UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs, v. Gailon Arthur Joy and Robert Pickle, Defendants.	Case No.: 07-40098-FDS

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO IMPOSE COSTS UPON THE PLAINTIFFS

INTRODUCTION

The Plaintiffs and their counsel endeavor to revise history in their opposition to the Defendants' motion to impose costs. Their historical revisionism appears to be an attempt to convince this Court to confine the question of imposing costs to merely Fed. R. Civ. P. 41(a)(2), and not to consider the invocation of 28 U.S.C. § 1927 or the court's inherent powers as an additional basis for imposing costs. But the facts are what they are, and cannot be changed.

The Plaintiffs, not the Defendants, asked this Court to order the return of most of the non-public documents that are evidence either of the extremely frivolous nature of the instant case, or of the flagrant abuse of the confidentiality order perpetrated by the Plaintiffs and their counsel. Such a return necessitates duplicative discovery expense if either the Plaintiffs or the Defendants file a future suit, and puts key evidence at risk of spoliation. But beyond the question of alleviating prejudice is the simple fact that "voluntary dismissals are often conditioned on the

payment of the defendant's costs," which may include attorney fees. *Puerto Rico Maritime Shipping Authority v. Leith* 668 F.2d 46, 51 (1st Cir. 1981).

FACTS

The Tightening Noose

In September and October 2008, the Plaintiffs found the noose tightening as discovery issues were steadily being initiated and resolved:

- Magistrate Judge Hillman's order of September 11, 2008, gave the Plaintiffs a bit of a tongue lashing:

> At the same time, it is apparent from the hearing 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. ... Plaintiffs should not have to be reminded that it is they who have initiated this action and as part of their claims, they are seeking significant monetary damages from the defendants. Documents which they may deem irrelevant to the specific statements they allege were defamatory may well be relevant to put the statements in context, or relevant on the issue of whether the plaintiffs have actually been damaged by the alleged statements. If the plaintiffs fail to produce documents which are relevant to their claims or potential defenses, then they may be subject to sanctions, including limiting evidence which they may introduce at trial, or limiting the scope of any damages to which they could be entitled should they prevail.

  (Doc. 107 pp. 3–4).

- Magistrate Judge Hillman's order of September 11, 2008, also denied the Plaintiffs' request to conduct *in camera* review of the records of MidCountry Bank (hereafter "MidCountry"), Gray Hunter Stenn LLP (hereafter "GHS"), Remnant Publications, Inc. (hereafter "Remnant"), and all other third parties, thus opening the way for the Defendants to obtain these documents. (Doc. 74 ¶ 7; Doc. 75 pp. 16–17; Doc. 107 p. 5).
- Magistrate Judge Hillman's order of September 11, 2008, also required the Plaintiffs, not just the Defendants, to seek leave of the court before issuing any new subpoenas upon non-parties. (Doc. 107 p. 5). Given the ability of the Defendants to document their

assertions and the inability of the Plaintiffs to do the same, this provision of Magistrate Judge Hillman's order gave the Defendants a distinct and considerable advantage. It also helped curb the Plaintiffs' own abuse of discovery. (Doc. 108 pp. 1–2; Doc. 80 pp. 6–7).

- On September 22, 2008, Remnant produced subpoenaed documents which went directly to the question of whether Shelton had engaged in private inurement by laundering 3ABN revenue through Remnant. (Affidavit of Robert Pickle (hereafter "Pickle Aff.") ¶ 1).
- Plaintiffs and their counsel claimed that Plaintiffs' counsel had long ago conducted a thorough review of Plaintiffs' finances. (Doc. 96-2; Doc. 123 ¶ 5; Doc. 127-6). Thus the Remnant documents constituted *prima facie* evidence of abuse of process and misuse of civil proceedings by Plaintiffs' counsel as well as the Plaintiffs. (Pickle Aff. ¶ 2, Ex. A).
- Pending in this Court were motions requesting subpoenas *duces tecum* seeking documents that would, *inter alia*, verify or refute the Plaintiffs' claims that the IRS had vindicated the Plaintiffs, demonstrate the extent to which Shelton falsified information on his July 2006 financial affidavit regarding his alleged mortgage loan from the Fjarli Foundation, help verify or refute the Plaintiffs' claims regarding alleged rendezvous between Arild Abrahamsen and Linda Shelton, and verify whether 3ABN knowingly paid for private vacation travel actually taken by Linda Shelton and/or Brenda Walsh. (Doc. 94–96; Doc. 104–105; Doc. 100).
- The Plaintiffs failed to provide proof of reimbursement for Delta Airlines tickets for private vacation travel when invited to do so. (Doc. 113 p. 9).
- The Plaintiffs declared that alleged rendezvous between Arild Abrahamsen and Linda Shelton were irrelevant, reversing their long-held position that these alleged rendezvous went to the question of whether Shelton had biblical grounds for divorce and remarriage. (Doc. 110 p. 3; Doc. 113 pp. 6–7).

