No.

In the Supreme Court of the United States

GAILON ARTHUR JOY; ROBERT PICKLE,

Petitioners,

v.

THREE ANGELS BROADCASTING NETWORK, INC., an Illinois Non-Profit Corporation; DANNY LEE SHELTON, individually,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRITE OF CERTIORARI

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Petitioners

QUESTIONS PRESENTED

1. A court has authority under Fed. R. Civ. P. 41(a)(2) to dismiss a case "on terms that the court considers proper." Does this require the court to focus primarily on the defendants' interests, or may the court (a) deprive non-moving parties of malicious prosecution claims without justification, (b) deny requested curative conditions without justification, (c) impose dismissal conditions upon non-moving parties, (d) grant a dismissal that prejudices non-moving parties, or (e) grant a dismissal without prejudice without applying the usual factors when requested to by non-moving parties?

2. Are the costs imposable under Fed.R.Civ.P. 41(a)(2) limited by 28 U.S.C. § 1920 or the American Rule?

3. Is *U.S. v. Miller*, 425 U.S. 435 (1976) still authoritative in civil matters regarding an account holder not having a privacy interest in bank records, and, if not, may an individual assert such a privacy interest in accounts owned by a corporation, without the corporation itself also asserting such an interest?

4. Does payment of costs confer an ownership interest in discovery materials, such that the complete transfer of those materials to an opposing party for private use without compensation, judgment, sanctions, proper notice, or basis in law and equity, constitutes a violation of the due process or takings clause of the Fifth Amendment?

5. Does personal knowledge of disputed evidentiary facts acquired during off-the-record judicial conduct proceedings require recusal under 28 U.S.C. § 455, when otherwise a majority of an appellate panel would have such knowledge?

6. Can intentional, material misstatements of fact or law fall within the boundaries of zealous advocacy?

7. Does a *sua sponte* recusal order confer merit upon a request for greater scrutiny under the abuse of discretion standard?

8. In connection with newly discovered evidence submitted on a motion to reconsider, must evidence that only clarifies that newly discovered evidence also be newly discovered?

9. May the district court eliminate material from the record on appeal?

10. Does the abuse of discretion standard of review include mistakes of law, clearly erroneous findings of fact, failures to exercise discretion, and internally inconsistent rulings, and can a failure to read an already filed brief constitute a failure to exercise discretion?

11. Is Fed. R. Civ. P. 52(b) applicable to motions to amend findings on motions?

LIST OF PARTIES

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Gailon Arthur Joy and Robert Pickle respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit in this case.

OPINIONS AND ORDERS BELOW

The orders of the court of appeals appear at App., *infra*, 1a, 7a–8a, 60a to the petition and are unpublished. The orders of the United States district courts appear at App., *infra*, 2a–6a, 9a–32a, 39a–59a to the petition and are unpublished.

JURISDICTION

The court of appeals decided petitioners' case on May 10, 2011, and denied a timely petition for panel rehearing and rehearing *en banc* on June 9, 2011. A copy of the order denying rehearing appears at App., *infra*, 60a.

This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause and Takings Clause of the Constitution provide in relevant part, "nor shall any person * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. Am. V.

Relevant portions of the following statutes and rules are reproduced at App., *infra*, 61a–65a: 28 U.S.C. § 455

(disqualification of judge); 28 U.S.C. § 1920 (taxation of costs); 28 U.S.C. § 1927 (counsel's liability for excessive costs); 28a U.S.C., Federal Rules of Civil Procedure 11, 41, and 52; First Circuit Local Rules 11.0(b) (transmission of the record) and 27.0(c) (summary disposition); District of Massachusetts Local Rules 7.1(f) (decision of motion without hearing) and 7.2 (filing impounded materials); Massachusetts Rule of Professional Conduct 1.16 (declining or terminating representation).

STATEMENT OF THE CASE

Litigation began in the District of Massachusetts on April 6, 2007, as a further attempt by deep-pocketed plaintiffs to silence the free speech and free press activities of defendants of modest means. But after defendants Joy and Pickle obtained in discovery *prima facie* evidence of abuse of process and malicious prosecution, the plaintiffs quickly moved for dismissal without prejudice on October 23, 2008, under Fed. R. Civ. P. 41(a)(2), seeking in the process to deprive petitioners of nearly all their hard-fought discovery and to preclude petitioners' claims.

At its simplest, this case tests the limits of a court's discretion under Rule 41(a)(2), and determines to what extent a dismissal under that rule may prejudice defendants.

