

On April 17, 2008, Magistrate Judge Hillman issued a confidentiality order. (Doc. 60). The order itself says nothing at all about parties returning any documents. (Doc. 60 pp. 1–6).

However, non-parties (and only non-parties) must sign Exhibit A of that order so that the court may obtain personal jurisdiction over non-parties in order to enforce that order. (Doc. 60 pp. 5–6, 8). Exhibit A does require non-parties to return confidential documents:

Upon the earlier of: (i) demand of counsel of record for the party who supplied the Confidential Information to me or (ii) within 30 days after the final termination of instant litigation, including appeal, I will return all Confidential Information ... to the person or party from whom I received the Confidential Information.

(Doc. 60 p. 8).

Exhibit A thus clearly says that non-parties must return confidential documents at any time requested by the party who supplied the documents, which could theoretically be the day after the documents were given to the non-parties, and years before the litigation ended.

Additionally, Exhibit A clearly says that non-parties are to return the documents to the party that gave them the documents, not to some other third party.

Defendants argued on appeal that Plaintiffs tried to alter the confidentiality order's provisions on the sly by inducing the Court to order parties to return documents.¹ (Doc. 171-3 pp. 9, 36, 62, 64, 67). However, this Court wisely worded its order of October 30, 2008, so that any return of documents by parties was only pursuant to the confidentiality order. (Doc. 141 p. 12). This is the more obvious since the Court at that point in time was unsure what the confidentiality order actually required. (Doc. 141 pp. 14).

On appeal, Plaintiffs responded by asserting that an order requiring parties to return documents is an order “enforcing the Protective Order as written,” and denied that they had sought the alteration of the confidentiality order. (Doc. 178-4 p. 4). Defendants replied:

¹ More evidence of Plaintiffs' attempts to impose the confidentiality order's terms for non-parties upon parties is found at Doc. 161 p. 6.

- Plaintiffs failed in their appellees' brief to quote any language from the confidentiality order which requires parties to return anything, since such language isn't there.
- Plaintiffs sought the return of documents from Remnant Publications, Inc. ("Remnant") and MidCountry Bank ("MidCountry") to themselves, not to Remnant and MidCountry as Exhibit A requires. (Doc. 120 p. 1).
- Plaintiffs' assertion that the non-party return requirements of Exhibit A apply to parties is ludicrous, since Exhibit A requires non-parties to return documents *at any time*, even before litigation has ended.

(Doc. 178-2 pp. 33–35).

If Exhibit A requires parties to return documents, then mere requests to that effect from opposing counsel the day after production could grind discovery to an absolute halt in an ongoing case.

Additionally, Plaintiffs admitted that the orders of this Court were insufficient to require the return of even the MidCountry documents, for on November 11, 2008, Plaintiffs threatened to obtain a court order compelling Defendants to "consent" to the return of the MidCountry documents, documents not even in Defendants' possession. (Doc. 162-6).

Pertaining to the Remnant Documents

Remnant lost its appeal on September 8, 2008. (Doc. 127-40). Remnant then produced the subpoenaed documents to Defendants on September 22. (Doc. 155-2).

Prior to that date, on August 20, 2008, in Defendants' opposition to Remnant's appeal, Defendants argued that Danny Lee Shelton ("Shelton") received kickbacks on sales by Remnant to Three Angels Broadcasting Network, Inc. ("3ABN") of his booklets published by Pacific Press Publishing Association ("PPPA"). (Doc. 96-9 p. 3).

Prior to 2005, 3ABN bought these booklets from Shelton for 25¢ apiece, sometimes

100,000 at a time, giving Shelton a profit of roughly 30%. (Doc. 96-11 p. 5; Doc. 93 Ex. O (Ex. EE–GG) at Sched. C (line 5 ÷ line 3)). Beginning about 2005, 3ABN started purchasing these booklets from Remnant instead of Shelton for the same 25¢. (Doc. 96-11 pp. 18–22).

