UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc.,
an Illinois non-profit corporation, and
Danny Lee Shelton, individually,

Case No. 07-40098-FDS

Plaintiffs,

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR LEAVE TO FILE UNDER SEAL

Plaintiffs Three Angels Broadcasting Network, Inc. ("3ABN") and Danny Lee Shelton submit this memorandum in opposition to the motion of Defendants Gailon Arthur Joy and Robert Pickle to file certain exhibits to an affidavit, and an explanatory affidavit, under seal. (Doc. 173).

Defendants assert that Exhibits Q-R, X-Y and BB of the Affidavit of Robert Pickle (Doc. 171), as well as an affidavit that "succinctly draws attention to the facts or admissions in the above," need to be filed "because they have a bearing on Defendants' motions for reconsideration and motion to amend findings." (Doc. 173, p. 1). What that "bearing" may be is not explained, presumably being reserved for the reply memorandum, as is the pattern with these Defendants. (*See, e.g.,* Defendants' Memo in Support of Motion for Costs (Doc. # 131)(seeking costs and fees because of claimed prejudice consisting only of concern for spoliation of evidence and faded witness

memories) and Defendants' Reply Memo in Support of Motion for Costs (Doc. # 149)(adding additional grounds for motion for costs and fees including alleged litigation misconduct).

The exhibits are said to be relevant to the motion for reconsideration of this Court's order denying Defendants an award of fees and costs (Doc. # 169). The motion for reconsideration hinges on whether new evidence has been found, not reasonably available to Defendants at the time of the original briefing, that shows litigation misconduct by Plaintiffs such as would warrant an award of costs and fees pursuant to Fed. R. Civ. P. 41(a)(2) (which allows the court to condition voluntary dismissal on terms necessary to mitigate legal prejudice). *In re Williams*, 188 B.R. 721, 725 (D. R.I. 1995); *see also* 12 Moore's Federal Practice 3d, § 59.30[6] (Matthew Bender 3d ed.) ("A Rule 59(e) motion to alter or amend a judgment may not be used to relitigate the same matters already determined by the court."); *Williams v. Poulos*, 11 F.3d 271, 289 (1st Cir. 1993); *FDIC v. World Univ. Inc.,* 978 F.2d 10, 16 (1st Cir. 1992) (a motion to amend may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment); *see also* 12 Moore's Federal Practice 3d, § 59.30[6].

Thus, to be relevant, these exhibits would have to be (1) something newly discovered; (2) that Defendants couldn't reasonably have submitted when they briefed the original motion in November of 2008; (3) that shows litigation misconduct. As the proponents of the evidence, Defendants have the burden of proving these things. *FDIC v. World Univ. Inc.,* 978 F.2d at 16 (moving party in a motion to amend must clearly

establish a manifest error of law or present newly discovered evidence). The exhibits flunk all three tests.

Although the motion is not clear on this point, and Plaintiffs have not been made aware of exactly what documents Defendants seek to file, the Pickle affidavit (Doc. 171 ¶¶ 18, 25) identifies the exhibits as materials that were produced by the Plaintiffs during discovery in this case, which were stamped as "Confidential" under the Protective Order issued by Magistrate Judge Hillman on April 17, 2007. (See Doc. 60). For the following reasons, the motion should be denied.

1. Defendants Were Ordered to Return These Documents.

At the threshold, Defendants are not even supposed to have these documents anymore. This Court expressly ordered that Defendants return all discovery materials stamped as confidential. At the status conference on October 30, 2008, which by consent of the parties was converted into a hearing on the Plaintiffs' motion for voluntary dismissal, this Court stated:

> I will order that the materials produced in discovery that were designated as confidential under the confidentiality and protective order issued in this case on April 17th will be returned, as set forth in that order.

(Doc. 141, p. 12). The electronic clerk's notes echoed this order: "Court orders all confidential documents returned." Defendants never sought a stay of this order. The Court's order was consistent with the Protective Order itself, which had provided that material produced under it "Shall be used for no other purpose than this litigation." (Doc.

60, pp. 1-2). The matter had been briefed and argued by both sides and the Court issued its order from the bench.