Unique developments in the underlying case also bring under scrutiny Rule 11 sanctions, due process and property rights, recusal, and the definition of abuse of discretion.

The First Circuit summarily affirmed the lower court on the basis of 1st Cir. Loc. R. 27(c), namely, that it "clearly appear[ed] that no substantial question is

presented." App., *infra*, 1a, 64a. While the First Circuit thus held that the district court's rulings represent long-established precedent, these rulings are in stark conflict with other circuits and the U.S. Supreme Court, violate the First Circuit's own precedents, and depart from the accepted and usual course of judicial proceedings.

The issues in this case are of significant public interest: Ensuring that Rules 41(a)(2) and 11 are consistently interpreted among the circuits appeals both to those interested in tort reform and to those interested in anti-SLAPP legislation, since such consistency potentially deters abuse of the judicial process.

A. The Underlying Suit.

1. Petitioners' Dec. 2006 Reports; Save3ABN.com.

In December 2006, Joy and Pickle reported on the coverup by televangelist Danny Lee Shelton ("Shelton") of pedophilia allegations against Shelton's brother Tommy Shelton ("Tommy"), and on new pedophilia allegations against Tommy announced in Fairfax County, Virginia.

In response, Shelton orchestrated a tribute to Tommy on a broadcast by Three Angels Broadcasting Network, Inc. ("3ABN"), a lay ministry founded by Shelton and widely recognized as affiliated with petitioners' religious faith.

In consequence, petitioners purchased the domain names Save3ABN.com and Save3ABN.org on January 9 and 14, 2007, and proceeded to launch a non-commercial gripe site at Save3ABN.com in order to report on Shelton's misdeeds, and to call for reform.

Respondents' January 30, 2007, cease and desist letter asserted trademark and copyright violations, and

outlined five defamatory statements, all related to the pedophilia allegations against Tommy.

Petitioners' published response, *inter alia*, cited *Taubman Co. v. Webfeats*, 319 F.3d 770 (6th Cir. 2003); and *Bosley Medical v. Kremer*, 403 F.3d 672, 674 (9th Cir. 2005) to show that non-commercial gripe sites do not fall under the Lanham Act, even if the domain name contains no qualifier such as "sucks" or "save."

2. Respondents File Suit; Course of the Litigation.

Respondents filed suit anyway on April 6, 2007, alleging trademark infringement and dilution, intentional interference with prospective business advantage, and defamation, and invoking both subject matter and diversity jurisdiction pursuant to 28 U.S.C. §§ 1332, 1338; 15 U.S.C. § 1121. Respondents never sought a preliminary injunction under the Lanham Act, but did seek to permanently impound the entire case.

Petitioners adopted the strategy of producing everything possible in discovery, including witness lists totaling 163 potential witnesses, and of trying to prove beyond reasonable doubt the truth of the allegedly defamatory statements, whether petitioners had actually made those statements or not.

Respondents, in contrast, refused to produce their Rule 26(a)(1) materials until compelled to do so, taking the position that petitioners needed "nothing ... more to prove a defensive truth" than what they already had.[2] App., *infra*, 58a. Though ¶¶ 50(a)–(i) of respondents' complaint concerned Shelton's divorce and remarriage,

[2]This position unconstitutionally restricts journalists from reporting on anything that they can't already prove under the high standards of the Federal Rules of Evidence.

Shelton asserted that the evidence against his ex-wife, which he had long declared would be presented in court, was privileged. 3ABN produced hardly anything substantive, and Shelton never produced anything at all.

Respondents used motions to quash and for protective orders, often untimely, to impede and protract litigation in four federal districts. Respondents abusively designated as confidential publicly available documents though warned by the court not to do so (App., *infra*, 57a, 47a), and tried to have written discovery close before responding to any requests to produce.

The district court's confidentiality order issued in response to respondent's motion required litigants to "retain" but not to return discovery materials, much to respondents' disliking. App., *infra*, 49a. Exhibit A to that order contains a return provision. App., *infra*, 53a. But the order requires only non-litigants to sign that exhibit. App., *infra*, 49a–51a. Respondents had sought a broadly-worded order that could have required petitioners to surrender petitioners' own materials already produced in discovery if respondents designated them as confidential. The confidentiality order also explicitly permits challenges to confidentiality designations after the case is entirely over. App., *infra*, 51a.

Petitioners, though *pro se*, slowly overcame respondents' procedural obstacles one by one. In order to do so, petitioners filed copious amounts of documentation showing that Shelton had engaged in document fraud, deception, private inurement, and conspiracy to commit tax fraud, and that 3ABN's board chairman, Walter Thompson ("Thompson") lacked veracity.