If there was no kickback scheme going on, 3ABN would have bought these PPPA booklets directly from PPPA at a minimum of 10% less, for 3ABN purchased books from PPPA as well. (Doc. 96-9 p. 3; Doc. 96-10 ¶ 11; Doc. 96-11 p. 4). The fact that 3ABN paid a higher price by instead buying them from Remnant, even when Remnant did not have stock to fill the order (Doc. 96-11 pp. 18–22), is proof that there was a kickback scheme. On August 20, 2008, Defendants argued that these kickbacks amounted to as much as 32% per order. (Doc. 96-9 p. 3; Doc. 96-10 ¶¶ 11–12).

PPPA by contract was the payer of royalties to Shelton for his PPPA booklets. (Doc. 96-11 pp. 1–3 at ¶ 9). Therefore, payments by Remnant to Shelton for sales of these same booklets are kickbacks, not royalties. Thus, the Remnant documents, produced after Defendants made all these arguments, must contain evidence of kickbacks.

To repeat: Since Remnant wasn't the publisher, payments by Remnant to Shelton for sales of his PPPA booklets to 3ABN cannot be royalties. They must be kickbacks.

Given Shelton's documentable greed, and given that Remnant must have paid Shelton between about \$749,706 and \$808,614 from 2005 to 2007 (Doc. 154 p. 3), it should not surprise the Court if the Remnant documents reveal other transactions of a similar nature. But, due to the confidentiality order, Defendants are prohibited from saying more. Yet due process concerns dictate that Defendants be given an appropriate opportunity to detail the evidence within the Remnant documents because that evidence is *prima facie* evidence of abuse of process and malicious prosecution. (Doc. 126 pp. 4–5; Doc. 149 p. 3; Doc. 161 p. 2).

PLAINTIFFS' ARGUMENTS REFUTED

A. “What that ‘bearing’ [of the exhibits to the motion] may be is not explained ...”

False. To the contrary, Defendants fully explained what bearing the exhibits to be filed under seal have upon Defendants’ motions:

- **Exhibits Q–R** establish when a *3ABN World* issue might have gone to press and come back from the printers. This is relevant to a proper understanding of the implications of the newly found evidence in certain *3ABN World* issues, since it clarifies when the articles may have been written. (Doc. 170 p. 7).
- **Exhibits X–Y** establish whether or not 3ABN administration believed the allegations against Leonard Westphal to be true. Thus these exhibits conclusively demonstrate whether Plaintiffs always knew that ¶ 48(b) of their complaint was baseless, and whether claims of vindication by the EEOC are fraudulent due to Plaintiffs’ failure to produce these documents to the EEOC during its investigation. (Doc. 170 p. 9).
- **Exhibit BB** demonstrates the truthfulness of Defendants’ unrebutted assertions regarding the vexatious nature of Plaintiffs’ discovery. (Doc. 170 p. 14).

B. “... Plaintiffs have not been made aware of exactly what documents Defendants seek to file”

False. On April 20, 2009, Defendants gave Plaintiffs’ counsel a list of documents Defendants were considering filing in connection with Defendants’ motions to reconsider. (Affidavit of Robert Pickle (“Pickle Aff.”) ¶¶ 1–4, Ex. A at p. 4). In that list were the documents designated TABN000677, TABN000680, TABN002431, and TABN002620. (Pickle Aff. Ex. A at p. 4). Anyone who has read Defendants’ filings in connection with the instant motions can tell from a mere glance at these four documents that TABN000677 and TABN000680 are Exhibits Q–R, and that TABN002431, and TABN002620 are Exhibits X–Y. (Pickle Aff. ¶ 4).

C. “... litigation misconduct by Plaintiffs such as would warrant

an award of costs and fees pursuant to Fed. R. Civ. P. 41(a)(2) ...”

Defendants consider this argument to be frivolous, since under Fed. R. Civ. P. 41(a)(2) both costs and attorney fees may be awarded absent any showing of litigation misconduct. Good faith is simply irrelevant to an award of costs and fees. *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 (D.C. Cir. 1981). Since voluntary dismissals without prejudice are “typically” conditioned upon payment of defendant’s expenses, “which usually includes reasonable attorneys’ fees,” litigation misconduct cannot be a required factor. *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir.1994).