- Brenda Walsh, the Plaintiffs' star, stealth witness, lied about who had arranged for or bought the tickets for the planned trip to Florida, and whether Linda Shelton had used her ticket. (Doc. 100 ¶¶ 4–6, 8; Doc. 100-4 to Doc. 100-6; Pickle Aff. ¶ 3, Ex. B).
- The Defendants were preparing a motion seeking leave to issue a subpoena *duces tecum* upon the EEOC to determine whether the Plaintiffs had tainted the EEOC's investigation by withholding evidence of 3ABN's administrative conspiracy to terminate the Trust Services Department whistleblowers. (Pickle Aff. ¶¶ 4–6).
- Magistrate Judge Hillman's order of September 11, 2008, had ordered the Plaintiffs to respond to Defendant Pickle's revised requests to produce by October 27, 2008. (Doc. 107 p. 4).

With the noose tightening, the Plaintiffs decided to dismiss the instant case, a case they had known for some time that they could never win.

Deposition Difficulties

The above were not the only difficulties facing the Plaintiffs. Another soon-to-be-met obstacle was the depositions of the Defendants.

Defendant Pickle had informed Attorney Gregory Simpson (hereafter "Simpson") that Simpson needed to demonstrate that Defendant Pickle had actually written the alleged defamatory statements. Given the length of time since the statements were allegedly written, Defendant Pickle needed to review the actual statements before testifying under oath that he had actually written those statements. (Pickle Aff. ¶¶ 7, 13).

Defendant Pickle specifically brought to Simpson's attention the statements found at ¶¶ 46b–d, 46j of the Plaintiffs' complaint, and challenged him to find anywhere prior to the filing of the instant case where Defendant Pickle had ever made such statements as fact. (*Id.*).

The article at Save-3ABN.com states that the allegations found at ¶¶ 46b–d are the

allegations of sources, not that those incidents actually occurred. (Doc. 8-2 pp. 58–59). However, since the source of those allegations was Derrell Mundall, and since he claims to have been the Shelton family member who was the recipient of the van and furniture of ¶¶ 46b and 46d, the allegations are credible. (Pickle Aff. ¶ 9). Further, the Plaintiffs' refusal and failure to produce documentation for the sales price of the van of ¶ 46b suggests that the allegation is in fact true. (Pickle Aff. ¶ 11).

Regarding the allegation of ¶ 46j, the Defendants have located an internet posting by Defendant Pickle in which he quotes the January 28, 2004, decision of Administrative Law Judge Barbara Rowe, in which she says that 3ABN provides a corporate jet to the Sheltons for weekend travel. (Pickle Aff. Ex. C–D). Defendant Pickle's post was followed by a post by Gregory Matthews in which he pretty much asserts that Shelton used the jet for honeymoon travel. (Pickle Aff. Ex. C). Since the Plaintiffs never joined Barbara Rowe or Gregory Matthews as defendants in the instant case, ¶ 46j should never have been in the complaint.

Deceit and Contradictions

Sometime during the week of October 12, 2008, the 3ABN Board "promptly voted" to dismiss the instant case, according to Walter Thompson's sworn testimony dated October 22, 2008. (Doc. 123 ¶ 8).

On October 17, 2008, Attorney Gregory Simpson contacted Defendant Pickle and orally, not in writing, proposed terms for settlement. (Doc. 127 ¶¶ 3–4). In that conversation Simpson gave as the reason for needing to settle now the avoidance of *expense* regarding *discovery* over the following three months. (Doc. 127 ¶ 5). Thus the dismissal was a ploy to avoid discovery. In passing, Simpson stated that the Plaintiffs could simply file a motion to dismiss, and there wouldn't be anything that could be done about it. (Doc. 127 ¶ 6). Yet in that same conversation, Simpson explicitly denied that a motion to dismiss would be filed. (Doc. 127 ¶ 7).

On October 18, 2008, Defendant Joy memorialized Simpson's conversation with Defendant Pickle in a private message, including Simpson's statement that he would not be filing a motion to dismiss. (Pickle Aff. Ex. E).

On October 22, 2008, the same date as the date of Walter Thompson's affidavit, Simpson told the court in the Southern District of Illinois:

> And we are not yet, the time to respond to their narrow document request has not yet expired, but ... in the next production we will either identify where we've already produced it or produce additional records that pertain to the specific transactions that they identified.

(Pickle Aff. Ex. F at p. 35). Thus Simpson made it clear to that court that he would be responding to Defendant Pickle's revised requests to produce on or by October 27, 2008, in compliance with the September 11, 2008, order of the Honorable Timothy S. Hillman. (Doc. 107 p. 4).