Respondents' June 25, 2008, motion sought to (a) limit discovery to the time period January 2001 through

January 2007, (b) prohibit discovery regarding, *inter alia*, (i) Tommy, (ii) the identity of former donors adversely affected by petitioners' activities, and (iii) the comprehensive "Plaintiff-related Issues" in Pickle's requests to produce, (c) obtain an *in camera* review before the documents petitioners subpoenaed, including those from MidCountry Bank, were given to petitioners, and (d) require leave of court before *petitioners* issued any more subpoenas.

On September 11, 2008, the district court denied respondents' motion in its entirety, except for requiring petitioners and *respondents* to obtain leave of court before issuing additional subpoenas. App., *infra*, 43a. The court chastised respondents for unreasonably trying to narrow discovery, and for not indexing discovery responses. App., *infra*, 41a–42a. The same order also denied without prejudice Pickle's motion to compel, requiring him to reserve his requests to produce and requiring respondents to respond by October 27, 2008. App., *infra*, 42a.

On October 22, 2008, respondents represented in open court that they would be responding to Pickle's reserved requests to produce in "the very near future." App., *infra*, 36a–38a. On October 23, respondents moved for dismissal and notified petitioners that they would not be complying with the court-ordered discovery deadline.[3] Shelton, individually, gave no reasons whatsoever for dismissing his claims. 3ABN's dubious reasons for dismissal were based entirely upon Thompson's largely uncorroborated, hearsay testimony.

Respondents filed their motion just 7 days before a

[3]This was not a sudden change of plans: Respondents' motion used an October 22 affidavit that asserted that 3ABN had decided the previous week to terminate the lawsuit.

status conference scheduled for 3 pm on October 30.[4] Petitioners hastily prepared an opposition, affidavit, and 45 exhibits, totaling 255 pages, and completed filing these at 2:23 pm on October 30. App. *infra*, 72a–96a. The district court took up the motion during the status conference, and granted it.

B. Petitioners' Malicious Prosecution Claims.

On September 22, 2008, Remnant Publications, Inc. ("Remnant") produced documents ("Remnant documents") documenting transactions between it and respondents.[5] These transactions proved that Shelton had perjured himself in his divorce-related proceedings, withheld information about his kickbacks and royalties from those proceedings and the 3ABN Board, privately enriched himself at 3ABN's expense, and violated the Internal Revenue Code, matters put at issue in ¶¶ 46(g)–(i), 50(i) of respondents' complaint against petitioners.

Due to Thompson's assertion that respondents' counsel had thoroughly investigated 3ABN's finances *before* taking the case, and due to respondents' counsel's letter supporting that assertion, respondents' counsel knew or should have known that the financial and perjury allegations in respondents' complaint were baseless. Petitioners referred to these facts in their opposition to respondent's motion to dismiss, asserting that respondents were attempting to evade petitioners' counterclaims of abuse of process and malicious prosecution. App. *infra*, 72a,

[4]Petitioners immediately began the 7-day conferring process with Remnant outlined in the confidentiality order (App., *infra*, 49a) in order to file the Remnant documents as part of their opposition, but were informed on October 27 that they had to begin the conferring process anew with respondents.

[5]Transactions with Shelton were in actuality with Shelton's sham corporation DLS Publishing, Inc. ("DLS").

75a–76a, 85a, 87a, 89a.

In the October 30, 2008, status conference, respondents' counsel explicitly requested that the dismissal be without prejudice in order to deprive petitioners of "one of the elements of a malicious prosecution tort," citing petitioners' assertion of claims in petitioners' opposition. If respondents could still raise their claims defensively, respondents said, "that would keep them in check." App. *infra*, 22a, 24a.

The district court gave no justification whatsoever for precluding petitioners' malicious prosecution claims, despite the purpose of Rule 41(a)(2) being to protect defendants' interests. App. *infra*, 26a. Neither is justification for that preclusion apparent from the record. By affirming, the First Circuit conflicts with the Second Circuit, which has determined that under Rule 41(a)(2) such claims "ought not to be precluded without some justification." *Camilli v. Grimes*, 436 F.3d 120, 124 (2d Cir. 2006).

C. Protecting Defendants' Interests Under Rule 41(a)(2).

Petitioners' hastily prepared opposition outright opposed dismissal as to one or both plaintiffs. App., *infra*, 94a–95a. Petitioners requested, if dismissal was granted, that dismissal be with prejudice, discovery be transferable to future actions, costs and fees be imposed for non-transferrable discovery, and/or favorable rulings be preserved. *Id.*

During the status conference, the district court initially represented that it had not read petitioners' just-filed opposition. App., *infra*, 20a. The motion to dismiss was granted rather than being taken under advisement, and no reasons were given for not permitting the trans-

fer of discovery and favorable rulings to future actions. App., *infra*, 26a–28a.

