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**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.

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**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO**  
**DEFENDANTS' MOTION FOR SANCTIONS**

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**INTRODUCTION**

Plaintiffs Three Angels Broadcasting, Inc. ("3ABN") and Danny Lee Shelton ("Shelton") submit this memorandum in opposition to *pro se* Defendants' Motion for Sanctions [Docket # 184]. The motion, which complains about several dozen isolated sentence fragments mined from memos submitted by Plaintiffs, is frivolous and itself violates Rule 11 because it contains numerous intentional distortions of the record and is merely supplemental argument on the underlying motions. Mindful that a party disregards *ad hominem* attacks at its peril, Plaintiffs will respond by correcting, clarifying and providing context, as necessary, to show that each contention does not support a finding of a violation of Fed. R. Civ. P. 11 or the exercise of the Court's inherent powers. The result of this exercise is an unfortunately long memo, but one which demonstrates that the motion should be denied.

**ISSUE**

The legal issue presented by this motion is whether Plaintiffs have submitted briefs that violate Fed. R. Civ. P. 11 by setting forth factual or legal contentions that lack support. Manifestly, nothing appears in Plaintiffs' briefs that is inaccurate, let alone violative of Rule 11. By contrast, Defendants' motion and supporting memorandum go well beyond the limit of tolerable litigation conduct, and it is only out of a strong desire to end this litigation that the Plaintiffs have resisted filing their own motion for sanctions against the Defendants.

### **LEGAL STANDARD**

Rule 11 provides that by presenting to the court a pleading or other writing, an attorney or unrepresented party "is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances," (1) the filing "is not being presented for any improper purpose"; (2) "the claims ..and other contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification or reversal of existing law or the establishment of new law"; (3) the allegations and other factual contentions have evidentiary support"; and (4) "the denials of factual contentions are warranted on the evidence." Fed. R. Civ. P. 11(b). The court's inherent power to sanction parties for bad faith litigation conduct should ordinarily be exercised only when Rule 11 is inadequate.

*Chambers v. NASCO, Inc.*, 501 U.S. 32, 50, 111 S. Ct. 2123, 2126, 115 L.Ed.2d 27 (1991).

### **ARGUMENT**

The factual recitation contained in Defendants' memorandum in support of their motion [ECF # 184] seems to be premised on the assumption that the Court would not check the accuracy of the Defendants' citations to the record. Nearly every factual assertion in it is irrelevant, unsupported by the record, requires the unique world view of these Defendants to be viewed as supportive of their position, or all of the above.

1. ***Response to Introduction.***

The first example of supposed wrongdoing, raised in the Introduction section of Defendants' brief, is their oft-repeated charge that a pre-suit letter authored by Gerald S. Duffy, counsel for 3ABN, improperly invoked the doctrine of "common law copyright" in order "to keep the public from discovering his attempt to silence concerns about child molestation allegations." [Doc. 184 p. 1]. The letter was a "cease and desist" letter that sought to avert litigation by notifying the Defendants that their conduct placed them at risk of being sued. [Doc. 63-18]. The letter's reference to "common law copyright" was perfectly appropriate in view of the fact that Massachusetts recognizes the doctrine, as do other states. *See Edgar H. Wood Assocs., Inc. v. Skene*, 347 Mass. 351, 354, 197 N.E.2d 886, 889 (1964) ("Common law copyright exists in this Commonwealth."); *HNH Int'l, Ltd. V. Pryor Cashman Sherman & Flynn LLP*, \_\_\_ N.Y.S.2d \_\_\_, 2009 WL 1687489 (N.Y.A.D. 1 Dept.) (June 18, 2009) (noting that plaintiffs in legal malpractice action had been sued and found liable for common law copyright infringement). In any case, the letter was an out-of-court communication to which the requirements of Fed. R. Civ. P. 11 do not apply.

