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-RWZ

DEFENDANTS' REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO FILE UNDER SEAL

On February 26, 2010, Defendants filed a motion to file under seal certain documents already filed with the court of appeals, and which the court of appeals has already declared to be part of the record on appeal. (Doc. 236; Doc. 234-6; Doc. 212-2). Defendants seek to file these documents in order to rebut three specific misrepresentations Plaintiffs made in Plaintiffs' response to Defendants' objections to the magistrate judge's orders. (Doc. 237 pp. 1–2).

On March 11, 2010, Plaintiffs opposed Defendants' motion to file under seal on the procedural grounds that Rule 72(a) does not explicitly permit a reply to a response to objections. (Doc. 238 p. 8). Plaintiffs' logic requires this Court to strike Plaintiffs' response to Defendants' objections since Rule 72(a) did not explicitly permit Plaintiffs to file that response.

Plaintiffs also contend that this Court should not consider arguments and evidence not first considered by the magistrate judge. (Doc. 238 p. 8). Yet the three specific misrepresentations Defendants now seek to rebut were arguments Plaintiffs did not first raise before the magistrate

judge in their oppositions to Defendants' motions. (Doc. 207; Doc. 216).

Plaintiffs' other arguments similarly fail to advance Plaintiffs' ultimate objectives.

REPLY TO PLAINTIFFS' FACTS

A. ***"Pickle and Joy controlled no other web sites ...."*** (Doc. 238 p. 3)

On July 17, 2009, Defendants stated, "Plaintiffs never engaged in the discovery required to prove that neither Defendant ... own[s], use[s], or manage[s] any of the 16 [other] websites" using domain names containing the word "3ABN." (Doc. 190 p. 8). That fact is still true today.

On January 20, 2008, Defendant Pickle purchased the domain names 3ABNvJoy.info and 3ABNvsJoy.info. From that date through October 30, 2008, Defendant Pickle at all times owned and controlled these domain names. (Affidavit of Robert Pickle ("Pickle Aff.") ¶ 1, Ex. A).

B. ***"... [Pickle and Joy] had an apparently inexhaustible taste for litigation ...."*** (Doc. 238 p. 3)

Plaintiffs thus characterize Defendants' *pre-dismissal* defense efforts, confirming Defendants' testimony that Plaintiffs' counsel indicated on June 5, 2008, that Defendants had Plaintiffs "outgunned." (Doc. 214 ¶ 11). Defendants *pro se* were prevailing against Plaintiffs' frivolous claims, despite eleven attorneys in four states, and Plaintiffs' immense resources.

But Plaintiffs never really wanted to stop all litigation. Not 90 minutes after the October 30, 2008, status conference ended, Plaintiffs threatened to drag Defendants' back into court. (Doc. 152-8 p. 2). As recently as January 5, 2010, Plaintiffs clearly stated their intention to prosecute Defendants over publishing material that does not qualify for protection under the confidentiality order of this case, such as material Defendants obtained from other sources. (Doc. 223 pp. 6–7; Doc. 224-11). Plaintiffs seek to transform the confidentiality order into a permanent injunction, even though Plaintiffs neither proved their case in court, nor showed cause why any specific documents should be declared confidential. As Defendants stated on January 11, 2010:

> Defendants refuse to waive their First Amendment freedoms ....

> Defendants will defend these rights until Plaintiffs' threats are judicially neutralized, regardless of the time, effort, and expense required.

(Doc. 223 p. 7).

In light of Plaintiffs' counsel's threat of filing his own frivolous lawsuit against Defendant Pickle, litigation is far from over. (Pickle Aff. ¶¶ 2–4, Ex. B).

C. ***"... [Pickle and Joy] had asserted no counterclaims."*** (Doc. 238 p. 3)

Defendants were preparing counterclaims against Plaintiffs and their counsel on the basis of documents produced by Remnant Publications, Inc. ("Remnant documents") on September 22, 2008, and on the basis of statements made by 3ABN Board chairman Walter Thompson and Attorney Gerald S. Duffy. (Doc. 126 pp. 4–5, 11, 13–14; Doc. 161 pp. 16–17; Doc. 127-6 p. 1; Doc. 96-2). To avoid these counterclaims, Plaintiffs moved to dismiss, and Plaintiffs' counsel told the Court that evading these claims was his "only concern." (Doc. 141 p. 8).

D. ***"... 'to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order ..., they should have been returned to plaintiffs some time ago.'"*** (Doc. 238 p. 5)

The confidentiality order nowhere requires parties to return documents. (Doc. 60).