Simpson filed his motion to dismiss on October 23, 2008, along with Thompson's affidavit of October 22, and informed the Defendants that very day that he would not be complying with Magistrate Judge Hillman's order on October 27. (Pickle Aff. Ex. G).

It should be no surprise that Simpson also lied to this Court in the status conference of October 30, 2008, when he stated, "[The Defendants] are no worse off than they were before the lawsuit began." He knew otherwise, as demonstrated by his threats of October 30 and 31, 2008.

The Threat of October 30, 2008

Not 90 minutes after the conclusion of the October 30 status conference during which the instant case was dismissed, Simpson fired off a new threat:

> Plaintiffs have previously designated, and hereby reaffirm their desigation [*sic.*] of, the following materials as Confidential: ...
>
> 3. Any other documents produced to Defendants pursuant to third party subpoenas issued by Defendants in this case.
>
> ... If I become aware of any evidence that Confidential material has been retained by you or released to others by you, or if I become aware of internet postings that reflect or imply the contents of Confidential

> materials, my instructions are to immediately seek relief from the Court.

(Pickle Aff. Ex. H).

Simpson's reference to documents obtained by way of third-party subpoenas can refer to but two groups of documents. The first group pertains to the wrongful termination of Three Angels Broadcasting Network, Inc. (hereafter "3ABN") Trust Services Department whistleblowers due to their reporting of the misconduct of Leonard Westphal, and to unethical or illegal activity in that department. (Doc. 76-3 pp. 14–15). The second group pertains to the child molestation allegations against Tommy Shelton stemming from alleged misconduct while he served as pastor at the Ezra Church of God in West Frankfort, Illinois, and the Community Church of God in Dunn Loring, Virginia, and to Tommy Shelton's ownership and use in the latter church of a grand piano that he had allegedly purchased from 3ABN at below fair market value. (Doc. 76-3 pp. 16–17).

The Defendants never received notice from Plaintiffs' counsel prior to the email of October 30, 2008, that the Plaintiffs wished to designate these documents as "confidential." (Pickle Aff. ¶ 18). Plaintiffs' counsel previously denied that they were seeking to make "employment related information" confidential. (Doc. 89 pp. 24–25).

¶ 1 of the confidentiality order allowed the Plaintiffs to designate as confidential

> matters that [the Plaintiffs] believe[] in good faith are not generally known or readily available to the public, and that [the Plaintiffs] deem[] to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business ....

(Doc. 60 ¶ 1). The child molestation allegations against Tommy Shelton are hardly a trade secret of 3ABN, and a videotaped public piano concert in Tommy Shelton's then church in Virginia (Doc. 76-3 p. 17 at ¶ 1) is hardly propriety business information of Danny Lee Shelton (hereafter "Shelton") that is not generally known to the public.

While the Defendants have submitted documents to this Court to substantiate their

assertion that the instant suit was conceived in retaliation for and to silence the Defendants' story that Shelton covered up the child molestation allegations against Tommy Shelton (Doc. 63-15 to Doc. 63-17; Doc. 63-18 p. 2; Doc. 63-19 p. 2), the Plaintiffs have instead represented to this Court that the child molestation allegations against Tommy Shelton were irrelevant to the instant case. (Doc. 75 pp. 12–13). Yet as soon as Plaintiffs' motion for voluntary dismissal had been granted, Plaintiffs and their counsel appear to have conspired to misuse the confidentiality order in order to cover up those very same child molestation allegations.

The Threat of October 31, 2008

What Simpson in his October 30 email meant by the words "if I become aware of internet postings that reflect or imply the contents of Confidential materials, my instructions are to immediately seek relief from the Court," became readily apparent in a new threat he issued on October 31, 2008:

> I have received the blog posting by you pasted in this email below. I will be bringing a motion to enforce the Confidentiality Order unless you provide a satisfactory explanation TODAY of why your reference to net receipts from book deals does not reveal confidental information that you obtained from Remnant Publications.
>
> > Well, here we are!!! When do I get my own world-wide television ministry to go along with the rest of the hypocricy??? I would like a jet, my own personal secretary and a barn full of horses and a cute little filly to go with the new sports car. And I need to be able to do book deals that will net $300,000 annually, minimum!!! A new house with a tarred driveway and a gate would be nice!!! 4,300 sq feet of living space would be ok, as long as the grandchildren get to live with us!!! But I also need one of those disappearing mortgages from a foundation somewhere!!! I also need complete discretion to hire, fire and ridicule people regardless of due process. I would clearly need "kingly authority"!!!

(Pickle Aff. Ex. I, red in original).

