

incorporate their replies to Plaintiffs' responses to Defendants' statement of the case, facts, and arguments. (Affidavit of Robert Pickle "Pickle Aff." ¶ 2, Ex. A pp. 2–31, Ex. B).

REBUTTAL OF PLAINTIFFS' RESPONSE TO DEFENDANTS' FACTS

1. Defendants' Reply to Plaintiffs' Opposition to Defendants' Motion for Costs

Defendants' reply argued that costs, expenses, and fees may be awarded in this case under 28 U.S.C. § 1927 and the Court's inherent powers, in direct rebuttal to Plaintiffs' assertion that the only authority for awarding such costs is Rule 41(a)(2). (Doc. 140 p. 10; Doc. 149 pp. 15–18). A reply brief can't effectively rebut if it must merely rehash an opening brief's material.

Defendants' opening brief was relatively benign. (Doc. 131). Plaintiffs responded with an attack containing factual contentions that are without evidentiary support, which in effect served as a reply to Defendants' opposition to Plaintiffs' motion to dismiss.¹ (Doc. 140 pp. 2–7; Doc. 126 pp. 6–11). In direct rebuttal to Plaintiffs' opposition, Defendants' reply brief outlined yet again glaring evidence of Plaintiffs' abuse of process and malicious prosecution. (Doc. 149).

If Defendants' reply brief thus constituted procedural error, such error was harmless. Defendants "welcome[d] additional briefing and/or oral argument to adequately address the Plaintiffs' concerns." (Doc. 161 p. 20). Plaintiffs' substantial rights would only have been affected if the Court had denied Plaintiffs' request to that end, a request Plaintiffs never made.

Further, since the April 13 order concerned whether anything in the record "suggest[ed]" abuse of process and malicious prosecution, Defendants' facts and arguments in their memoranda and replies for both motions must be considered due to their relevance to that question.

Lastly, Plaintiffs' own citations defeat them. In *In re Boston Regional Medical Center, Inc.*, the court found that the party raising new issues in a *supplemental memorandum* should have raised those issues in a *reply memorandum*. 328 F.Supp.2d 130, 142–143 (D. Mass. 2004).

¹ Plaintiffs tried to incorporate this response into their brief in the appeal case. (Pickle Aff. Ex. C pp. 3–4).

Regarding Plaintiffs' citation of the appellate case *Rivera-Muriente*, it should be noted that in the First Circuit, "[a] reply brief may be rejected ... if it contains matter repetitive of the main brief." 1st Cir. Loc. R. 31(a)(1). And a reply to a response to a motion in the Court of Appeals "must not present matters that do not relate to the response." Fed. R. App. P. 27(a)(4). By these appellate standards, Defendants' reply brief was therefore fine.

2. "Discovery Conduct"

Plaintiffs characterize Defendants' concerns as "their usual litany of complaints about Plaintiffs' discovery conduct" (Doc. 175 p. 5), thus admitting that Defendants' concerns appear throughout the record. Thus, the record does "suggest" that Plaintiffs obstructed discovery and increased Defendants' costs, and the finding of the April 13, 2009, must therefore be in error.

Plaintiffs fallaciously declare:

These claims have been raised and rejected any number of times before by every judge to consider them, including this Court, Magistrate Judge Hillman, and several out-of-district judges who heard motions to quash the third party subpoenas served by the Defendants.

(*Id.*). Yet Plaintiffs give no citations for such unanimous rejections. To the contrary:²

- On March 4, 2008, Magistrate Judge Boylan agreed that Danny Lee Shelton ("Shelton") lacked standing to object to Defendants' acquiring documents from MidCountry Bank ("MidCountry") pertaining to DLS Publishing, Inc. ("DLS").³ (Doc. 155 ¶ 3; Doc. 154 p. 2).
- On March 10, Magistrate Judge Hillman granted in part Defendants' motion to compel Plaintiffs to produce their Rule 26(a)(1) materials, and warned against abusively designating documents as confidential. (Elec. orders).
- On March 28, Magistrate Judge Boylan denied Plaintiffs' motion to quash, and

² The orders of April 13 and 15 should not have set aside the findings of the proceedings listed below unless they were clearly erroneous. Fed. R. Civ. P. 52(a)(6).

³ To disregard Defendants' argument on this point would ignore more than 200 years of federal jurisprudence. *Rowland v. California Men's Colony*, 506 U.S. 194, 201-02 (1993).