E. ***"The Pickle Affidavit [filed with the First Circuit] — dated November 17, 2009 — was entirely new and had never been submitted to the district court."*** (Doc. 238 p. 5)

That affidavit was filed pursuant to 1st Cir. Loc. R. 11(c)(2), which explicitly permits the filing of such affidavits. On October 7, 2008, Plaintiffs told Defendants that if they wanted to "say something about [a] document" that Plaintiffs had designated confidential, Defendants must do so in a sealed document such as the affidavit in question. (Doc. 127-5).

F. ***"The First Circuit has denied this motion."*** (Doc. 238 p. 5)

The First Circuit did deny Defendants' motion to include the Remnant documents in the record on appeal for Defendants' first appeal, but also ruled that these documents were already part of the record on appeal for Defendants' second appeal. (Doc. 234-6; Doc. 212-2).

G. ***"Pickle and Joy's current effort now marks the* fourth time *that they have attempted to add these Remnant documents to the record."*** (Doc. 238 p. 5)

If Plaintiffs refuse to settle with Defendants, there will be other times when these documents will be relevant to issues at bar, whether in this or other litigation. That is to be expected, since these documents constitute *prima facie* evidence of the abuse of process and malicious prosecution perpetrated by Plaintiffs and their counsel.

Defendants first tried to offer the Remnant documents to the Court in opposition to Plaintiffs' motion to dismiss. (Doc. 170 p. 17; Doc. 224-12 pp. 3–4; Doc. 171-24; Doc. 155-3; Doc. 162-9; Doc. 126 p. 20, 4). Then, Defendants offered these documents in support of the dismissal condition of payment of costs. (Doc. 149 p. 3; Doc. 152 ¶ 2). Defendants next argued that review of these documents would support Defendants' motions for reconsideration, and to amend findings under Rule 52(b), since the contents of these documents establish Plaintiffs' misrepresentation, misconduct, fraud, abuse of process, and malicious prosecution, and the correctness of Magistrate Judge Carmody's finding of relevance. (Doc. 170 pp. 9–10, 13–18, 20). Defendants then indicated that review of these documents would prove that Plaintiffs' counsel had made intentional, material misrepresentations.[1] (Doc. 182 p. 11; Doc. 184 p. 3).

Defendants are not to blame that Plaintiffs made their three assertions (Doc. 237 pp. 1–2), thus unwisely opening the door for Defendants to offer the Remnant documents to the Court yet again, documents indisputably relevant to those three assertions.

H. ***"... Pickle and Joy's ... motion to ... stay the pending appeals."*** (Doc. 238 p. 6).

Plaintiffs inexcusably continue advocating this misrepresentation, refuted by Defendants on February 26, 2010. (Doc. 233 p. 9). Defendants never requested this Court to stay the appeals in the court of appeals. Rather, Defendants requested this Court to stay during Defendants' pending appeals the still unexecuted order to return to MidCountry Bank ("MidCountry") the

[1]The Court found that the "disputed assertions" were "problematic." (Doc. 193 p. 3).

bank statements produced by MidCountry ("MidCountry records"). (Doc. 210 p. 2).

REPLY TO PLAINTIFFS' ARGUMENTS

I. REMNANT DOCUMENTS ALREADY PART OF RECORD ON APPEAL

On December 18, 2009, the Honorable Appellate Judge Bruce M. Selya ruled:

> As those documents were submitted to the district court after the filing of the notice of appeal, they are not properly considered as part of the record in this appeal .... We note that, in any event, appellants filed a subsequent notice of appeal from the district court's refusal to accept the proffered documents. ... [T]he documents in question are part of the record on appeal in this subsequent appeal.

(Doc. 234-6; Doc. 212-2). Time will tell if this ruling proves the death knell for Plaintiffs' chances of prevailing on appeal.

Plaintiffs therefore falsely assert that the instant motion attempts to enlarge the record on appeal. (Doc. 238 p. 9). The documents would have had to be offered prior to November 13, 2008, to be part of the record on appeal for Defendants' first appeal, and the documents already are part of the record on appeal for Defendants' second appeal.

II. RAMIFICATIONS OF WHAT AUTHORITY APPLIES

A. General Considerations

Plaintiffs assert that Defendants filed their objections pursuant to Fed.R.Civ.P. 72(a), while Defendants have been uncertain as to what authority Defendants objected pursuant to. (Doc. 238 p. 6; Doc. 231 p. 3; Doc. 229 pp. 1–2).