The confidentiality order clearly states, "This Agreement shall not preclude any party from using or disclosing any of its own documents or materials for any lawful purpose." (Doc. 60

¶ 8). Thus, since the above $300,000 figure is derived from Nicholas Miller's email of September 19, 2006 (Doc. 63-32 p. 32), a reference to such a figure is permissible, regardless of what the "confidential" documents from Remnant Publications, Inc. (hereafter "Remnant") received more than two years later say.

Further, since Remnant's publicly available IRS Form 990's suggest that Shelton's royalties and kickbacks received from Remnant in 2005, 2006, and 2007 were more like $90,378, $482,589, and $176,739 respectively (amount that "royalty" payments from 2005 through 2007 exceeded that of 2004 in Doc. 81-7 pp. 25–26, in ln. 43 of Doc. 81-4 at pp. 35, 38, and 42, and in ln. 43 of Pickle Aff. Ex. J), it is practically impossible that the Remnant documents would substantiate Miller's $300,000 figure. According to these publicly available Form 990's, the royalties paid to Shelton for the 2006 *Ten Commandments Twice Removed* campaign should have been closer to $482,589, minus whatever payments Shelton may have received as kickbacks for sales by Remnant to 3ABN of Shelton's booklets published by Pacific Press Publishing Association. (*Id.*; Doc. 96-11 p. 54).

Yet the Plaintiffs and their counsel appear to be conspiring to find every possible similarity between "confidential" documents and the Defendants' public statements, regardless of whether the Defendants obtained the same information or documents from other sources, and regardless of whether any confidential information was actually disclosed.

"[The Defendants] Are No Worse Off Than They Were Before the Lawsuit Began"

Clearly, because the case was dismissed without prejudice, because the various issues never were resolved under the full light of public scrutiny in an American courtroom, the Defendants are worse off now than before the lawsuit began. As Simpson's threats of October 30–31, 2008, make clear, the Defendants are at risk of repeatedly being hounded, harassed, and dragged back into court over the supposed violation of the confidentiality order when all they are

doing is reporting facts available from their own sources and documents.

One individual described the vindictive and spiteful Shelton in the following way:

> ... with Danny they are dealing with someone who doesn't walk away. They are dealing with someone for whom a fight is a fight to the finish. When this one is over someone will walk out of the ring and someone won't. I think Duane knows that when in a fight with Danny a person doesn't ever just bite the bullet and walk away. They will not be allowed to walk away. One battle may be closing, but the war is no where near done. Look at the Linda thing. Years later Danny and his minions still pursue her and they will continue until she is irreversably [*sic*.] crushed and has no chance of standing again.

(Pickle Aff. ¶ 21, Ex. K, Ex. L at p. 2).

PLAINTIFFS' "FACTS" REBUTTED

"The Complaint Identified 24 Specific Defamatory Statements ...." *(Doc. 140 pp. 2–3)*

Of the alleged statements cited in the complaint, ¶¶ 46a, 46e, 46g, 48a, 48c, 50d, and 50i are quite broad, opening the door to extensive discovery. (Doc. 1).

In the Southern District of Illinois on October 22, 2008, after Defendant Pickle quoted ¶ 46g, the Honorable Philip M. Frazier asked Simpson to confirm whether ¶ 46g was really that broad, and Simpson acknowledged that Defendant Pickle had correctly quoted that paragraph. (Pickle Aff. Ex. F at pp. 9–10). Magistrate Judge Frazier then made the following comments:

> But it seems to me that if you are going to be successful in proving these, in proving defamation, you are going to have to narrow it down to some specific statements. Instead, you just can't go in at a trial, for example, and say, "Well, they generally implied that we were benefiting personally in violation of IRS rules." That's not going to get to a jury. You're going to have to come up with specifics. ...
>
> You know, I kind of think Three Angels probably should have thought this through a little bit. My guess is that Three Angels probably thought that these guys had probably backed down pretty quick when this defamation lawsuit was filed. ... these kinds of little nasty bits such as of the revelation involving Mr. Shelton's brother tend to or any impropriety on behalf of Mr. Shelton himself would probably tend to erode some of those. And so a nice public way of refuting those statements is by filing a defamation action, and, you know, saying it ain't so, Joe.

> But the problem is, is now Three Angels has opened up a very large can of worms here. And it's a very large can of worms.

(Pickle Aff. Ex. F at pp. 11, 23).

"Answers to Interrogatories Continued the Pattern of Refusing to Reveal the Sources of Their Challenged Statements." *(Doc. 140 p. 3).*

To the contrary, the Defendants in their Rule 26(a)(1) disclosures and in their answer to the interrogatories served upon them on August 20, 2007, listed at least 163 different individuals or entities as being potential witnesses. (Pickle Aff. ¶¶ 22–24, Ex. M at pp 3–44, Ex. N at pp. 1–7, Ex. O). The answers to the interrogatories broke down the names into at least 11 categories of information the witnesses' testimony would pertain to. (Pickle Aff. Ex. M at pp 3–44).