- ensured that the future confidentiality order did not preclude the information those documents contain by having them be produced under seal. (Doc. 63-36; Doc. 60).
- On May 7, this Court's advice to Plaintiffs harmonized with Rule 34(b)(2)(C), after Plaintiffs' failure to obey that rule was apparent. (Doc. 77 p. 13).
 - Plaintiffs' untimely motion to quash prompted Judge Gilbert to issue stern orders unfavorable toward Defendants on June 18 and 30. (Doc. 76-3 pp. 50-51; Pickle Aff. Ex. D). That tone dramatically changed on July 8 after Defendants' lengthy filings were received. (Pickle Aff. Ex. E).
 - On October 22, Magistrate Judge Frazier had "no doubt that [Defendants] are entitled to a large amount" of information. He agreed that some of Plaintiffs' allegations were "pretty broad," and Plaintiffs' counsel agreed too. (Doc. 152-6 pp. 22, 9-10). He refused to quash the subpoena, but was misled into thinking that the issue of scope of discovery was not yet resolved. (Doc. 125 p. 2; Doc. 152-6 p. 36).
 - On September 11, 2008, Magistrate Judge Hillman reprimanded Plaintiffs for "taking much too narrow a view as to whether documents ... in their possession may be relevant," and for failing to index the documents they produced. (Doc. 107 pp. 3-4).
 - Also on September 11, Magistrate Judge Hillman refused to limit the scope of discovery, and refused to order an *in camera* review of the MidCountry and Remnant documents. (Doc. 107 p. 5; Doc. 74 ¶ 7; Doc. 75 pp. 16-17).
 - Additionally, on June 20, 2008, Magistrate Judge Carmody agreed that documents from Remnant Publications, Inc. ("Remnant") were relevant, and compelled their production. (Doc. 127-38). That order survived appeal. (Doc. 127-39; Doc. 127-40).

Not that Defendants won everything. On May 7, when Defendants asked about obtaining the MidCountry documents, this Court directed Defendants to the Minnesota court. (Doc. 77 p.

17). However, Magistrate Judge Boylan denied the subsequent motion because his previous order had directed Defendants to obtain such relief from the Massachusetts court.⁴ (Doc. 92 p. 31).

Defendant Pickle's second motion to compel might have prevailed if he had provided "a request by request breakdown of why information is sought and the argument for its production," as Local Rule 37.1(b) requires. (Doc. 107 p. 3). But at the time, Defendant Pickle didn't know how to do that given the "overly general nature" of Plaintiffs' responses. (Doc. 61 p. 2).⁵

3. "The 'Sweeping Admission' in Appellate Brief"

Defendants filed merits-related evidence to justify Defendants' discovery requests and defeat Plaintiffs' obstruction of discovery. Plaintiffs camouflaged their inability to similarly file merits-related evidence in rebuttal by instead filing case-related, attorney correspondence, and by refiled exhibits that were already in the record. (Doc. 171-3 pp. 56–57 n.18).

The uninformed and inexperienced might conclude that Plaintiffs simply chose the losing legal strategy of withholding evidence from the Court. But the real problem is that no such evidence ever existed, despite the voluminous initial disclosures Defendants gave Plaintiffs way, way back in 2007. (Doc. 89 p. 40; Doc. 103 p. 1). Plaintiffs' suit was therefore baseless.

Despite Plaintiffs' repeated, fallacious assertions, the statements of Plaintiffs and their agents, representatives, and co-conspirators which Defendants filed are not hearsay. (Doc. 175 p. 6; Pickle Aff. Ex. A pp. 20–21). Fed. R. Evid. 801(d)(2).

4. "The Dryden Recording"

Plaintiffs asserted in May 2007 that Defendants in particular drastically affected donation levels in December 2006. (Doc. 10-5 ¶ 7). Only one thing could possibly substantiate this claim: Defendants' late 2006 exposé of Shelton's 2003 cover up of the child molestation allegations

⁴ Defendant Pickle regrets not more clearly elucidating the situation in the May 7, 2008, status conference. It should also be noted that the loss of these documents at the courthouse until about December 16, 2008 (Doc. 160) is why Defendants did not pursue the matter further.

⁵ Unaware of the scheduling order's allowance for reply briefs, Defendant Pickle mistakenly requested leave to file a reply brief due to Plaintiffs never having been specific enough in their objections. (*Id.*).

against Tommy Shelton. (Doc. 63-15). Therefore, this recording must be material.