The second factual contention offered to show a pattern of unethical conduct by Plaintiffs and their counsel is even less compelling. Defendants say that another of Plaintiffs' counsel, Jerrie M. Hayes, "denied in open court that a criminal investigation was going on even though her own proposed protective order referred to an investigation by the Department of Justice." [Doc. 184 at p. 1]. The cited portion of the transcript of the hearing, which was before Magistrate Judge Hillman on March 7, 2008, shows Hayes arguing in support of Plaintiffs' motion for a protective order. Specifically, she was addressing the appropriate scope of

discovery as to Defendants' allegation that the Plaintiffs had improperly reported a particular real estate transaction on tax returns. (Doc. 89 at pp. 32-33). Hayes states:

There is absolutely no reason to believe that *this transaction* was incorrect or improperly reported to the IRS. There's been no finding by the IRS. There's been no criminal investigation, no complaint. There's been absolutely no finding by any determinative body from the Illinois Attorney General to the Department of Revenue that any of these documents contain any errors of fact whatsoever.

[Doc. 89 at p. 33 (emphasis added)]. In other words, Hayes' statement was in reference to a single real estate transaction at issue in the case.

Defendants, however, use this passage to support their contention that Hayes "denied in open court that a criminal investigation was going on." [Doc. 184 at p. 1]. They imply that Hayes stated that there was no investigation by the IRS of any kind, when the record actually has her saying that there was no criminal investigation of a *specific* real estate transaction. The transcript reveals that the Court was informed that there was a government tax review of 3ABN at the time. [Doc. 89 at p. 38]. The IRS investigation ultimately concluded with the IRS notifying Plaintiffs that the investigation had ended with no findings of wrongdoing, or even a request to refile tax returns. [Affidavit of Walt Thompson, Doc. 123 at ¶¶ 4-5]. This is another example of how these Defendants use the absence of contextual information to convey a false impression. "Context matters." *Cf. Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S. Ct. 2325 (2003). Defendants understand this all too well, and use the absence of context to make the mundane appear sinister.

The third factual contention in Defendants' Introduction is a personal attack on the undersigned attorney for the Plaintiffs, and states that despite his "alleged high ratings for ethics," he "has continued this pattern of questionable conduct." [Doc. 184, pp. 1-2]. No citation to the record is supplied, thankfully, but none is needed. The undersigned has indeed

continued the pattern set by his co-counsel of accurately marshaling the facts and law to the best of his ability in his presentations to this Court. To be characterized as ethically questionable by these Defendants is a sad but inevitable result of coming into contact with them.

**2. *Allegedly Erroneous Statements in Plaintiffs' Memos.***

Defendants next set forth a shotgun blast of what they call sanctionable statements in Plaintiffs' legal memos. Each will be answered as briefly as possible.

**A. *"Perfectly proper" royalty payments.***

The first supposedly erroneous statement in Plaintiffs' brief is one opposing Defendants' motion for leave to file some irrelevant exhibits under seal (which motion remains pending), in which Plaintiffs advised the Court that despite its order that the Defendants return confidential documents, the Defendants had not done so. Ignoring the point of that sentence, i.e., that Defendants are currently ignoring this Court's order to return all confidential documents, defendants zero in on two words in the sentence which characterize the royalty payments to Shelton from Remnant Publications as "perfectly proper." [Doc. 174 at p. 4]. Defendants contend those two words merit sanctions. [Doc. 184 at p. 2].

Their "evidence," however, is not evidence as much as a web of guesswork and speculation that begins and ends with the assumption that the payments were kickbacks. The reason they must be kickbacks, say the Defendants, is that the booklets for which royalties were paid were at one time published by a different publisher at a lower cost. Defendants say "the only logical reason for such an arrangement is that it was a kickback scheme." In other words, Defendants' logic goes, moving to a higher cost publisher is proof of a kickback scheme because they can't think of any other reason for it. Of course, speculation is not evidence. There are any number of legitimate business reasons to switch to a different publisher. Since the factual record

has long since been closed without this issue being raised or litigated, no further information is available on this point.