The sole dismissal condition imposed, one petitioners never requested, was that respondents must refile their claims in the same court, unless, apparently, petitioners pursued their claims in state court due to a lack of complete diversity. App., *infra*, 26a. This set the stage for petitioners to have to start over from square one, despite over 18 months of intense and extensive litigation, if they dared pursue their claims against respondents.

The First Circuit has ruled that none of this constitutes a substantial question, which conflicts with those circuits that hold that under Rule 41(a)(2) the defendant's position and interests must be protected.

Further, the Second Circuit has ruled that there is no authority under Rule 41(a)(2) to impose dismissal conditions upon the non-moving party. *Cross Westchester Dev. Corp. v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989). $3,534.59 worth of copies of bank statements from MidCountry Bank ("MidCountry's records") which petitioners paid for were ordered returned to MidCountry Bank, without reimbursement, and the loss of that discovery is therefore a *de facto* dismissal condition imposed upon petitioners.[6]

D. Factors Considered Under Rule 41(a)(2).

Petitioners' opposition to respondents' dismissal mo-

[6]Respondents tried to induce the district court to deprive petitioners of nearly all discovery. But the district court's dismissal order explicitly allowed petitioners to retain copies of confidential documents if the confidentiality order permitted; and only required return of documents to the extent that the confidentiality order so required, which it does not. App., *infra*, 27a, 29a, 46a–51a. Thus, petitioners' only loss was $3,534.59 worth of bank statement copies.

tion examined that motion in light of eight different factors, citing non-exclusive lists of factors used by many circuits. App., *infra*, 77a–94a.

In the October 30, 2008, status conference, respondents' counsel stated, "The factor test, if you run through it, and I'm sure you will, would indicate that it should be, I think, without prejudice." App., *infra*, 22a. But the record does not indicate that the district court ran through "the factor test" prior to granting the motion shortly thereafter. App., *infra*, 26a.

Petitioners stated:

> In our memorandum, we've outlined eight different factors, I believe, * * * that different circuits have taken into consideration. One of those is adequacy of the plaintiffs' explanation for the need to dismiss; and one of the explanations they gave is that they've achieved one of the goals of their — their suit. That is just one — one aspect that we bring out in the memorandum.

App., *infra*, 25a. Petitioners then referred to 3ABN's assertion that it had already accomplished one goal by purchasing the offending domain names from Joy's bankruptcy estate on February 12, 2008. In reality, 15 or 16 new "Save 3ABN" websites had started operating before that purchase. App., *infra*, 25a, 84a–85a, 90a–91a. But the record nowhere indicates that the district court evaluated 3ABN's reasons for dismissal in light of this fact.

Applying the factor test to 3ABN's reasons[7] for dismissal involved more than just counting how many Save 3ABN websites were still operating. Petitioners' opposition called into question respondents' unsubstantiated

[7]Shelton gave no reasons whatsoever.

assertions regarding (a) IRS vindication, (b) EEOC vindication, and (c) donation levels being restored to pre-June or July 2006 levels due to (d) restoration of public reputation.[8] App., *infra*, 74a, 86a–87a, 89a, 91a–92a, 95a. Certainly the IRS never approved of Shelton's 1998 real estate deal, inflated horse donations reported as cash, and kickbacks and huge royalties earned to 3ABN's detriment, all documented in the record. The EEOC couldn't have vindicated respondents if respondents had produced the "Thompson memo." 3ABN president Jim Gilley had just requested huge donations as if 3ABN was in financial distress. Increased insider contributions could not demonstrate restored public reputation.

Did 3ABN already accomplish the lawsuit's objectives as asserted? Respondents' complaint sought a permanent injunction against petitioners and "all others in concert and privity with" them from using "3ABN" in any domain name. No such injunction was ever obtained.

While not every factor possible must be considered, certainly a defendant's opposition should be read and some sort of consideration should be given to the factors raised therein by a defendant, if the defendants' interests must be the primary focus.

E. Motion for Sanctions.

Petitioners moved for sanctions pursuant to Rule 11 and the court's inherent powers after respondents made and re-advocated material misrepresentations, sometimes intentionally, upon which misrepresentations the

[8]These assertions were supported only by Thompson's uncorroborated, hearsay affidavit, which cited for support opinions of respondents' unnamed attorneys, and unspecified donation figures from respondents' unnamed accountants. For this reason, petitioners requested an evidentiary hearing. App., *infra*, 95a.

court partly based its rulings.