This newly discovered evidence for the very first time indisputably proves that Shelton as well as Three Angels Broadcasting Network, Inc. (“3ABN”) Board chairman Walter Thompson (“Thompson”) had the “action items” which revealed that there were recent allegations against Tommy Shelton in Virginia. (Pickle Aff. ¶ 5; Doc. 170 pp. 5–6). Since Defendants’ late 2006 exposé of the 3ABN Board’s failure to protect 3ABN from liability was therefore correct, Shelton’s launch of this retaliatory suit was therefore baseless. (Doc. 170 pp. 18–19).

Plaintiffs’ counsel falsely claims that Defendants acquired this recording prior to the lawsuit, when it was not in Defendants’ initial disclosures, and when Defendants produced it to the same counselor on June 19, 2008, soon after it was received. (Pickle Aff ¶ 6, Ex. F–G).

Determining when evidence is discovered doesn’t necessarily depend on when a party obtains the documents. For example, evidence was considered timely when it was contained in yet untranslated emails. *Perez v. Volvo Car Corp.*, 247 F.3d 303, 318-19 (1st Cir. 2001). In this instance, Defendants had no idea that what Shelton called a letter was in actuality the action items. (Pickle Aff. ¶¶ 5, 7).

Earlier recognition of Shelton’s mischaracterization of the action items was hindered by (a) receiving the recordings about the beginning of Plaintiffs and Remnants’ lengthy blitzkrieg or battles in four states,⁶ (b) Defendants’ preparation in August and September of motions seeking leave to serve four subpoenas, (c) the arrival of the Remnant documents and subsequent preparations for filing counterclaims, (d) the hastily drafted opposition to Plaintiffs’ motion to dismiss, and (e) preparations for Defendants’ appeal involving re-reading the entire record.

5. “3ABN World Articles.”

Plaintiffs fallaciously contend regarding the missing *3ABN World* issues:

⁶ Plaintiffs’ blitzkrieg necessitated a motion to extend the time for a filing. (Doc. 85).

The “conspiracy to hide” arises from the fact that these issues of the magazine were apparently inadvertently omitted from the document production in the case, a matter which would have been rectified had it been brought to the attention of counsel.

(Doc. 175 p. 8). Defendants brought this very matter to the same counselor’s attention in letters on June 18 and 25, 2008. (Pickle Aff. Ex. H; Doc. 81-11 p. 40).⁷

The matter is graver still. Not only did Plaintiffs conspire to destroy evidence by removing these issues from their web site, but, after Defendants obtained these issues in January 2009, Plaintiffs spoiled the evidence of their spoliation by *recreating* the missing 2004 and 2005 issues, using software that did not exist until 2008. (Pickle Aff. ¶¶ 9–17, Tables 1–3, Ex. J–N).

Plaintiffs contend that “a simple request to 3ABN for back issues of their magazine” would have sufficed. Have they forgotten the request to produce dated November 29, 2007? (Doc. 63-20 p. 10). Only requests through counsel are allowed by this Court. (Doc. 144 p. 19).

The issues in question are not available from a variety of public sources. Defendant Pickle could not locate a single public library in the entire state of Minnesota that carried *3ABN World*. (Pickle Aff. ¶ 18). In January 2009, Defendants purchased photocopies from the Center for Adventist Research in the James White Library at Andrews University in Berrien Springs, Michigan, which is 780 to 880 miles away from each Defendant. (Pickle Aff. ¶¶ 19–20, Ex. O).

6. “Fraud and Misrepresentation.”

Plaintiffs fraudulently assert that “... every one of [the disputed statements by Plaintiffs or their counsel] is demonstrably accurate.” (Doc. 175 p. 9). Yet Plaintiffs fail to demonstrate the accuracy of any of their disputed statements, much less all of them. The citations in Defendants’ opening brief prove the impossibility of ever proving all of them true. (Doc. 170 pp. 7–10).

Ronnie Shelton claimed on June 26 and 27, 2008, that both Plaintiffs had been vindicated by the IRS, according to Plaintiffs’ attorneys. (Doc. 96-4; Doc. 96-5). Thompson testified

⁷ The same counselor admitted on June 20, 2008, that none of the 2004 issues were available from 3ABN’s website. (Doc. 81-2 p. 118).

without any documentary support that unnamed attorneys had asserted such vindication in July, not in June. (Doc. 123 ¶ 5). However, the IRS informed a whistleblower on May 6, 2009, that her “claim is still open” regarding her possible reward for the “3ABN Tax Investigation.” (Pickle Aff. Ex. P). If the IRS investigation really ended in June or July 2008 with Plaintiffs’ total vindication, despite documentable violations of the Internal Revenue Code (Doc. 170 p. 9), the whistleblower’s claim should not still be open 10 months later!