Without belaboring the issue, the “perfectly proper” statement was in reference to the fact that the Plaintiffs’ financial activities were reviewed by outside experts including accountants and, for the maximum audit period allowed by law, the IRS. Nothing was found to be out of place. The payments can be fairly characterized as proper.

**B. “A matter which would have been rectified had it been brought to the attention of counsel.”**

Defendants next find fault with a statement in Plaintiffs’ brief opposing Defendants’ motion for reconsideration of the Court’s order denying litigation costs, i.e., that the matter of issues of *3ABN World* that were missing from Plaintiff’s document production would have been rectified had it been brought to the attention of counsel. It is useful to recall the context in which this statement was made, despite Defendants’ preference that sentence fragments they disagree with be reviewed in a vacuum. Defendants moved for an award of their litigation costs; this Court denied the motion. Defendants have now moved for reconsideration of that order, on the theory that “newly discovered” evidence of litigation misconduct by Plaintiffs would induce this Court to reconsider. One of these “new facts” was that in June of 2008, Plaintiffs had failed to produce three issues of 3ABN’s monthly magazine, *3ABN World*, which Defendants had sought along with Plaintiffs’ other publications. Plaintiffs’ brief opposing the motion for reconsideration responded to this argument, in part, by stating that the matter of the missing magazines “would have been rectified had it been brought to the attention of counsel.” [Doc. 175 at p. 8]. Defendants, demonstrating their unique facility with language, say that “Simpson thus denies that he was ever contacted about the missing” magazines. [Doc. 184 at p. 3]. This supposed misrepresentation is said to be the basis for an award of Rule 11 sanctions.

Defendants have again used selective citations to the record, leaps of logic and creative omission of context to give a false impression. The story of the discovery skirmishes in this case, which involved numerous issues in addition to the three missing magazines, has been told before and is partly set forth in the Affidavit of Kristin Kingsbury [Doc. 92]. Before Plaintiffs' document production was even complete, Defendants began peppering Plaintiffs with letters pointing out supposed deficiencies in the document production. [See Doc. 92, Exhibits 2-3]. One of these, dated June 25, 2008, claimed that three issues of *3ABN World* were missing from Plaintiffs' document production. [Doc. 81-11 at p. 40]. This letter was one of four letters sent by Pickle to Plaintiffs *on that day* raising issues relating to discovery. [Doc. 92, Exhibits 23-26].

Defendants' document requests had sought "all issues of *3ABN World* (or its predecessor newsletter) and *Catch the Vision* from all years of 3ABN's existence..." (Doc. 63-20 p. 10). Current and back issues of *3ABN World* are available on 3ABN's web site at <http://www.3abn.org/magazine.cfm>. In the assessment of counsel, Defendants were asking 3ABN to produce copies of all of 3ABN's publications for no conceivable reason other than harassment. Plaintiffs told Defendants by letter dated June 20 that the magazines were available online, and that they would not be producing materials that could just as easily be obtained from a public source. [Doc. 81-2 at p. 118].

In an effort to consolidate all the discovery issues and deal with them in an orderly fashion, Plaintiffs issued Defendants a letter dated July 9, 2008, which explained the meet and confer process. [Doc. 92 at p. 12-14]. The letter began: "This letter is to respond to your numerous letters to me and Kristin Kingsbury regarding miscellaneous discovery issues and other matters." It then goes on to address the process of creating a written record of disputed discovery issues, so that they could be addressed or, as a last resort, brought before the Court.

Near the end of the letter is the following: “You have also complained about deficiencies in our production that I believe have been addressed in our pending motion to narrow the scope of permissible discovery. If you believe there are any categories of documents which have been requested but not produced, with respect to which we have not sought protection from the court, please identify those documents and I will respond.” [Doc. 92 at p. 13]. Defendant did not raise the issue of the missing magazines again. The parties eventually submitted their disputes over the range and scope of discovery to Magistrate Judge Hillman, who denied the Defendants’ motion to compel and granted in part Plaintiffs’ motion to narrow discovery. [Doc. 106].