Respondents put the perjurious nature of Shelton's July 2006, divorce-related financial affidavit at issue in their complaint. That affidavit failed to report substantial kickback and royalty income Shelton received from Remnant and other entities. Though respondents' counsel had a copy of the Remnant documents and thus knew about these unreported kickbacks and royalties, he asserted that these documents had no relevance to the lawsuit.[9] But a court had already found them to be clearly relevant. App., *infra*, 45a.

Remnant paid Shelton for Remnant's sales to 3ABN of Shelton's booklets, booklets published by another publisher and which Remnant didn't even stock. Respondents' counsel called these kickbacks "perfectly proper royalty payments."

To accuse petitioners of discovery abuse, respondents falsified the timeline of events: Respondents accused petitioners of issuing subpoenas from other courts as an end-run around a December 18, 2007, protective order motion, and as a fishing expedition after looking through respondents' documents, none of which were produced before March 28, 2008. Yet respondents had already admitted that the contested subpoenas were originally issued before December 18, 2007.[10] App., *infra*, 59a, 98a. Also, respondents used Joy's January 20, 2008, email about a not-yet-executed, future expansion of the case's issues (by adding parties) to explain why Pickle's re-

[9]Even if these documents revealed no such payments, they would still be relevant because they would exonerate Shelton. Thus, either way, there was no legal basis for an assertion of irrelevancy.

[10]Additionally, the district judge had already denied respondents' request to stay discovery until after the not-yet-filed December 18, 2007, motion was heard. App., *infra*, 59a.

quests to produce were so comprehensive. And yet respondents knew that Pickle had served his requests on November 29 and December 7, 2007.

Without reviewing the Remnant documents to see just how extreme respondents' misrepresentations were, the district court found these and other misstatements to "fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions." App., *infra*, 12a.

The court of appeals witnessed firsthand respondents' timeline fabrications: Respondents' principal brief referred to motions filed on December 14 and 18, 2007, and then contended that Pickle's "late November and early December 2007" requests to produce were served "while the above-discussed motions were pending." App., *infra*, 66a–67a.

Yet the court of appeals affirmed the placing of these intentional misrepresentations within the realm of "zealous advocacy," conflicting with those circuits that define "zealous advocacy" as "hard fought, energetic and honest representation." *Perkins v. General Motors Corp.*, 965 F.2d 597, 600 (8th Cir. 1992); *Matter of Yagman*, 796 F.2d 1165, 1182 (9th Cir. 1986).

F. Handling of MidCountry Bank's Records.

By court order, MidCountry Bank produced its records under seal directly to the district court, to ensure that the records complied with the terms of the confidentiality order (which they do). App., *infra*, 55a–56a.

As the record documents, the district judge's docket clerk and the magistrate judge's courtroom clerk told petitioners that MidCountry's records could not be found (even though the judge's docket clerk had signed for

their delivery on September 12, 2008).[11] Petitioners were never given notice otherwise. Petitioners memorialized these assertions in two court filings in May 2009, believing that the vaguely-worded receipt filed on December 23, 2008, indicated that the records had finally been found on or about December 16, seven days after the record was declared complete in petitioners' first appeal. App., *infra*, 69a n.4, 70a n.4.

In December 2009, upon closer examination of the vague receipt, petitioners noticed for the first time that the address under the signature was that of respondents' counsel, the only indication that the court had surrendered the records to respondents. But the district judge had ordered them to be returned to the bank. App., *infra*, 28a ("... shall be returned to the party that produced those documents").

The court of appeals' December 4, 2009, order (App., *infra*, 7a) made petitioners realize that MidCountry's records were part of the record on appeal,[12] which had not yet been declared complete in petitioners' second appeal. Petitioners therefore moved the district court to have these records forwarded to the court of appeals, and for respondents to return them to the court.

These motions were ultimately denied on the basis that "Shelton's right to this private information trumped defendants' right to see and distribute them." App., *infra*, 4a. Yet six of the ten bank accounts were not owned by Shelton, petitioners had not asked to see, much less

[11]Petitioners obtained this tracking information on October 8, 2008. MidCountry's records thus arrived the day after the district court denied respondents' motion to conduct an *in camera* review before giving them to petitioners. *Supra*, 5–6.