But such a factor is relevant to an award of costs and fees under 28 U.S.C. § 1927 or the court’s inherent powers.

It should be noted that *Blackburn v. City of Columbus, Ohio* cited *Smoot v. Fox* as authority for using the American Rule to restrict Rule 41(a)(2). 60 F.R.D. 197, 198 (S.D. Ohio 1973). Yet *Smoot* concerned a Rule 41(a)(2) dismissal *with* prejudice, not without prejudice, and thus *Blackburn*’s reliance upon *Smoot* was in error. 353 F.2d 830 (6th Cir. 1965).

**D. “The exhibits flunk all three tests.”
“The Exhibits Are Irrelevant to the Motion For Reconsideration.”**

Plaintiffs’ three tests, referred to below as (a) (must be newly discovered), (b) (can’t have been reasonably submitted in November 2008), and (c) (must show litigation misconduct), are clearly too restrictive. Specifically, litigation misconduct is not the only factor that may be considered under Rules 52(b), 59(e), or 60(b).

1. Exhibits Q–R:

(a) Since Exhibits Q–R are necessary for a proper understanding of the implications of newly discovered evidence in certain *3ABN World* issues, Exhibits Q–R themselves don’t have to be newly discovered. If a proper understanding of newly discovered evidence by the Court is prevented by not allowing Exhibits Q–R to be filed, Defendants’

substantial rights may be affected.

(b) Plaintiffs' refusal to produce the *3ABN World* issues in question prevented Defendants from having need to submit Exhibits Q–R heretofore. Fed. R. Civ. P. 5(d)(1) prohibits the filing of these documents until they are “used in the proceeding,” and there was no need to use Exhibits Q–R before the *3ABN World* issues were obtained.

(c) The newly discovered evidence in the *3ABN World* issues proves that *Antichrist Agenda: Ten Commandments Twice Removed, Ten Commandments Twice Removed*, and part of the rights to *Mending Broken People* were Shelton's premarital assets. (Doc. 170 pp. 6–7). The evidence thus proves that Shelton committed perjury when he failed to disclose these books, and royalties attributable to these books, in his divorce-related proceedings, and that thus ¶¶ 46(h) and 50(i) of Plaintiffs' complaint were knowingly baseless. (Doc. 170 pp. 19–20; Doc. 1). Thus, this evidence demonstrates that Plaintiffs filed a frivolous suit to harass Defendants, and intentionally refused to produce the missing issues in order to hide that fact. It also demonstrates that Plaintiffs spoiled evidence by destroying the original PDF files of the missing issues, and spoiled evidence of spoliation of evidence by recently recreating the missing issues and posting them on 3ABN.org. (Doc. 178 ¶¶ 10–17, Tables 1–3; Doc. 178-10 to 178-14).

2. Exhibits X–Y:

(b) Defendants brought these documents to the Court's attention in October in their opposition to Plaintiffs' motion to dismiss. (Doc. 126 pp. 2–3, 15, 17, 20). Specifically, Defendants requested an evidentiary hearing to determine whether Plaintiffs had failed to produce these documents to the EEOC, and that thus Plaintiffs' claims of vindication were based on fraud. (Doc. 126 p. 20). The Court failed to consider Defendants' request for an evidentiary hearing. Defendants raised the issue again in connection with their motion for costs, suggesting that Plaintiffs had withheld “evidence of 3ABN's administrative conspiracy to terminate the Trust

Services Department whistleblowers.” (Doc. 149 p. 4; Doc. 152 ¶¶ 4–6). Plaintiffs have made no attempt whatsoever to demonstrate that the documents in question were produced to the EEOC.

Defendants wanted to be more explicit last October or November regarding the contents of these documents, wanted to file them heretofore, and want to be more explicit now, but Plaintiffs’ confidentiality designation² coupled with Local Rule 7.2(e) prevent such. Defendants’ due process rights are therefore in jeopardy.