Judge Hillman agreed that the Defendants’ discovery requests were overbroad and ordered them stricken. The request for issues of *3ABN World* was among the discovery requests stricken by Judge Hillman. The motion for voluntary dismissal was filed before responses to the revised discovery requests became due, and the case was dismissed before any further discovery disputes came before the Court. Any implication that 3ABN was under a duty to produce the missing issues of *3ABN World* is false.

The subject of the supposedly missing magazines came up again on September 8, 2008, when Defendants filed an affidavit in connection with their motion to extend discovery, which stated that Defendants had received “No issues of *3ABN World*...” [Doc. 103 at p. 7]. Defendants thus falsely implied to the Court in a sworn affidavit that they had been unable to obtain *any* issues of *3ABN World*, when in fact they got all but three issues online and at some point got the other three issues at a library.

This concrete example illustrates the linguistic acrobatics that these Defendants are capable of performing to mislead the Court, and how easy it is for Defendants to say something false and misleading – in this instance just one short paragraph – and how onerous it is for

Plaintiffs to supply the omitted context, correct the misstatements of fact and explain the circumstances fully. These Defendants are absolutely reckless with their submissions to this Court. Plaintiffs' statement that the missing magazines would have been rectified had the matter been brought to counsel's attention was accurate.

**C. "Including a simple request to 3ABN for back issues of their magazine."**

Defendants next complain about another fragment of Plaintiffs' response to their gripe about the missing issues of *3ABN World*. [Doc. 184 at p. 3]. They say that a statement that Defendants could have made a request to 3ABN for back issues of their magazine merits sanctions because the Court had directed the Defendants to stop issuing subpoenas to Plaintiffs' witnesses – one of several tactics they employed to circumvent the Court's management of case discovery -- which order could be construed as broad enough to prevent them from submitting an on-line request for missing copies of *3ABN World*. If Defendants had a concern about what they could and could not do, all they had to do was ask 3ABN's counsel or as a last resort bring the issue to the Court.

**D. "What that bearing may be is not explained."**

The next sentence fragment that the Defendants disapprove of is one from the Plaintiffs' memo opposing the motion for leave to file some exhibits under seal. [Doc. 184 at p. 4]. Plaintiffs had observed that the motion to file under seal did not explain what the exhibits would show. [Doc. 174, p. 1]. Although the truth of this remark is apparent merely by looking at Defendants' memo, *see* Doc. 173, Defendants say this comment merits sanctions because they explained the relevance of the exhibits in a different filing, Doc. 170, although review of that memo leaves the reader even more perplexed as to what the relevance of the exhibits might be. The broader point, which Defendants willfully ignore, is that these documents are no longer

relevant to any issue in the case because the case has been voluntarily dismissed without ever reaching the merits. The proffered exhibits relate to the merits of the litigation, not to the issue for which they were offered – reconsideration of a motion for an award of litigation expenses under Fed. R. Civ. P. 41(a)(2).

The challenged statement is literally true because Defendants did not explain in their motion for leave to file under seal why the exhibits were relevant, nor did they incorporate by reference whatever explanation may be found in Doc. 170. Whether the Defendants explained the relevance of the exhibits in Doc. 170 is debatable, but that is a matter for argument.

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

Defendants next lament that Plaintiffs said they were not informed of precisely which documents were at issue in the motion to file exhibits under seal. [Doc. 184 at p. 4]. They are again counting on the Court not checking the facts. Their citation to the record is an email they sent to the undersigned on April 20, 2009, which lists some 87 documents which the email states “we may seek to file...in connection with our motion to reconsider.” [Doc. 180-2, p. 4]. There is nothing indicating that these *are* the documents the Defendants moved to file under seal labeled Exhibits Q-R, X-Y and BB. Plaintiffs said they had not been made aware of exactly what documents were encompassed by the labels Exhibits Q-R, X-Y and BB because such was the case.