[12]Respondents have twice admitted that MidCountry's records were filed with the court. App., *infra*, 67a–68a.

distribute, the bank statements, and this Court long ago declared that account holders have no such privacy interest. *U.S. v. Miller*, 425 U.S. 435, 440–443 (1976). Even though 1st Cir. Loc. R. 11.0(b) required that MidCountry's records be forwarded to the court of appeals, the court of appeals declined to rectify the matter when petitioners moved that court to do so.

G. Misconduct Investigations.

In order to discover why the judge's clerk had told petitioners that MidCountry's records were lost if they never were, why petitioners were never given notice otherwise, and why these records were surrendered to respondents in violation of the judge's order, petitioners requested investigations by quietly filing complaints for judicial and court staff misconduct.[13]

The district judge then recused himself *sua sponte* on the grounds that his impartiality might reasonably be questioned by an objective observer. App., *infra*, 6a. Thus, the district judge found that "some kind of probative evidence" existed showing "a factual basis for an inference of lack of impartiality" by an objective observer. *In re U.S.*, 158 F.3d 26, 31 (1st Cir. 1998) (internal quotation marks omitted); *U.S. v. Giorgi*, 840 F.2d 1022, 1036 (1st Cir. 1988). This probative evidence was laid out in petitioners' complaint for judicial misconduct, and in a December 24, 2009, district court filing.

1. Merit of Recusal Order.

In their second appeal, petitioners used the district judge's recusal order, and the factual basis leading to it which the district judge found so compelling, to request greater scrutiny under the abuse of discretion standard.

[13]Despite these complaints, these questions remain unanswered.

In response, the court of appeals ruled, "Defendants' allegations of judicial bias are without merit."

2. Composition of the Appellate Panel.

The chief judge dismissed petitioners' misconduct complaint, and a five-judge panel affirmed. Both orders stated that there was no evidence of a clerical error in the management of MidCountry's records. Order, Lynch, C.C.J., *In Re Complaint No. 01-10-90001*, May 24, 2010, at 10; Order, Judicial Council of the First Circuit, *In Re Complaint No. 01-10-90001*, December 14, 2010, at 14.

The public record of the underlying case contains (a) phone records, court filings, and sworn testimony documenting that the judge and magistrate judge's clerks told petitioners that MidCountry's records couldn't be found, (b) a DHL tracking record with the judge's clerk's signature, (c) the judge's explicit order to return MidCountry's records to the bank, and (d) a vague receipt documenting that the records were instead surrendered to respondents. But the chief circuit judge and the judicial council concluded after their off-the-record investigation that this evidence in the record is so utterly impeached, it is as if it doesn't even exist.

Two judges from the above proceedings served on the appellate panel that considered petitioners' appeals, even though they had obtained personal knowledge of disputed evidentiary facts via the judicial complaint proceedings. For this reason, as part of their petition for rehearing, petitioners requested that their appeals be submitted to a new panel.

H. Definition of Abuse of Discretion.

The standard of review in this case was largely abuse of discretion, except where constitutional issues were in-

volved. Therefore, petitioners' appellate briefs highlighted clearly erroneous findings of fact,[14] errors of law,[15] failures to exercise discretion,[16] and internally inconsistent rulings.[17]

In response, respondents stated, "Thus, the standard of review in this Court is abuse of discretion, it is not a 'clearly erroneous' standard as Pickle and Joy repetit-

[14]Examples included, *inter alia*, finding (a) that petitioners' total cost for copies was $206.70 (App., *infra*, 14a–16a), which excluded the itemized $3,534.59 cost of MidCountry's records; (b) that nothing in the record suggested malicious prosecution or that respondents had tried to increase petitioners' costs (App., *infra*, 17a), when (i) petitioners' opposition to respondents' dismissal motion, (ii) respondents' stated intention never to produce any discovery, and (iii) findings that respondents had not indexed discovery responses all clearly do (App., *infra*, 75a–76a, 79a–87a, 89a, 58a, 42a); (c) that petitioners already had or could have presented new evidence (App., *infra*, 11a) that did not yet exist; and (d) that petitioners should have already returned documents pursuant to the confidentiality order (*Id.*) when that order requires no such return (App., *infra*, 46a–51a).

[15]Examples included, *inter alia*, not applying the factors generally considered under Rule 41(a)(2), imposing dismissal terms upon the non-moving parties, imposing dismissal terms that protected respondents rather than petitioners, setting aside findings that were not clearly erroneous, and finding that Rule 52(b) did not apply to a motion to amend findings (App., *infra*, 10a n.1).

[16]Examples included, *inter alia*, ruling on motions without reading petitioners' briefs or considering the arguments they contained, and when unfamiliar with relevant facts in the case. As one example, the dismissal order invoked the confidentiality order even though the court was unfamiliar with that order's terms. App., *infra*, 27a, 29a.