It does not take much intelligence to figure out that the Defendants' witness list included the Defendants' sources, and that the Plaintiffs should have deposed some of those individuals.

Further, since all email communications between sources and the Defendants had been turned over to the Plaintiffs as part of the Defendants' Rule 26(a)(1) disclosures (Doc. 103 ¶ 1; Doc. 77 pp. 8–9; Doc. 89 p. 40; Pickle Aff. Ex. P), the Plaintiffs have had in their possession all the material they could possibly hope for to incriminate the Defendants and their sources, if there was the remotest possibility to incriminate.

"... Thousands of Pages of Records in Discovery Including Virtually All Of ...." *(Doc. 140 p. 3).*

> [Defendants] were given thousands of pages of records in discovery including virtually all of 3ABN's corporate records and tax filings, and the internet postings that contained the defamatory statements.

(Doc. 140 p. 3).

The Defendants were not given a single document until the Plaintiffs were compelled by order of this Court. (Electronic order of March 10, 2008). All documents produced were entirely unindexed, and incapable of being searched using Adobe Acrobat features. (Doc. 81 ¶ 2; Doc. 107 p. 4; Pickle Aff. ¶ 26). A considerable number of hours was spent by the Defendants in

indexing these documents, something the Plaintiffs were required to do. (Pickle Aff. ¶ 26). To all appearances, the huge mass of unsearchable internet postings the Plaintiffs produced suggested that the Plaintiffs considered a wide range of issues to be fair game for discovery. (Doc. 81 ¶¶ 7–8, 10–11, Table 2–3).

Shelton never produced his tax filings, nor any corporate records for non-3ABN companies he controls, such as DLS Publishing, Inc. (Pickle Aff. ¶ 27).

Except for 3ABN's tax filings filed in the state of California, and perhaps an Oregon return or two, the Defendants already had the other tax filings the Plaintiffs produced. (Pickle Aff. ¶ 28). So while 3ABN's production enabled these documents' entry into evidence to be unchallenged, it did little else. 3ABN didn't even produce its 2006 returns!

"Adopted a Strategy ... Oppressively Large Amounts of Irrelevant Information" *(Doc. 140 p. 3).*

> Finding little help among the Plaintiffs' *relevant* documents, the Defendants adopted a strategy of seeking oppressively large amounts of irrelevant information that they hoped would contain at least *something* that would show the Plaintiffs in a bad light. In an email to a confidante, Defendant Gailon Arthur Joy explained the Defendants' plan to expand the scope of the case beyond the complaint: ....

(Doc. 140 p. 3). Simpson then quotes from an email dated January 22, 2008, to prove what strategy the Defendants adopted *after* the Plaintiffs first produced documents on March 28, 2008! (Doc. 76-5 p. 33). Simpson's reckless disregard for truth and accuracy is inexcusable.

On January 3, 2008, the Defendants served upon Plaintiffs' counsel and Tommy Shelton a motion to amend the pleadings that would have made 3ABN's officers and directors, and Tommy Shelton named plaintiffs in the instant case. (Pickle Aff. Ex. Q). On the same day the Defendants served upon Nicholas Miller, Linda Shelton's counsel, and Derrell Mundall a motion to amend the pleadings that would have named them third-party defendants in the instant case on the grounds of detrimental reliance. (Pickle Aff. Ex. R). Defendant Joy's "email to a confidante"

dated January 22, 2008, is thus referring to expanding the case *by adding parties*, not by "seeking oppressively large amounts of irrelevant information." Since Plaintiffs' counsel was served at least one of these motions, Simpson knew or should have known this fact at the time he wrote the above words.

And besides, GHS's "oppressively large amounts" of documents were confined to but 10 banker's boxes. (Doc. 81-5 p. 24 at ¶ 7).

"... 'A Substantial Number of Documents ... Would Be Irrelevant to Any Claims or Defenses ....' " *(Doc. 140 p. 4).*

Simpson omits from this quotation Magistrate Judge Hillman's explanation that the perceived difficulty was due to "the broad definitions utilized by Pickle." (Doc. 107 p. 3). Magistrate Judge Hillman's accompanying footnote references the Defendants' claim that Defendant Pickle's definitions were modeled after those of the Plaintiffs. (Doc. 107 p. 3 at fn. 1).

"... Plaintiffs' Efforts to Narrow the Scope of Discovery Were Justified." *(Doc. 140 p. 4).*

The portion Simpson quoted from Magistrate Judge Hillman's order of September 11, 2008, to make such a claim was immediately followed by Magistrate Judge Hillman's taking the Plaintiffs to task for those very efforts. (*supra* p. 2; Doc. 107 pp. 3–4).