Plaintiffs cited *U.S. v. Flaherty* in support of their contention that Rule 72(a) applied. (Doc. 231 p. 4). That case based its reasoning for expanding the meaning of "pretrial" upon the wording of Fed. R. Crim. P. 12(b). 668 F.2d 566, 586 (1st Cir. 1981). Yet that rule as it now reads uses the headings "Motions That May Be Made Before Trial" and "Motions That Must Be Made Before Trial" when referring to pretrial motions, thus suggesting that a pretrial motion is a motion made before trial, not a motion made after judgment.

More logical would be the referral of certain post-trial matters to magistrate judges under 28 U.S.C § 636(b)(3). Yet § 636(b)(3) prescribes neither methods of objecting nor standard of review. To provide what § 636(b)(3) lacks, it seems reasonable to apply the procedures of Rule 72(a) to non-dispositive matters, and the procedures of Rule 72(b) to dispositive matters. 12 Wright & Miller, *Federal Practice and Procedure* § 3068.1, at 331 (2d 1997). Still, § 636(b)(3) provides no guidelines or rules to go by, and Rule 72 does not explicitly supply that lack.

B. Fed. R. Civ. P. 72(a): No Authority for Responses or Replies

Suppose the procedures of Rule 72(a) *must* be applied to non-dispositive matters arising post-judgment. Suppose also that the Court determines that Defendants' motions are entirely non-dispositive.[2] Plaintiffs' response to Defendants' objections would then be unauthorized under Rule 72(a), since Rule 72(a) does not authorize responses to objections.

On that basis, Defendants could have moved to strike Plaintiffs' response, despite that response's three damaging concessions: (a) that the magistrate judge understandably recused himself, (b) that the MidCountry records were filed with this Court, and (c) that the cover up by Danny Lee Shelton ("Shelton") of the child molestation allegations against Tommy Shelton "framed the original basis for the lawsuit." (Doc. 231 pp. 7, 5).

If Defendants' reply must be stricken or ignored, then Plaintiffs' response must be also, for if Rule 72(a) must be rigidly applied, one side apparently erred in filing a response, and the other side apparently erred in filing a reply. Plaintiffs filed a motion to strike Defendants' submissions on March 4, 2008, (Doc. 52) but have not done so now, leading one to suspect that Plaintiffs do not want to invite the striking of their own submission, and hope no one notices their error.

[2]Defendants' two motions sought to (a) stay the order to return the MidCountry records to MidCountry, (b) forward the MidCountry records to the First Circuit, and (c) compel Plaintiffs to return those unlawfully acquired records to the Court. (Doc. 204; Doc. 210).

C. Fed. R. Civ. P. 72(b): *De Novo* Determination Required

If Rule 72(b) applies, then Plaintiffs did not file their response to Defendants' objections without authorization, since Rule 72(b) allows responses. But Rule 72(b) also requires a *de novo* determination of Defendants' motions, something Plaintiffs oppose. (Doc. 231 p. 2).

Yet, "for questions of law, there is no practical difference between review under Rule 72(a)'s 'contrary to law' standard and review under Rule 72(b)'s *de novo* standard." *Powershare v. Syntel*, No. 09-1625 (1st Cir. Mar. 1, 2010). Since the orders in question contain no factual findings to review, and since Defendants objected on the basis that the orders were contrary to law, a *de novo* review seems inevitable, regardless.

D. 28 U.S.C. § 636, Its Legislative History, and Local Rules

While 28 U.S.C. § 636(b)(1)(C) outlines a procedure for objecting to a magistrate judge's recommendations for dispositive motions, no rules are given for objecting to orders resolving non-dispositive issues referred under § 636(b)(1)(A). The statute's legislative history shows that Congress contemplated that a review of such orders " 'would normally be obtained by motion duly served, noticed and filed.' " But Congress did not codify that motion procedure, allowing local rules to govern the process. Wright & Miller § 3069 at 348, citing S.Report No. 94-625, 94th Cong., 2d Sess. 8 (1976); H.R. Rep. No. 94-1609, 94th Cong., 2d Sess., p. 10 (1976).

Therefore, districts differ in their stated procedures for objecting to a magistrate judge's orders. Some explicitly authorize the filing of a response to objections under Rule 72(a). W.D. Mich. LCivR 72.3(a); LR, D.N.H. 72.2. Other districts, such as this one, do not. R. Mag. J., D. Mass. 2(b); LR, D.P.R. 72(c). The District of Maine and the District of Rhode Island permit replies to responses to objections under both Rule 72(a) and Rule 72(b), the former only "by prior order of the court," and the latter without restriction. LR, D.Me. 72.1; DRI LR 72(c)(3).

If Defendants' objections had been a motion, Defendants' reply would have been

authorized. (Doc. 20 p. 3).