(c) The references to these documents in the record (Doc. 126 pp. 2–3, 15, 17, 20; Doc. 149 p. 4; Doc. 152 ¶¶ 4–6) (along with a host of other references) suggest that Plaintiffs filed a frivolous suit, thus contradicting the finding of the Court to the contrary. The Court should review these documents to determine whether these particular suggestions in the record are in fact true, as well as whether Plaintiffs have always believed that the allegations against Leonard Westphal were true, and that thus ¶ 48(b) of their complaint was baseless.

These documents demonstrate that Plaintiffs obtained a voluntary dismissal by fraud, misrepresentation, and/or misconduct. (*supra* 7). Plaintiffs opposed Defendants’ motion for costs using the same fraudulent claims. (Doc. 140 p. 6). Defendants believe the Court’s findings and orders of April 13 and 15, 2009, were in part based on these same misrepresentations. Thus, these documents are relevant to Defendants’ motion to reconsider under Fed. R. Civ. P. 52(b), 59(e), and/or 60(b)(3).

3. Exhibit BB:

(b) Defendants’ analysis of these documents in the record stands un rebutted and unrefuted, as does Defendants’ analysis of Plaintiffs’ non-confidential Rule 26(a)(1) materials. (Doc. 81 ¶ 14, Table 4; Doc. 103 ¶¶ 2–5; Doc. 81 pp. 1–7). The Court, rather than calling into question any of Defendants’ analyses, instead incorporated part of them in a finding.

² Plaintiffs specifically stated that they would not designate employment records as confidential (Doc. 89 p. 25), but did so anyway when they produced these documents.

(Doc. 107 p. 4). In particular, the Court on September 11, 2008, found that Plaintiffs had produced volumes of documents without any indexing in violation of discovery rules, a finding that suggests that Plaintiffs tried to increase Defendants' costs, a finding that cannot be set aside unless clearly erroneous. (*Id.*). Fed. R. Civ. P. 52(a)(6). Since neither Plaintiffs nor the Court called into question Defendants' analysis, there was no reason to file these documents heretofore, given the restriction of Fed. R. Civ. P. 5(d)(1). Undoubtedly, Plaintiffs would not have taken kindly to any attempt to file them heretofore.

(c) But the Court's finding of April 13, 2009, set aside the finding of September 11, 2008, without giving any explanation as to how that finding was clearly erroneous. Before the Court set aside that finding *sua sponte*, it should first have verified that Defendants' unrebutted and unrefuted analysis of these documents is indeed in error. And, since Defendants' analysis and this Court's previous finding in the record both "suggest" that Plaintiffs tried to increase Defendants' costs, thus requiring that the finding of the order of April 13, 2009, be amended, the Court must have opportunity to review these documents in order to determine to what extent these suggestions are true.

Defendants have also explicitly stated that they seek to file these documents in order to more efficiently invoke ¶ 7 of the confidentiality order, which allows for a party to attack confidentiality designations even after the case has concluded. (Doc. 173 p. 2; Doc. 60 p. 6). This is vital in order to minimize Plaintiffs' promised, future harassment of Defendants. (Doc. 149 pp. 6–10). Many of the "confidential" documents simply don't qualify to be confidential, such as a book of which there are over 5 million copies in print. (Doc. 161 p. 8; Doc. 162-8; Doc. 68-2 p. 3; Doc. 60 ¶ 1). The ability of Defendants to invoke ¶ 7 of the confidentiality order has clear First Amendment implications, since Plaintiffs will harass Defendants over material in "confidential" documents even if Defendants obtained the

information from other sources. (Doc. 161 p. 9).

Defendants could instead simply file repeated motions to file under seal as Defendants invoke ¶ 7 for various classes of documents. But it seems to be a more efficient use of judicial resources to allow all the documents to be filed at one time on a DVD or CD, if a DVD or CD is an acceptable way for the Court to review the documents as needed.