"To Circumvent the Discovery Delays and Limitations ... in This Forum ...." *(Doc. 140 p. 5).*

> To circumvent the discovery delays and limitations they encountered in this forum as these issues worked their way to a conclusion, Defendants served at least six third-party subpoenas seeking more or less the same information as was requested from the Plaintiffs.

(Doc. 140 p. 5). Yet this bogus accusation was already refuted in the District of Minnesota. (Doc. 63-28 p. 11).

- Defendant Pickle's original requests to produce were served on November 29 and December 7, 2007. (Doc. 42 ¶ 6).
- Plaintiffs' counsel in the status conference of December 14, 2007, acknowledged that four

subpoenas had already been served (Doc. 144 p. 12), which were the original ones served on Remnant, GHS, Century Bank and Trust, and MidCountry. (Doc. 76-2 pp. 34–38; Doc. 76-3 pp. 1–4, 8–11).

- The Plaintiffs' motion for a protective order was not filed until December 18. (Doc. 40).
- The Plaintiffs' responses to Defendant Pickle's requests to produce were not served until January 9, 2008. (Doc. 63-24 p. 20; Doc. 63-25 p. 22).

Thus it is a glaring fraud upon the court to assert that these subpoenas were an effort to circumvent anything, for nothing yet had arisen to circumvent. The Defendants simply read the Complaint with all its broad language, as well as their answer to the Complaint, and proceeded the best they knew how to conduct discovery to address the issues these pleadings contained.

"All of This ... Could Have Been Obtained Directly from the Plaintiffs ...." *(Doc. 140 p. 5).*

The Plaintiffs have been in defensive mode since the summer of 2007, and have never wanted to produce anything. The Plaintiffs only produced documents after the Defendants filed motions to compel, and even then those documents were nearly entirely non-substantive. (Doc. 35; Doc. 61; Pickle Aff. ¶ 26). When the Honorable Philip Frazier asked Simpson whether he would want to subpoena documents from GHS to see if GHS's documents and 3ABN's documents were different, Simpson admitted that he would. (Pickle Aff. Ex. F at p. 32).

"(See Affidavit of Walt Thompson ¶ 8, Doc. 123)." *(Doc. 140 p. 6).*

Simpson's reliance on Thompson's uncorroborated testimony is fatal. We have earlier noted the impossibly contradictory nature of some of Thompson's statements concerning evidence for Linda Shelton's alleged adultery. (Doc. 113 pp. 3–4; Doc. 114-4 p. 1; Doc. 114-5 p. 1; Doc. 114-6 p. 3). Thompson also claimed that the instant lawsuit "has only one purpose," "to expose the truth," and that "the law suit does nothing to hide truth," for "[w]e have nothing to hide." (Doc. 114-4 p. 2; Doc. 114-5 p. 1). If these statements by Thompson are not lies, then

Plaintiffs' counsel throughout this litigation *has acted without authorization* in obstructing discovery and continually seeking to draw a veil of secrecy permanently over this case.

Ignoring Thompson's lies regarding Linda Shelton's alleged adultery, we observe the following: If Thompson as 3ABN Board chairman authorized Plaintiffs' counsel to prevent the exposing of truth despite his statements to the contrary, then Thompson is a proven liar, and his testimony upon which the motion to dismiss was based is impeached. Once a liar, always a liar.

"The Only Legal Prejudice That Defendants Identified Was the Possibility That the Plaintiffs Would Refile the Litigation in Another Forum." *(Doc. 140 p. 7).*

Simpson fails to note that the Defendants' memorandum in opposition to the Plaintiffs' motion cited a number of other examples of legal prejudice, including the exhaustion of financial resources, the waste of time, effort, and expense preparing a defense in the instant case, meeting challenges of venue and jurisdiction in future cases, evidence spoliation, and loss of favorable rulings. (Doc. 126 pp. 14–15, 17–18).

"... $20,000 is for an undisclosed expert ...." *(Doc. 140 p. 9).*

As required by the confidentiality order, Simpson was served with copies of Exhibit A of that order, signed by four experts the Defendants retained. (Doc. 60 ¶ 4(v); Pickle Aff. ¶ 31, Ex. S at p. 2). Simpson was served around June 10, 2008, with a copy of the one Lynette Rhodes had signed, and thus the Defendants did disclose her name to Simpson. (Pickle Aff. ¶ 31).