REBUTTAL OF PLAINTIFFS’ ARGUMENTS

For the convenience of the Court, the arguments appearing in Doc. 170 are listed in Table 1 below using the numbering found in that document.

TABLE 1: Arguments Listed by Number Used in Docket Entry # 170

Num.	Argument Summary
II(A)	No legal authority cited for imposing 28 U.S.C § 1920 on Rule 41(a)(2).
II(B)	Reliance upon <i>Blackburn</i> was in error.
II(C)	Rule 41(a)(2) not the only authority for awarding costs and fees.
II(D)	Court did not adequately address “potential legal prejudice.”
II(E)	Motion to file under seal should have been ruled on first.
II(F)	Remnant documents are relevant; Court’s orders inconsistent.
II(G)	Record does more than “suggest” abuse of process and malicious prosecution.
II(H)	Order of April 13 mischaracterizes Defendants’ experts.
II(I)	Order of April 13 mischaracterizes Defendants’ expenses.
III	Orders of April 13 and 15 subject Defendants to manifest injustice.
IV	Plaintiffs’ fraud, misrepresentation, or misconduct.
V	Mistake, inadvertence, surprise, excusable neglect.
VI	Newly discovered evidence.

Arguably, the consideration of the above arguments, with the exception perhaps of II(H), would result in a different outcome. Even II(I) is significant since it demonstrates that Defendants’ costs of acquiring copies of documents was much higher than found.

I. PLAINTIFFS FAIL TO RESPOND TO NUMEROUS ARGUMENTS

In Doc. 175, Plaintiffs made no objections against Defendants' arguments listed as II(A)–(B), II(E)–II(F), II(H–I), III, and V in Table 1.

II. “... REHASH[ING] THE SAME MATTERS ALREADY DETERMINED BY THE COURT ...” (Doc. 175 p. 9).

To the extent that Defendants' arguments and evidence have not previously been both considered and rejected by this Court or the courts of the related cases, Defendants are not rehashing matters “already determined” by the courts. This is particularly true when Defendants' arguments are based on findings of fact in the record.

Defendants detect nothing in the orders of April 13 and 15 that indicates that anything by Defendants other than their opening brief was read and considered prior to the order of April 13. Thus, Defendants maintain that arguments II(C) and IV were not previously considered.

Motions under Rules 52(b) and 59(e) give the court an opportunity to correct its own errors of fact or law before appeal. The Court's finding of April 13, 2009, that there is nothing in the record that even suggests that Plaintiffs engaged in abuse of process and malicious prosecution is clear error. To prove such a finding wrong, one must of necessity cite the record. Yet if Defendants are prohibited from citing the multiplicity of un rebutted facts, testimony, and evidence in the record simply because they are already in the record, then it would be impossible for Defendants to request the Court to correct this clear error of fact before appeal.

III. “... ARGUMENTS, OR ... EVIDENCE, THAT COULD REASONABLY HAVE BEEN RAISED OR PRESENTED” “IN THEIR ORIGINAL MOTION PAPERS”

Defendants' arguments II(A)–(B), (D)–(I), and III concern the legal authority relied on or the wording used in the orders of April 13 and 15, the order in which those orders were issued, or the practical results of those orders. Arguably, these arguments could not have been raised before April 13.⁸ Also, the specific use made of *Blackburn* in the April 13 order was not suggested in

⁸ Part of Defendants' argument in II(A)–(B) is implied at pages 15–16 of Doc. 149.

Plaintiffs' brief (Doc. 140), and thus could not have been addressed earlier.

Defendants outlined under argument V how Plaintiffs hindered the earlier submission of the Remnant documents and the two documents relevant to the EEOC investigation, and how mistake, inadvertence, surprise, or excusable neglect contributed to their not being previously submitted. Yet, Defendants did alert the Court to the implications of these documents, and requested an evidentiary hearing. (Doc. 126 pp. 4–5, 13–15, 20; Doc. 149 pp. 3–4).

Regarding argument VI, Defendants have already demonstrated why the newly discovered evidence was not available heretofore, and, given Defendants' history in this case, Defendants could hardly be charged with negligence or with withholding evidence.