But now, more than six months after the Court's order, the Defendants have *not* returned any of the confidential documents and instead seek leave to file them in connection with yet another abusive and pointless motion. While resisting the temptation to publish the documents themselves, Defendants describe the confidential documents in pleadings available to the public, for example referring to perfectly proper royalty payments to Shelton from Remnant Publications for the sale of books he authored as "kickbacks and/or royalties." (See Doc. # 158 at pp. 2-3 – Plaintiffs Memo in Opposition to Defendants Motion to File Under Seal and record citations therein). This is somewhat akin to describing a banking transaction as "a robbery and/or withdrawal."

Plaintiffs are continuing to incur litigation costs directly related to Defendants' failure to return these documents, as ordered by this Court. Enough is enough. The Court should order Defendants to show cause why they should not be held in contempt for flouting its order to return the confidential documents, and for describing them publicly.

2. The Exhibits Are Irrelevant to the Motion For Reconsideration.

The motion should be denied because the proferred exhibits do not contain admissible evidence. Evidence is admissible if and only if it is relevant. Fed. R. Evid. 402. Evidence is relevant if it tends to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. Fed. R. Evid. 401. As argued with citation to authorities

in Plaintiffs' Memorandum in Opposition to Defendants Motions to Reconsider and to Amend Findings (filed and served herewith), the substantive legal issue now is whether new evidence that was not available to Defendants has come to light that would justify the "extraordinary remedy" of a motion to reconsider. These documents fall far short of that standard.

Exhibits Q-R are described in the Pickle affidavit as purchase orders that will help establish when the supposedly missing issues of *3ABN World* "came back from the printer." Defendants do not explain why this matters, or why they could not have presented this information and argument to the Court last November when they briefed the motion for costs and fees. Exhibits Q-R would not be considered if they were filed, so the motion for leave to file them should be denied.

Exhibits X-Y suffer from the same problem. The Pickle affidavit says they "speak to the question of whether Plaintiffs believed the allegations against Leonard Westphal to be true." (Doc. 171 ¶ 25). Why that would be relevant to any remaining issue in the case is not explained. Whatever these documents are, Defendants had them when they originally briefed the motion. If they are relevant, Defendants should have brought them to the Court's attention in November, and not for the first time on motion for reconsideration. They are manifestly not relevant to the underlying issue of litigation misconduct, and leave to file them should be denied.

Exhibit BB is said to be a "CD or DVD containing documents produced by Plaintiffs which Plaintiffs designated confidential." (Pickle Affidavit, Doc. 171 ¶ 31). Why this Court needs those materials to decide the motion to reconsider is not explained

in the moving papers. Why Defendants wish to file them under seal, however, is becoming apparent. Defendants have been ordered (by this Court) to return all documents labeled confidential. They have expressed concern that they will be unable to retrieve these documents again in the future for use in some unspecified litigation that they hope to commence. If the documents are made part of the district court record, Defendants must think they will be preserved for whatever litigation Defendants have in store for the Plaintiffs. In short, Defendants want to file these documents in this litigation because of an unspecified lawsuit to come.

In any case, the motion to file Exhibit BB should be denied because it contains only information that was available to Defendants when they filed their initial brief in November. If Exhibit BB is relevant, Defendants could and should have brought it to the Court's attention the first go around.

Finally, Defendants wish to file an affidavit that "succinctly draws attention to the facts or admissions in the" exhibits to be filed under seal. That is what briefs are for. Allowance of such an affidavit is not authorized by any rule, and would amount to an extra brief not permitted by the rules, to which no reply would be authorized. The motion to file an explanatory affidavit should be denied.

CONCLUSION

Plaintiffs ask that the Court deny Defendants motion to file exhibits and an affidavit under seal. However, if the Court is inclined to grant the motion, then Plaintiffs agree that the exhibits and affidavit should be filed under seal.

Respectfully Submitted:

Dated: May 11, 2009

SIEGEL, BRILL, GREUPNER,
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Certificate of Service

I, M. Gregory Simpson, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on May 11, 2009.

Dated: May 11, 2009

/s/ M. Gregory Simpson
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