**F. Citation to *Boston Regional Medical Center* case.**

Defendants next contend that Plaintiffs improperly cited a case. [Doc. 184, p. 5]. Plaintiffs’ brief cited *Boston Regional Med. Center v. Ricks*, 328 F.Supp.2d 130, 143 (D. Mass. 2004), as one of two First Circuit authorities for the proposition that new arguments raised in a reply brief should not be considered. Defendants say that the facts of the *Boston Regional*

*Medical Center* involved arguments raised for the first time in a *supplemental brief*. They apparently don't dispute that the other case cited for the proposition, *Rivera-Muriente v. Agosto-Alicia*, 959 F.2d 349, 354 (1<sup>st</sup> Cir. 1992), involved a reply brief. The *Boston Regional Medical Center* case quoted the *Rivera-Muriente* case for the proposition that "It is well settled in this court...that a legal argument made for the first time in an appellant's reply brief comes too late and need not be addressed." In other words, both cases support the proposition for which they were cited.

**G. "This Court's order indicates that it considered the argument raised by the Defendants in their reply brief."**

Proving that nobody is above their suspicions, Defendants claim that this Court did not read their briefs. More specifically, they say that Plaintiffs should be sanctioned under Rule 11 for suggesting that the Court *did* read Defendants' reply brief. [Doc. 184, p. 5]. One doubts that this particular argument has previously been advanced in the annals of Anglo-American jurisprudence, at least not before the very judge who is accused of not reading the brief. In any case, Plaintiffs did not presume to say that the Court *read* Defendants' reply brief, since their writings are painful to slog through and anyone would be excused for giving them a miss. Rather, Plaintiffs confined their remark to the objectively verifiable fact that the Court had *considered* the arguments raised in the reply brief, and cited to the parts of the Court's order [Doc. 166 at pp. 3-4] that proved it. The Defendants have also argued to the First Circuit Court of Appeals that this Court erred by dismissing the case without reading Defendants' opposition brief, despite the fact that the Court stated on the record that it had reviewed it and, more importantly, demonstrated during oral argument that it understood the parties' positions.

**H. "These claims have been raised and rejected...by every judge to consider them."**

Defendants next take issue with Plaintiffs' statement in Doc. 175 at p. 5 that the litany of complaints about the discovery conduct by the Plaintiffs have been rejected by every judge to consider them. Here, Defendants confuse the normal disagreements regarding appropriate scope of permissible discovery that inevitably arise in litigation with sanctionable discovery misconduct. It is a matter of record that there are no findings of discovery misconduct by the Plaintiffs. Defendants vigorously denounced every effort of the Plaintiffs to restrict their access to the Plaintiffs' records. At the same time, Defendants had acknowledged to themselves that they were using the lawsuit to gain access to records that went beyond the merits. [*E.g.*, Doc. 76-5 at p. 33 (email from G. Joy to R. Pickle dated January 20, 2008, including the following: "Unfortunately, because of the very narrow charges pressed by 3ABN and Danny Lee Shelton, we must substantially expand the case to bring in the most damaging and certain to sway the jury details. I have deliberately dragged my feet hoping the IRS would move a bit quicker and finish their investigation before we would have to become extremely aggressive." )].

True to their word, Defendants caused satellite litigation in Minnesota, Illinois and Michigan and served other subpoenas elsewhere that never made it into court because they got the documents they wanted without a challenge. The courts in Michigan and Minnesota ordered discovery disclosures subject to the protective order issued in this case. The Illinois court simply referred the matter to the Magistrate Judge Hillman for resolution, to the same effect. There was nothing improper or even unusual about the disagreement between the parties as to the appropriate extent of discovery, despite the frequent bombastic claims of the Defendants that they amounted to a "fraud on the court." The scope of permissible discovery was never judicially resolved because the case was dismissed before the issue was ripe. The point remains

that each of the courts that heard the grouings of these Defendants about supposed bad faith misconduct by their opponents found no merit in them.