This Court "must disregard all errors and defects that do not affect any party's substantial rights." Fed. R. Civ. P. 61. If Rule 72(a) must apply, then Plaintiffs' error in filing a response only affects Defendants' substantial rights if Defendants are prohibited from rebutting Plaintiffs' blatant mischaracterizations of the record in that response. Therefore, either Plaintiffs' response must be stricken and the instant motion denied as moot, or the instant motion must be granted.

Local Rule 7.1(b)(3) explicitly prohibits the filing of additional papers in connection with motions without leave of court, similar to how LR, D.Me. 72.1 explicitly prohibits replies to responses to objections without "prior order of the court." Since neither Rule 72(a) nor R. Mag. J., D. Mass. 2(b) explicitly prohibit filing a response to objections or a reply to such a response, it may be within the Court's discretion to allow both submissions in this instance.

III. ARGUMENTS AND EVIDENCE NOT PRESENTED TO MAGISTRATE JUDGE

Plaintiffs contend that the instant motion should be denied since arguments, case law, and evidence that could have been, but was not, presented to the magistrate judge should not now be considered. (Doc. 238 p. 8). Yet Plaintiffs ignore the fact that Plaintiffs failed to present to the magistrate judge the three assertions Defendants now seek to rebut. If Plaintiffs had not newly raised those three assertions, Defendants would not have filed the instant motion.

A. Whether the MidCountry Records Contain Anything Unflattering

Plaintiffs' response to Defendants' objections argued that Defendants' "contention that the records contain anything unflattering is pure conjecture." (Doc. 231 p. 6). Plaintiffs' oppositions to Defendants' two motions made no such argument. (Doc. 207; Doc. 216). Since the financial transactions in the Remnant documents clearly reveal what must be in the MidCountry records, Defendants sought to file these documents under seal to rebut Plaintiffs' new argument. (Doc. 237 pp. 1–2).

B. Whether Defendants' Rule 11 Motion Was Baseless

Plaintiffs' response to Defendants' objections contended that Defendants brought "a baseless motion alleging a violation of Fed.R.Civ.P. 11." (Doc. 231 p. 7). Plaintiffs' oppositions to Defendants' two motions made no such argument. (Doc. 207; Doc. 216). Since the Remnant documents unequivocally refute this argument newly raised by Plaintiffs, Defendants sought to file these documents under seal. (Doc. 237 p. 2).

C. Whether the MidCountry Records Are Relevant

Plaintiffs' response to Defendants' objections argued that "the MidCountry records were never relevant." (Doc. 231 pp. 1, 6). In contrast, Plaintiffs' oppositions to Defendants' motions seemingly abandoned that issue when both contended that "FRAP 10(e) cannot be used to put additional evidence – *relevant or not* – before the court of appeals." (Doc. 207 p. 10 & Doc. 216 p. 12, italics added). Plaintiffs even tacitly admitted that the issue of relevance was resolved by the Court's September 11, 2008, denial of Plaintiffs' motion to review the MidCountry records for relevance: "The only question surrounding these confidential documents at the time of the motion to dismiss concerned their physical disposition." (Doc. 207 p. 9 & Doc. 216 p. 12; Doc. 74 p. 3; Doc. 75 pp. 16–17; Doc. 107 p. 5). Since Plaintiffs newly injected the issue of relevance into the controversy over Defendants' two motions, Defendants sought to file under seal the Remnant documents in order to demonstrate Plaintiffs' pattern of declaring to be irrelevant documents that are indisputably relevant. (Doc. 237 p. 2).

D. When the Court May Consider New Arguments and Evidence

The above discussion regarding whether new arguments and evidence may be considered pertains particularly to the review of a magistrate judge's orders under Rule 72(a). Under Rule 72(b) the Court is not precluded from considering additional evidence. *State Farm Mutual Auto. Ins. Co. v. CPT Med. Serv., P.C.*, 375 F.Supp.2d 141, 158 (E.D.N.Y. 2005).

Plaintiffs' difficulty is that even if Rule 72(b) applies, allowing Plaintiffs to submit new arguments, Plaintiffs have never offered any evidence to support Plaintiffs' three assertions. Surely if any such evidence existed, Plaintiffs would have made it a part of the record long ago.

As Wright & Miller contends regarding a non-dispositive matter, if the assigned judge

> ... would not be powerless to reconsider his or her own prior rulings in the case, it is difficult to understand why the magistrate judge's orders should be absolutely immune to revision unless clearly erroneous on the basis of the material available to the magistrate judge. ... Indeed, when a case is shifted from one district judge to another, the second district judge can alter earlier rulings by the first due to simple disagreement ....