[17]Examples included, *inter alia*, (a) finding that *prima facie* evidence of abuse of process and malicious prosecution was irrelevant to a motion for costs, but deciding that motion in part on whether such evidence existed (App., *infra*, 13a, 17a); (b) finding that respondents' statements were problematic, yet denying petitioners' request for reconsideration based upon those statements (App., *infra*, 11a–12a); and (c) acknowledging that petitioners had

ively insist." App., *infra*, 67a.

The court of appeals ruled that "there was no abuse of discretion in the district court's rulings" (App., *infra*, 1a), raising questions as to what definition of "abuse of discretion" the court of appeals used.

I. Other Rulings Not Already Referred To.

In ruling on petitioners' request for costs pursuant to Rule 41(a)(2), 28 U.S.C. § 1927, and the court's inherent powers, the district court determined that only costs falling under 28 U.S.C. § 1920 could be imposed under Rule 41(a)(2), and that good faith is a factor when considering whether to impose attorney's fees under Rule 41(a)(2). App., *infra*, 15a–17a.

The district court found that on a motion to reconsider, evidence that only clarifies newly discovered evidence[18] must itself also be newly discovered. App., *infra*, 11a.

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already placed in the record arguments and evidence suggesting that respondents had engaged in abuse of process and malicious prosecution, yet denying petitioners' motion to amend the finding to the contrary (App., *infra*, 11a, 17a).

[18]3ABN had deleted incriminating issues of *3ABN World* from their web server, and had refused to produce these in discovery. Since the date of creation of a particular article was relevant, petitioners sought to file otherwise worthless purchase orders for printing to clarify when each issue arrived back from the printer. But respondents' abusive confidentiality designation, LR, D.Mass. 7.2(d)–(e), and the court's ruling prevented that filing.

REASONS FOR GRANTING THE PETITION

I. The Decision Conflicts with Other Circuits re: Rule 41(a)(2).

A. Whether Protection of Defendants' Interests Is the Primary Focus.

Rule 41(a)(2) permits a court to grant a voluntary dismissal "on terms that the court considers proper." A number of circuits interpret this language as requiring the court to primarily focus on protecting the position and interests of defendants rather than of plaintiffs. *Fisher v. Puerto Rico Marine Management, Inc.*, 940 F.2d 1502, 1503 (11th Cir. 1991); *Davis v. USX Corp.*, 819 F.2d 1270, 1273 (4th Cir. 1987); *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

But the First Circuit has affirmed a case that sets the stage for petitioners to incur significant duplicative expense, since the curative conditions petitioners requested were not granted, such as the transfer of discovery and favorable rulings. Petitioners' ability to pursue any claims whatsoever against respondents, or to defend themselves in future litigation, was thereby severely prejudiced, to respondents' great benefit.

The Eleventh Circuit remanded a case for further proceedings when the trial court gave no reasons for denying requested curative conditions, and when the record provided no basis for determining those reasons. *McCants v. Ford Motor Co., Inc.*, 781 F.2d 855, 859–861 (11th Cir. 1986). But the First Circuit did not remand in this case.

The Fourth Circuit ruled that the payment of a portion of taxable costs and the transfer of discovery to future actions "should be imposed as a matter of course in

most cases." *Davis*, 819 F.2d at 1276. But the First Circuit affirmed a case which did not, without any real justification apparent from the record.

B. Whether Malicious Prosecution Claims May Be Precluded Without Justification.

The Second Circuit ruled that in a voluntary dismissal, malicious prosecution claims "ought not to be precluded without some justification." *Camilli*, 436 F.3d at 124. *Camilli* cited district court cases from the Third and Ninth Circuits, which found in those cases that the deprivation of malicious prosecution claims constituted legal prejudice, "forfeiting a significant right," and "irremediable injustice." *In re Sizzler Restaurants International Inc.*, 262 B.R. 811, 821–822 (Bankr.C.D.Cal. 2001); *Kappa Publishing Group, Inc. v. Poltrack*, 1996 U.S. Dist. LEXIS 3844, at *4 (E.D.Pa. 1996); *Selas Corp. v. Wilshire Oil Co.*, 57 F.R.D. 3, 6–7 (E.D.Pa.1972). While a defendant's assertion of such claims cannot always prevent a dismissal without prejudice, these cases note that it sometimes does.