**I. Defendants' appellate briefs string together hearsay from unsourced emails.**

Defendants next disapprove of a sentence fragment in the memorandum opposing reconsideration in which Plaintiffs observed that Defendants' appellate briefs were being used to try the merits of the underlying action, in the guise of an appeal. [Doc. 184, pp. 6, 17].

Defendants apparently do not understand that they cannot simply submit to the court emails and other exhibits that they obtained from various sources and claim that they are what they purport on their face to be, and that the authors are as indicated in the emails. A review of their appellate brief fact section [Doc. 171-3, pages 10-22] shows the Defendants spinning their theory of the case using emails and other exhibits about which no witness has testified, as if there had been a trial on the merits. There has not been a trial on the merits, nor were there even any depositions. These Defendants are not competent to testify to the "facts" contained in their appellate briefs.

**J. "The merits had never been at issue before...."**

Defendants next object that in explaining why the record was ill-equipped to debate the merits of the case, since the only issues presented to the Court were procedural ones, Plaintiffs stated that "the merits had never been at issue before." Defendants assert that they twice "invited Plaintiffs to submit such evidence," and wax poetic about "What golden opportunities wasted!" [Doc. 184, p. 7].

They miss the point. The pretrial motions before the Court involved the *character* of the claims and defenses, because that determines the scope of relevant discovery, but the motions never involved the *truth* of the claims and defenses. Truth is what the trial is for, and the case never got that far because the Plaintiffs got all the relief they could hope for without a trial.

Defendants never appreciated that point, and blithely took their best shots at the Plaintiffs in every filing and motion in the case, submitting generally unopposed affidavits to the general effect that the Plaintiffs and their counsel are scoundrels. Plaintiffs took care not to burden the Court with irrelevant information by responding to these premature and irrelevant ramblings of *pro se* parties. However, when Defendants used their appellate briefs to try the merits of the case to the First Circuit Court of Appeals, Plaintiffs felt it necessary to explain why they would not be responding by citation to the record to the savage but baseless attacks contained in the Defendants' brief. This is why the Plaintiffs said that the merits had not been at issue before.

**K. "Tape recording...not material to the case."**

Defendants next seek sanctions because Plaintiffs stated in Doc. 175 that a tape recording containing an allegedly false statement by Shelton was "about something that is not material to the case." [Doc. 184, p. 7]. Defendants claim the recording is material because their "exposé" in late 2006 of the Dryden phone call is the "only ... thing [that] could possibly substantiate" Plaintiffs' claim of a donation level drop in December of 2006. But as usual, they completely miss the point that "even if the tape recording was evidence of dishonesty...it doesn't show litigation misconduct." [Doc. 175, p. 8]. The point of the whole exercise, which Defendants never seem to get around to discussing, was to show litigation misconduct that might justify an award of litigation expenses. An out-of-court statement made years ago can't perform that function, and in that sense is not material.

**L. Defendants had the tape since before the lawsuit started.**

Defendants next gripe about a fragment of a sentence suggesting that Defendants did not really acquire the Dryden tape recording as "new evidence," which they had asserted in order to justify their failure to bring it to the Court's attention in the initial motion. [Doc. 184, p. 7].

Although their moving papers did not indicate when they received the Dryden tape, a fact which is material to a motion to reconsider, they use their Rule 11 motion to clarify that they got the tape “after June 2, 2008.” [*Id.*]. From the previous paragraph, in which they boast of exposing a cover up of the child molestation allegations, it appears they already knew the contents of the recording and implied that they had it in late 2006. The Pickle affidavit, Doc. 171 at ¶ 10, says that “Dryden gave me recordings of two messages left by Danny Shelton on the Ezra Church of God’s answering machine on May 23, 2003....” Pickle admits that he realized as early as January or February of 2009 the supposed significance of the recording. [Doc. 171 ¶13]. Yet he claims this recording was “newly discovered” evidence that justifies reconsideration of the order denying litigation expenses. Clearly it is not, nor is it violative of Rule 11 to state otherwise.