§ 3069 at 354. This logic, used to argue against absolutely prohibiting the consideration of new evidence under Rule 72(a), does not quite apply here, since Defendants seek to file under seal documents in rebuttal to the new arguments in Plaintiffs' response to Defendants' objections, not in support of Defendants' original motions.

IV. AUTHORITY OF LOCAL RULE 7.2(a), (e), AND LACK OF SAFEGUARDS

Ignoring the question of whether Plaintiffs' response and Defendants' reply were authorized under the rules, Local Rule 7.2(a) clearly authorizes the instant motion. In the District of Massachusetts, if material must be filed under seal, a motion seeking leave must be filed.

Similarly, 1st Cir. Loc. R. 11(c)(2) also authorizes motions to file under seal. But unlike Local Rule 7.2, 1st Cir. Loc. R. 11(c)(2) safeguards due process by allowing material to be provisionally filed under seal with the motion to file under seal. That due process safeguard protects the rights of litigants caught in the situation Defendants have found themselves in.

Probably by January 2008, before Plaintiffs produced any documents in discovery, Defendants discerned Plaintiffs' strategy of using confidentiality designations to keep Defendants from getting relevant documents into the record. (Pickle Aff. ¶ 5). Plaintiffs' opposition to the instant motion illustrates this strategy: (a) Declare problematic documents confidential. (b) Require Defendants to file a motion to file under seal. (c) Oppose Defendants' motion.

V. PLAINTIFFS' NEW ATTEMPT TO HOGTIE DEFENDANTS

Six motions to compel and/or for sanctions have been filed against Plaintiffs and their allies. (Doc. 35; Doc. 61; Doc. 81-2 pp. 121–132; Doc. 81-5 pp. 8–11; Doc. 14; Doc. 183). No such motions were ever filed against Defendants. Over the nearly three years of this case, Defendants heretofore erred once by filing a supplemental brief, not realizing that leave of court must first be sought. (Doc. 50; Doc. 54).

Now, because Defendants have filed a motion seeking leave to file under seal pursuant to Local Rule 7.2, Plaintiffs ask the Court in their response, not by motion, to sanction Defendants by requiring Defendants to obtain leave of court before filing any further motions. So must Defendants now file a motion seeking leave to file a motion seeking leave to file under seal?

What would that gain? Rule 43(c) and Local Rule 7.1(b)(1) authorize the filing of affidavits and exhibits with motions. Thus, any post-judgment motion concerning matters collateral to the judgment or an appeal enlarges the post-judgment record. Even Plaintiffs have enlarged the record with exhibits, Doc. 208-2 pp. 1–4 being but one recent example.

Plaintiffs cite *Greenier v. Pace*. Yet unlike plaintiff Greenier in D. Me. Case. No. 01-cv-00121, Defendants have never filed motions "for reasonable accomodations [*sic*.] when entering the Federal Building," "for Answer to Court Complaint," "for Hearing to require defendant's counsel to prove what he has put into the files," or "for a fair hearing in the name of Lord Jesus Christ for Truth and Justice." None of Defendants' post-judgment motions were frivolous, and Defendants respectively request a hearing before any finding to the contrary is made.

Probably Defendants *and* Plaintiffs should have sought leave before filing Doc. 233 and Doc. 231. But Fed. R. Civ. P. 83(b) prohibits the imposing of a sanction or disadvantage upon Defendants if the requirement to do so cannot be found in federal law, federal rules, or local rules, and if notice to Defendants of that requirement has not been given. In this instance, such a

requirement cannot be found in those legal sources, and no notice was given.

"[D]istrict courts have refrained from exercising any degree of control over the contents of the trial record," even when petitioned by parties, for such control is a "usurpation of power." *IBM v. Edelstein*, 526 F.2d 37, 45–46 (2nd Cir. 1975). The proposed sanction therefore appears impermissible, though it might help level the playing field between the parties. Yet Plaintiffs' confidentiality designations have already significantly hindered Defendants' litigation efforts.

CONCLUSION

If Plaintiffs' response to Defendants' objections and Defendants' reply to that response are not stricken, then the instant motion should be granted. If they are stricken, then the instant motion should be denied as moot. Defendants respectively request oral arguments before any sanction be imposed upon Defendants for their filing any post-judgment motion, including the instant motion which was filed pursuant to Local Rule 7.2(a).

Respectfully submitted,

Dated: March 16th, 2010

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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: March 16th, 2010

/s/ Bob Pickle
Bob Pickle