PLAINIFFS' ARGUMENTS REBUTTED

I. LEGAL AUTHORITY FOR IMPOSITION OF COSTS, EXPENSES, AND FEES

A. Under Fed. R. Civ. P. 41(a)

We here quote part of *Puerto Rico Maritime Shipping Authority v. Leith* not cited by the Plaintiffs, which allows for the payment of costs *and* attorney fees:

> In *Cone v. West Virginia Paper Co.*, 330 U.S. 212, 217, 67 S.Ct. 752, 755, 91 L.Ed. 849 (1947), the Supreme Court noted that "(t)raditionally, a plaintiff ... has had an unqualified right, upon payment of costs, to take a

> nonsuit in order to file a new action after further preparation, unless the defendant would suffer some plain legal prejudice other than the mere prospect of a second lawsuit" (emphasis added). The Court noted that while the Federal Rules of Civil Procedure now restrict the plaintiff's formerly unlimited right to dismiss without prejudice, "Rule 41(a)(2) still permits a trial court to grant a dismissal without prejudice 'upon such terms and conditions as the court deems proper.' " *Id.*
>
> We do not read Rule 41(a)(2) as always requiring the imposition of costs as a condition to a voluntary dismissal, although it is usually considered necessary for the protection of the defendant. See 5 Moore's *Federal Practice* P 41.06 & n.2, at 41-83 to 41-84 (3d ed. 1981). The decision of whether or not to impose costs on the plaintiff lies within the sound discretion of the district judge, see *New York, C. & St. L. R. Co. v. Vardaman*, 181 F.2d 769, 771 (8th Cir. 1950), as does the decision of whether to impose attorney's fees, see Bready v. Geist, 85 F.R.D. 36, 36 (E.D.Pa.1979); *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973); *Eaddy v. Little*, 234 F.Supp. 377, 380 (E.D.S.C.1964); *Lunn v. United Aircraft Corp.*, 26 F.R.D. 12, 19 (D.Del.1960).

668 F.2d 46, 51 (1st Cir. 1981). Other circuits have noted the same:

> Typically, a court imposes as a term and condition of dismissal that plaintiff pay the defendant the expenses he has incurred in defending the suit, which usually includes reasonable attorneys' fees. See 5 Moore's *Federal Practice* p 41.06 at 41-82 to 41-86 (1993). As we have previously observed, such terms and conditions "are the quid for the quo of allowing the plaintiff to dismiss his suit without being prevented by the doctrine of *res judicata* from bringing the same suit again." *McCall*, 777 F.2d at 1184.

Marlow v. Winston & Strawn, 19 F.3d 300, 303 (7th Cir.1994).

> The purpose of awarding attorneys' fees on a voluntary dismissal without prejudice is to compensate the defendant for the unnecessary expense that the litigation has caused. See *Galva Union Elevator Co. v. Chicago and North Western Transportation Co.*, 498 F.Supp. 26, 27-28 (N.D.Iowa 1980); 9 C. Wright & A. Miller, *Federal Practice and Procedure* Sec. 2366, at 178-80 (1971).

Cauley v. Wilson, 754 F.2d 769, 772 (7th Cir. 1985).

B. Under 28 U.S.C. § 1927

Contrary to the Plaintiffs' assertion that "the only legal basis for an award of costs would be the Court's discretion under Fed. R. Civ. P. 41(a)(2)," the U.S. Congress has authorized the imposition of "excess costs, expenses, and attorneys' fees" in a case such as this one:

> **Counsel's liability for excessive costs**
>
> Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

28 U.S.C. § 1927.

The record demonstrates that the Plaintiffs failed to litigate their various claims, and instead have been in defensive mode for a year and a half. Knowing that they could never prevail on their copyright and trademark claims, and their claims concerning Shelton's divorce and Tommy Shelton, they purposely chose to try to limit discovery to little more than financial issues, and then sought to prohibit discovery of those issues as well, all without amending their complaint. The Plaintiffs sought to block discovery of documents from MidCountry, Remnant, and GHS. The Plaintiffs refused to produce any evidence that any donor to 3ABN ceased giving because of the Defendants, save a letter from a single anonymous trustor who was concerned about "documentation." (Doc. 10-4 p. 4).

Yet even before the suit was filed, Plaintiffs and their counsel knew about Shelton's laundering of money through Remnant, and thus that Shelton had failed to disclose his substantial Remnant income on his July 2006 financial affidavit. (*supra* p. 3). Before the suit was filed, Plaintiffs and their counsel knew they could not prevail on any claim.

Thus, this entire case from beginning to end, along with the related cases in Michigan, Minnesota, and Illinois, consists of unreasonably and vexatiously multiplied proceedings. And this Court would not be abusing its discretion in requiring the *attorneys* in this case to personally compensate the Defendants for all their *costs*, *expenses*, and *attorneys' fees*.