IV. JUSTIFICATION FOR “EXTRAORDINARY REMEDY”

Defendants already provided justification under the arguments II(D) and III.

Plaintiffs face no legal barrier to refile suit, and have reason to refile given the continued existence of Save-3ABN.com and its siblings. Requiring Plaintiffs to refile in this Court protects Defendants from having to obtain favorable rulings again, but does nothing to prevent considerable duplicative discovery expense. If Defendants file their claims in state court due to a lack of diversity jurisdiction, Plaintiffs would conceivably file their claims in state court anyway, and the result would be the duplication of even more effort and expense.

A noted treatise observes: “Legal prejudice is shown when actual legal rights are threatened or when monetary or other burdens appear to be extreme or unreasonable.” 8 *Moore's Federal Practice* § 41.40[6] (3d ed. 2003). As a clear example, it is an unreasonable monetary burden to deprive Defendants of the MidCountry records without compensation given that the confidentiality order did not order such, Magistrate Judge Hillman refused Plaintiffs' request to conduct an *in camera* review of those records, they contain no checks or deposit slips which could reveal health care information, and neither Plaintiff had standing to object to Defendants

receiving MidCountry records pertaining to DLS.

But there is more. Arguably, the factor of fraud, misrepresentation, or misconduct of Rule 60(b)(3) may be considered under the manifest injustice factor of Rule 59(e). The First Circuit takes “an expansive view of ‘misconduct’ ” in which misconduct includes “[f]ailure to disclose or produce materials requested in discovery.” *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923 (1st Cir. 1988). The omission might be “accidental,” it matters not whether the purpose was “evil, innocent or careless,” and “nefarious intent or purpose” is not “a prerequisite to redress.” *Id.*

Regarding Defendants’ claims of fraud, the standard is that of “colorable claim,” not “smoking gun,” allowing the Court to permit preliminary discovery and evidentiary proceedings. *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 35 (1st Cir. 1999). The moving party need not show that the result would be different without fraud. *Anderson*, 862 F.2d at 924 n.10.

Plaintiffs opposed the Remnant documents being submitted to the Court by misrepresenting their contents. (Doc. 158 p. 2). Plaintiffs continue to make such misrepresentations. (Doc. 174 p. 4). Plaintiffs’ misrepresentations are intentional since Plaintiffs have these documents and know what they contain. (Pickle Aff. Ex. Q). Therefore, in the First Circuit, *it must be presumed* that this misconduct substantially interfered with Defendants’ ability to fairly litigate their motion for costs, and that thus relief is justified. *Anderson*, 862 F.2d at 924–926. Plaintiffs failed to rebut this presumption as required. *Anderson*, 862 F.2d at 925.

Plaintiffs’ intentional failure to produce issues of *3ABN World* as requested results in a similar rebuttable presumption. So could Shelton’s intentional failure to produce documents pertaining to his divorce or his book deals, and to produce any documents at all, documents that Shelton claimed to have, documents indisputably relevant to Plaintiffs’ complaint.

If a review of the record does not prove, even circumstantially, whether or not the misrepresentations Defendants listed in their opening brief (Doc. 170 pp. 7–10) were intentional,

then as in *Anderson*, the Court should conduct an evidentiary hearing to determine this question. 862 F.2d at 932; 12 *Moore's Federal Practice* § 60.43[4][b] (Matthew Bender 3d ed.).

If Defendants are disallowed from submitting the Remnant and EEOC documentary evidence of fraud by Plaintiffs and their counsel, then Plaintiffs' use of the confidentiality order to prevent such submission suggests extrinsic fraud.

V. ARGUMENTS IN PLAINTIFFS' OPPOSITION (DOC. 174)

To the extent Plaintiffs' arguments in their opposition to Defendants' motion to file under seal (Doc. 174) pertain to Defendants' motions to reconsider, Defendants hereby incorporate their reply in support of Defendants' motion to file under seal.

CONCLUSION

Defendants seek some or all of their costs, expenses, and fees, the filing of certain Remnant documents under seal, and corrections to the findings in the orders of April 13 and 15, 2008, as described in their motion and opening brief. (Doc. 169 pp. 1–2; Doc. 170 p. 20).

Moreover, Defendants pray the Court to not schedule a hearing on this motion until after Plaintiffs have had the required 21 days after service of Defendants' motion for sanctions to correct the misrepresentations that will be outlined in that motion.

Respectfully submitted,

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