and 60% of the bank accounts at issue are for accounts owned by DLS and 3ABN, not Shelton. (*supra* 2).

E. Ownership of the Copies Comprising MidCountry Records

The lower court's ruling contends that Defendants do not own the records in question. (RA 261 p. 3). While that issue is not properly before this Court until Defendants' appeals are submitted to this Court, it may be noted that Defendants contracted with MidCountry to produce copies of MidCountry's records. (RA 206-4; RA 206-5). MidCountry neither asserted continued ownership of those copies, nor imposed licensing terms upon Defendants. The sole restrictions Defendants are bound to are those within pages 1–6 of the confidentiality order. (RA 60). Without due process, the evidence found in those copies, paid dearly for by Defendants,

was withheld from Defendants and given to the wrong party, and Defendants were denied just compensation.

F. Issues Unaddressed by Lower Court Ruling

The lower court's ruling regarding Defendants' objections leaves unaddressed the four critical issues of whether (a) the MidCountry records are part of the record on appeal, (b) the district judge ordered the MidCountry records to be returned to MidCountry, (c) the lower court has authority to eliminate material from the record during an appeal, and (d) irreparable harm will occur if the records are returned to MidCountry. By instead dwelling on whether Defendants could "see" or "distribute" the MidCountry records, the ruling misses the whole point of the objections and their underlying motions.

What if the lower court ruling did address the issue of whether the MidCountry records are part of the record?

> The trial judge ordered the record corrected pursuant to his recollection of the events at issue, and that determination, absent a showing of intentional falsification or plain unreasonableness, is conclusive.

United States v. Mori, 444 F.2d 240, 246 (5th Cir. 1971), *cert. denied*, 404 U.S. 913 (1971). The newly assigned trial judge does not have recollections of the events at issue, and never conducted a hearing. The lower court concealed the location of the MidCountry records from Defendants. (*supra* 3–6). The lower court waited until 7 days after the record on appeal was declared complete before surrendering the

records to the wrong party, and another 7 days before docketing an ambiguous receipt documenting that surrender. (*supra* 4). That receipt was docketed the very same day, December 23, 2008, that Defendants served their designation of appendix and issues for review in their first appeal, as if someone was trying to keep Defendants from realizing that the MidCountry records were part of the record on appeal. (RA 213 p. 10; RA 214-5; RA 230 p. 2). Thus, there is a showing of intentional falsification. Additionally, the unwillingness of the lower court to admit that sealed records were given to the wrong party, and to rectify the mistakes made, is plainly unreasonable.

The lower court's ruling also leaves unaddressed the issue of whether the terms of the dismissal and confidentiality orders must remain unaltered by the district court during an appeal, and the issue of whether the magistrate judge should have recused himself.

G. Preserving an Issue: Defendants Object to Collateral Finding

The lower court acknowledged that it generally lacks jurisdiction over a case during an appeal.[14] Yet the lower court expanded the record by adding a new finding regarding the underlying case's early history, a finding prejudicial to Defendants' contention that Plaintiffs obstructed discovery, and to Defendants' claims of abuse of process and malicious prosecution.[15] Defendants' contention and

[14]"Because the case was pending in the Court of Appeals, this court failed to rule on the objections." (RA 261 p. 2).

[15]"This straight forward case rapidly degenerated into a discovery morass

Defendants' right to have their claims heard are at issue in Defendants' appeals.[16] The lower court gave no legal rationale for thus expanding the record.

The district judge who made the finding in question was not assigned to the underlying case until January 15, 2010, and has conducted no hearings in which to observe demeanor, facial expressions, hesitancy, and the like. She therefore has no advantage over this Court when issuing such findings.

The lengthy delay in ruling on Defendants' objections was due to the lower court's uncertainty as to its jurisdiction, not to the time needed to carefully review the record. (*supra* 15 n.14). A *de novo* review was not conducted.

On what basis, then, did the lower court make its prejudicial, extra-jurisdictional finding? Probably on the basis of Plaintiffs' possibly unauthorized response to Defendants' objections (RA 231), which indisputably misrepresented the record. (RA 233 pp. 10–11, 4–10). Defendants therefore ask this Court to give no consideration to the finding in question.

V. MEETING THE REQUIREMENTS OF FED. R. APP. P. 8(a)(2) FOR A MOTION TO STAY

Defendants moved for a stay in the lower court on December 18, 2009 (RA

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accompanied by a series of ad hominem attacks on plaintiff and his counsel ...." (RA 261 p. 1). This finding essentially denies that (a) Defendants had a right to defend themselves by engaging in discovery to defeat Plaintiffs' defamation *per se* claims, and (b) Plaintiffs engaged in obstruction of discovery. Such denials set aside earlier findings of magistrate judges (RA 107 pp. 3–4; RA 152-6 pp. 22–24, 9, 11), without a finding that those earlier findings were clearly erroneous.

[16]See, for example, Defendants' opening appellant brief in their first appeal (Case No. 08-2457), pp. 2–3, 17–26, 49–54, 56–57, 59.

210), meeting the requirement of Fed. R. App. P. 8(a)(1). The lower court denied that motion to stay. No reasons for denial were given in either the magistrate judge's January 29, 2010, electronic orders, or the October 19, 2010, overruling of Defendants' objections to those orders. (RA 261).

Defendants could not bring the issue of a stay to this Court until objecting to the magistrate judge's orders. R. Mag. J., D. Mass. 2(b). Defendants now promptly bring the issue before this Court.