C. Under the Court's Inherent Powers

In *Chambers v. NASCO, Inc.* 501 U.S. 32, 49–51 (1991), the Supreme Court:

> ... upheld the imposition of monetary sanctions against a litigant and his attorney for bad-faith litigation conduct in a diversity case. Some of the conduct was covered by a federal statute and several sanction provisions of the Federal Rules of Civil Procedure, but some was not, and the Court held that, absent a showing that Congress had intended to limit the courts, they could utilize inherent powers to sanction for the entire course of conduct, including shifting attorney fees, ordinarily against the American rule.

Constitution of the United States of America (U.S. Government Printing Office, 2004). Thus, given the circumstances of this case, it would not be an abuse of discretion to impose all costs, expenses, and fees upon the Plaintiffs.

II. PLAINTIFFS' OBJECTIONS REBUTTED

A. Expenses Reasonably and Necessarily Incurred

The costs, expenses, and fees referenced in the instant motion were reasonably and necessarily incurred. (Pickle Aff. ¶¶ 32, 37, 45, 53; Affidavit of Lynette Rhodes; Affidavit of Laird Heal (hereafter "Heal Aff.")). Attorney Heal has submitted an additional invoice for later services amounting to an additional $9,524. (Heal Aff. ¶¶ 8–9, Ex. A pp. 16–20).

B. Imposition of Costs Necessary to Avert Legal Prejudice

The Plaintiffs have made it clear that they are not done litigating against and harassing the Defendants. (*supra* pp. 6–9). Defendant Pickle also made clear that, given the enormous resources of the Plaintiffs, "intense, 18-month conflicts separated by voluntary dismissals without prejudice will exhaust his resources and prejudice his ability to defend himself, even *pro se*." (Doc. 126 p. 14; Doc. 127 ¶¶ 35–36). The imposition of costs, expenses, and fees will avert this legal prejudice.

C. Defendant Pickle's Time

The nearly 1205 hours Defendant Pickle logged in defending himself in this litigation represents a considerable loss of income, since he was thus prevented in engaging in his usual employment. (Pickle Aff. ¶ 53). That loss of income is as much an expense of this litigation as

any other, and is but peanuts considering Simpson's hourly rate of $300. (Doc. 73 ¶ 11).

D. Travel Expenses for Two Trips

The reported mileage and miscellaneous travel expenses were as much expenses of this litigation as any other. These trips resulted in securing, *inter alia*, (a) documentation from 1998 of 3ABN's virtual gift of a house to Shelton as a retirement benefit whereby Shelton profited by almost $129,000 in one week, and (b) the 1757-page record from 3ABN's property tax case in which Shelton testified under oath that he received neither housing nor retirement benefits. (Pickle Aff. ¶¶ 32–36).

E. Miscellaneous Expenses

The Plaintiffs object to the $6 shower. (Doc. 140 p. 16). Of the expenses associated with the two fact-finding trips, only one night's lodging was obtained in a motel. Ordinarily, the cost of a shower is included in the price of a room. However, if in the interests of economy other arrangements are made for repose, one might have to instead obtain a shower as a trucker does, by purchasing one at a truck stop. Doing so makes that cost no less a travel expense than the accommodations attorneys that charge $300 an hour may be more accustomed to.

But the bulk of this category of expense is not the $6 shower. It is the $3,535 cost ($3,682.50 – $147.91) of obtaining MidCountry's records, records that the Defendants have yet to see. (Doc. 132 Table 2). If any party files a future suit over similar claims, this expense would have to be paid yet again for such purposes as, *inter alia*, locating the $10,000 check said to have been sent to Tommy Shelton, tracking all transfers of funds between 3ABN and Shelton, and verifying Shelton's claims on his July 2006 financial affidavit. This $3,535 expense is a concrete example of duplicative discovery costs.

The record will now contain explanations for the various other expenses of this category. (Pickle Aff. ¶¶ 38–44)

F. Copy Costs

With this reply memorandum, we provide a further breakdown and explanation of the copy expenses. (Pickle Aff. ¶¶ 45–52, Table 1). These copies of filings were necessitated by the obstruction of discovery by the Plaintiffs and their allies. (Pickle Aff. ¶¶ 45–52).

CONCLUSION

The Court may impose some or all of the costs, expenses, and fees incurred by the Defendants in the instant case utilizing Fed. R. Civ. P. 41(a)(2), 28 U.S.C. § 1927, or the Court's inherent powers. Doing so will help avert the legal prejudice the Defendants find themselves in by preventing their resources from becoming exhausted, for the Plaintiffs have by no means decided to drop all legal proceedings against the Defendants. At present, future litigation will require duplication of discovery, and greater expense to compensate for the spoliation of evidence and loss of witnesses. The Court should grant this modest relief to the Defendants.

Respectfully submitted,

Dated: December 8, 2008

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavits and exhibits, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: December 8, 2008

/s/ Bob Pickle
Bob Pickle