**M. “Every one of which is said to demonstrate fraud, but every one of which is demonstrably accurate.”**

Defendants next dispute a succinct paragraph in Plaintiffs brief opposing the motion for reconsideration, in which Plaintiffs characterized a portion of Defendants’ brief [Doc. 170, pp. 7-10] as a “more or less random series of nitpicky complaints about statements made by Plaintiffs or their counsel, in briefs or argument, every one of which is said to demonstrate fraud, but every one of which is demonstrably accurate.” [Doc. 175, p. 9]. That sentence captured the gist fairly well, but Defendants characterize it as sanctionable so a bit more will be required.

**1. The Complaint identified 24 specific defamatory statements.**

Defendants complain that the brief characterizes the 24 allegations of defamation as “specific,” when they are actually “broad.” [Doc. 184, p. 8]. Defendants themselves acknowledged that the scope of the complaint was narrow as they devised their plan to use the discovery process to gain access to irrelevant information. [Doc. 76-21]. “Specific” and “broad” are not antonyms like “specific” and “general.” A thing can be both at the same time.

**2. “They were given access to thousands of pages of records in discovery....”**

Although initially promising to confine their motion to the two most recent briefs of the Plaintiffs, Defendants expand their grievances to include statements made in motions that were heard and decided long ago. They protest that in a memo opposing Defendants’ motion to impose costs submitted *last November*, Doc. 140, Plaintiffs wrote that Defendants had been given access to thousands of pages of financial records of 3ABN. [Doc. 184, p. 8]. Defendants replied to Doc. 140 by suggesting that some of the requested tax documents had not been produced, but it is just their conjecture that many of the records they say were absent from the production actually exist. [Doc. 149 at p. 12]. Further, since the document requests were stricken by Judge Hillman, there was never a finding that any of the requested documents were not produced. Undoubtedly discovery was not complete, but the case ended before the disputes reached resolution. Plaintiffs were within their rights to describe their document production as voluminous and comprehensive, since that is objectively verifiable fact.

**3. “Finding little help...”**

Defendants next take issue with a sentence in the November 26, 2008 filing [Doc. 140] in which Plaintiffs wrote that Defendants adopted a strategy of seeking oppressively large amounts of irrelevant documents. Plaintiffs cited an email between the Defendants that proves the point. [Doc. 76-21]. Nothing more need be said.

**4. “In other words, Plaintiffs’ efforts to narrow the scope of discovery were justified.”**

Defendants next protest a statement by Plaintiffs that the ruling by Judge Hillman striking Defendants’ discovery as overly broad demonstrated that the efforts to narrow discovery was justified. [Doc. 184, p. 9]. Defendants quote a passage in which Judge Hillman observed that

Plaintiffs were taking an overly narrow view of the appropriate scope of discovery. However, Judge Hillman did not identify any specific respect in which Plaintiffs were being too restrictive. His ruling was to grant Plaintiffs' motion for a protective order, to scrap Defendants' discovery requests, and to order that new ones be served that were more carefully limited to the issues in the case. Thus, Plaintiffs' position was substantively justified.

**5. “Defendants sought to circumvent any limitations...”**

Defendants next disagree with a statement to the effect that their third party subpoenas constituted an “end run” around the Massachusetts district court. This rather self-evident observation derives from the fact that the subpoenas were served seeking the very information for which protective orders were pending and/or contemplated in the Massachusetts court. It is not remotely sanctionable.

**6. “The goals of the lawsuit had been met...”**

Defendants next argue that Plaintiffs' statement that the goals of the lawsuit have been resolved by other means merits Rule 11 sanctions. [Doc. 184, p. 10]. They say that 16 other internet domain names are using the logo 3ABN to defame the Plaintiffs. What they do *not* mention is that this lawsuit could not do anything about websites that the Defendants in this lawsuit do not own. The primary objectives of *this* lawsuit were achieved by other means.