The delay between the October 30, 2008, order and the December 18, 2009, motion to stay was not prejudicial since that order, as it pertains to the MidCountry records, has never yet been executed.[17] Contributing to that non-prejudicial delay was the confusion as to the location and custody of, and the lack of notice regarding the MidCountry records, as earlier described. (*supra* 3–5).

If the MidCountry records are returned to MidCountry, Defendants will suffer irreparable harm regarding future litigation for abuse of process and malicious prosecution.

The MidCountry records *do* contain evidence that (a) Shelton privately inured himself to 3ABN's detriment via kickbacks and royalties, (b) Shelton perjured himself by failing to report this income in his July 2006 financial affidavit, and (c) Shelton manipulated bank balances to evade reporting his assets on that

[17]The lower court ordered that the MidCountry records be "returned to the party that produced those documents" (RA 141 p. 13), which party is indisputably MidCountry. Those records have never yet been returned to MidCountry.

affidavit. The MidCountry records *should* contain evidence that (d) 3ABN sent at least one $10,000 "love gift" check to Shelton's brother, Tommy Shelton. The MidCountry records *may* contain evidence that (e) funds were transferred from 3ABN accounts into Shelton's personal accounts.[18] Thus, the MidCountry records decisively refute key claims in Plaintiffs' complaint. (RA 1 pp. 12–13, 15).

3ABN's board chairman and Plaintiffs' counsel both stated that the law firm had thoroughly reviewed Plaintiffs' finances. (RA 127-6 p. 1; RA 96-2). Therefore, Plaintiffs' counsel knew or should have known that the litigation was frivolous.

Without the MidCountry records, Defendants would be prejudiced in defending against an anti-SLAPP motion filed by Plaintiffs, and Defendants would have difficulty re-obtaining these records since an anti-SLAPP motion halts discovery. M.G.L. c. 231, § 59H. Also, Plaintiffs asserted that if the MidCountry records were returned to MidCountry, they would be destroyed. (RA 216 p. 16). Thus, any alterations to and notations upon the MidCountry records made since MidCountry produced them would be irretrievably lost. (RA 223 p. 11).

However, Defendants question whether a stay is necessary on two grounds: (a) The district judge seemed to condition the return of the MidCountry documents

[18]See the discussion at RA 233 p. 5, which cites for support (a) RA 80 p. 9; (b) RA 224-13 pp. 3–4, 8; (c) ¶¶ 3–59, 33–36 of Affidavit of Robert Pickle (provisionally filed under seal here on November 19, 2009); and (d) Ex. B (the "Expanded Record" provisionally filed under seal here on November 19, 2009). The $10,000 check is also referred to at RA 63-29 p. 3; RA 81-5 pp. 20–21, 31; RA 220 pp. 17–18; RA 149 p. 19.

on whatever the confidentiality order required, and was not attempting to alter that order's terms. (RA 141 pp. 12–15). Since the confidentiality order does not require parties to return documents (*supra* 3), the MidCountry documents do not need to be returned despite the October 30 order. (b) District courts are without authority to eliminate material from the record on appeal. 20 *Moore's Federal Practice* §310.40[2]; *Belt v. Holton*, 197 F.2d 579, 581 (D.C. Cir. 1952); *U.S. v. Forness*, 125 F.2d 928, 932 n.3 (2nd Cir. 1942). Therefore, while it is the appellant's responsibility to see that the record as certified is complete,[19] the district court cannot intentionally fail to forward part of the record, or dispose of part of the record during an appeal.[20] Thus, a stay of the order in question must be somewhat automatic during an appeal.

CONCLUSION

The MidCountry records became part of the district court record on September 12, 2008, and are part of the record on appeal. Thus far they have been omitted from the record by error or accident, and, pursuant to Fed. R. App. P. 10(e)(2)(C), this Court may issue orders to correct that omission. The MidCountry records must now be forwarded to this Court, properly certified pursuant to the Fed. R. Evid., for their contents pertain to a wide range of issues in Defendants' appeals. These issues include, *inter alia*, that material evidence was withheld from

[19] 1st Cir. Loc. R. 11(a).

[20] 1st Cir. Loc. R. 11(b). The latest version of the rules still requires the district court to physically transmit the entire record in *pro se* cases.

Defendants, adversely affecting Defendants' response to Plaintiffs' motion to dismiss, Defendants' motion for costs, Defendants' motion to reconsider and amend findings, Defendants' motion for sanctions, and Defendants' appeals.

If a stay of the yet unexecuted order commanding the return of the MidCountry records to MidCountry is required to prevent that return during the pending appeals, it must be stayed to prevent irreparable harm.

WHEREFORE, Gailon Arthur Joy and Robert Pickle pray the Court to (a) correct the omission from the record by issuing whatever orders are necessary in order to have the MidCountry records, properly certified pursuant to the Fed. R. Evid., forwarded to this Court as a supplemental record on appeal, and to (b) stay the yet unexecuted October 30, 2008, lower court order to return the MidCountry records to MidCountry, if a stay is required to prevent that return.

Respectfully submitted,

Dated: October 25, 2010

s/ Gailon Arthur Joy, *pro se*
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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on October 25, 2010, I served copies of this notice and motions on the following registered parties via the ECF system:

John P. Pucci, J. Lizette Richards
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Dated: October 25, 2010

s/ Bob Pickle
Bob Pickle