E. “Defendants Were Ordered to Return These Documents.”

On March 23, 2009, Plaintiffs maintained on appeal that the Court’s order of October 30, 2008, does nothing but enforce the existing terms of the confidentiality order “as written,” and that they had sought no alteration of those terms in their motion to dismiss. (Doc. 178-4 pp. 2, 4). Thus Plaintiffs evaded Defendants’ contentions that the confidentiality order does not require parties to return any documents, and that Plaintiffs had tried to alter that order’s provisions on the sly. (Doc. 171-3 pp. 9, 36, 62, 64, 67). Defendants made similar contentions in this Court on December 29, 2008. (Doc. 161 pp. 5–6).

Defendants also argued on appeal that since Plaintiffs had not appealed the confidentiality order within 30 days after entry of the order of dismissal, they could not alter the confidentiality order’s terms by way of Defendants’ appeal. (Doc. 171-3 p. 65).

Plaintiffs appear to be retrying their previous strategy, of inducing the Court by stealth to alter the terms of the confidentiality order. But given Plaintiffs’ denial of so doing on appeal, their attempts should be disregarded. If Plaintiffs must alter the terms of the confidentiality order in order to deprive Defendants of their discovery efforts in order to insulate themselves from liability, they should clearly and explicitly move this Court to that end. They have thus far failed to do so.

F. “Defendants never sought a stay of this order.”

Since the confidentiality order does not call for parties to return any documents, and since

the order of October 30, 2008, called for whatever return of documents that the confidentiality order required, no such stay was necessary.

G. “ ... referring to perfectly proper royalty payments to Shelton from Remnant Publications for the sale of books he authored as ‘kickbacks and/or royalties.’ ”

In light of the facts outlined at *supra* 3–4 which were all briefed long ago, and in light of the fact that Plaintiffs’ counsel has a copy of the Remnant documents in his possession (Doc. 178-17), this is a glaring, intentional, and indisputable misrepresentation.

Plaintiffs’ counsel’s statements in the status conference of October 30, 2008,³ suggest the improper purpose of attempting to shield himself and his colleagues from liability for malicious prosecution and abuse of process resulting from the information that the Remnant documents contain. (Doc. 141 pp. 8–11; Doc. 126 pp. 4–5).

The glaring misrepresentation above means that the Remnant documents are not only relevant to Defendants’ motion for costs, but also are now relevant to Defendants’ motion for sanctions to be served shortly upon Plaintiffs.

H. An Affidavit or Brief Filed Under Seal

Plaintiffs object to Defendants filing an affidavit that draws attention to facts within the documents in question, stating that that is what briefs are for. And yet Mollie Steenson’s affidavit of May 9, 2007, did that very sort of thing. (Doc. 10-3).

Something must be filed with these documents in order to direct the Court’s attention to specific words, phrases, and sentences. Otherwise, the Court may not see the significance of the statements in the documents in question.

Plaintiffs object to filing anything with these documents, whether it be an affidavit or a brief. However, regarding Exhibit Y, Plaintiffs previously told Defendants that an affidavit or

³ The counselor spoke of Defendants’ intent to “sue us,” and expressed doubt that Defendants would be able to obtain “diversity jurisdiction.” (*Id.*). Diversity jurisdiction would only be an issue if Defendants targeted the counselor himself, since the current case has complete diversity.

brief that “sa[id] something about the document” had to be filed under seal. (Doc. 127-5). Now Plaintiffs object on procedural grounds to even filing a sealed brief or affidavit, thus leaving Defendants without remedy or due process. Plaintiffs’ change of position and use of the confidentiality order in this manner, preventing Defendants from being able to fairly litigate, suggests extrinsic fraud.

Notably, Plaintiffs did not ask to be able to file a rebuttal to the suggested extra document, a possibility Defendants would not oppose. Instead, Plaintiffs opposed the filing of such a document at all, suggesting that concealment, not equity and due process, is their goal.

CONCLUSION

Simply put, Defendants ought to have their day in court by the Court having the opportunity to review Exhibits Q–R, X–Y, and BB. Each of these exhibits is relevant to the issues at bar in Defendants’ motions to reconsider and to amend findings.

Respectfully submitted,

Dated: May 20, 2009

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I, Bob Pickle, hereby certify that this document, with accompanying affidavit 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: May 20, 2009

/s/ Bob Pickle
Bob Pickle