**7. “And by obtaining favorable rulings...”**

Defendants next dispute a statement in the November 2008 filing in which Plaintiffs wrote that they had received favorable rulings from the governmental agencies that had been investigating them. [Doc. 184, p. 10]. This non-controversial statement derives from the facts set forth in the Thompson Affidavit, including that the IRS terminated their investigation, and the state and federal civil rights agencies found no reasonable cause to believe that discrimination

had occurred. [Doc. 184, p. 10]. Defendants' contrary opinion does not mean that Plaintiffs' view of the facts violates Rule 11.

**8. "...the bankruptcy judge closed down the web site..."**

Defendants next take issue with a statement *in an email* by 3ABN officer Walt Thompson to an unnamed correspondent in which Thompson (or somebody writing in his name, since no foundation is provided) appears to state that the bankruptcy judge closed down the infringing web site. It would have been more accurate to say that the bankruptcy judge approved the trustee's sale of the infringing web sites to 3ABN, which then shut them down, but for a layperson describing the event to another layperson, the gist of the communication was true. In any event, out-of-court statements don't implicate Rule 11.

**9. "When it became apparent..."**

Defendants argue that the November 2008 brief is sanctionable because they disagree with the statement in it that donations levels were restored. As usual, the evidence is their idle speculation. Plaintiffs submitted direct evidence in the form of the Walt Thompson affidavit, Doc. 123, regarding the fact that the Defendants had ceased to have a significant impact on the Plaintiffs' fundraising activities, despite their gadfly activities. Defendants cannot rebut the evidence in the record with mere conjecture.

**10. "...documents that had no relevance..."**

Defendants next complain about a sentence in Doc. 158 (filing date 12/22/2008) in which Plaintiffs opposed a motion to file the Remnant Publications documents under seal because they were irrelevant. [Doc. 184, p. 11]. That was, and remains, the Plaintiffs' position. It is not an issue of fact, however, and is not appropriately raised as a basis for sanctions.

**N. "Defendants told anybody who would listen...."**

Defendants complain about a sentence in which Plaintiffs said the courts did not agree that Plaintiffs' discovery positions were not well-founded. [Doc. 175, p. 10]. Defendants again fail to recognize the distinction between a well-founded argument and one that the Court accepts and adopts. It is a matter of record that not one court found Plaintiffs' position to lack a legal or factual basis, even if the Plaintiffs did not win every argument. None of the examples listed by Defendants show otherwise.

**O. "To the contrary, Plaintiffs prevailed every time..."**

Defendants quibble with Plaintiffs' contention that they prevailed in each of the out-of-district subpoena skirmishes because they succeeded in getting the documents to be subject to the protective order issued in this case. The basis for the quibble is not clear, but the record is. The statement is accurate.

**P. "They also offer a tape recording..."**

Defendants next argue that Plaintiffs wrote a sentence which indicated they misunderstood the thrust of Defendants' argument about the Dryden tape recording. [Doc. 184, p. 15]. Plaintiffs confess to being perplexed by much of Defendants' written work, but it is hard to see how that would violate Rule 11. Defendants are clearly using their Rule 11 memo to clarify their arguments in pending motions, rather than to identify sanctionable conduct.

**CONCLUSION**

Defendants' "Argument" section is a rehash of the misunderstandings and distortions that infect the "Fact" section of the brief, but with a more scolding tone directed at the undersigned counsel for Plaintiffs. This brief has demonstrated that each assertion of sanctionable conduct was nothing of the sort. To paraphrase the Defendants, "the number of glaring, factual

misrepresentations contained in [Defendants' brief] that are devoid of evidentiary support is truly astounding." [Doc. 184, p. 18]. Defendants' motion for sanctions should be denied.

Respectfully Submitted:

Dated: July 8, 2009

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