In conflict with the Second Circuit, the First Circuit affirmed a case which precluded such claims without any justification apparent in the record.[19]

C. Whether Rule 41(a)(2) Authorizes Imposing Dismissal Conditions Upon Defendants.

Petitioners paid $3,534.59 for the copies comprising MidCountry's records. Once the district court denied respondents' motion to conduct an *in camera* review before those records were given to petitioners (App., *infra*, 43a),

[19]The absence of justification further shows that the district court did not make petitioners' interests and position its primary focus.

no legal reason remained for petitioners not obtaining them.

The confidentiality order entered in the case does not require litigants to return any documents. App., *infra*, 46a–51a. That being so, the part of the district judge's order that appears to require that MidCountry's records be returned to MidCountry Bank imposed a dismissal condition upon petitioners. App., *infra*, 27a–28a. The First Circuit has now affirmed.

But the Second Circuit held that there is no authority under Rule 41(a)(2) to impose dismissal conditions upon defendants. *Cross*, 887 F.2d at 432. According to that ruling, therefore, the district court was without authority to do so.

D. Factors Considered Under Rule 41(a)(2).

Petitioners' opposition to respondents' dismissal motion examined that motion in light of eight different factors, citing, *inter alia*, *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990); *Grover By Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Catanzano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001); *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987); and *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969). These cases give non-exclusive lists of factors to use when considering motions under Rule 41(a)(2).[20]

One factor petitioners delved into in depth was whether there had been any vexatious conduct or bad faith on the part of the respondents. *Zagano*, 900 F.2d at

[20]The First Circuit earlier endorsed the list of factors in *Pace* and *Grover*, noting that such lists are non-exclusive. *Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000).

14; *Catanzano*, 277 F.3d at 110.[21] App., *infra*, 79a–85a. Such conduct has been found where a plaintiff has filed frivolous actions, entered or maintained an action in bad faith, or permitted a case to proceed while never having any intention of providing discovery. *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 532 (4th Cir. 1990); *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 271 (S.D.N.Y. 1998).

Petitioners' opposition outlined the frivolous and vexatious nature of respondents' complaint and litigation (App., *infra*, 79a–87a), but nothing in the record indicates that this factor was considered before ruling on the motion.

In the Ninth Circuit when applying the various factors, dismissal motions that were thinly-veiled attempts to avoid discovery were denied. *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996). In conflict with that ruling, the First Circuit affirmed the October 30, 2008, dismissal, though it was a thinly-veiled attempt to evade the court-ordered discovery deadline of October 27. App., *infra*, 42a. Respondents represented in open court on October 22 that they were going to comply with that deadline (App., *infra*, 36a–38a), but then, as soon as they moved to dismiss on October 23, gave notice that they would not.

Certainly some sort of consideration should be given to the factors raised by defendants, if the court must focus primarily on protecting defendants' interests under Rule 41(a)(2). But nothing in the record shows that this was done, and, by affirming, the First Circuit is in conflict with those circuits that apply "the factor test" when

[21] *See also In re Varona*, 388 B.R. 705, 726 (E.D. Va. 2008); *In re EXDS, Inc.*, 301 B.R. 436, 438 (Bankr.D.Del. 2003); *In re Wotkyns*, 274 B.R. 690, 693–694 (Bankr.S.D. Tex. 2002);

considering Rule 41(a)(2) motions.

E. Whether Rule 41(a)(2) Is Restricted by 28 U.S.C. § 1920 and American Rule.

In ruling on petitioners' motion for costs, the district court restricted the costs considered under Rule 41(a)(2) to only those costs enumerated under 28 U.S.C. § 1920, but cited no authority for doing so. The court of appeals affirmed, conflicting with the Eleventh Circuit's ruling that "[c]osts may include *all* litigation-related expenses incurred by the defendant, including reasonable attorneys' fees." *McCants*, 781 F.2d at 860, emphasis added.

Contradictorily, the district court considered awarding attorneys' fees under Rule 41(a)(2), a cost not found under § 1920. In considering these fees, the district court applied a good faith factor, citing and adopting the language of *Blackburn v. City of Columbus*, 60 F.R.D. 197, 198 (S.D. Ohio 1973). The court of appeals affirmed.

But as the D.C. Circuit noted, *Blackburn* "ignores the fact that Rule 41(a)(2) has the same force as any statute of the United States. 28 U.S.C. § 2072," and thus itself constitutes statutory authority apart from the American Rule for awarding attorney's fees. *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 n.16 (D.C. Cir. 1981); *see also Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 129 n.9 (5th Cir. 1978). Additionally, *GAF* found good faith to be "simply irrelevant" to the imposing of any dismissal terms under Rule 41(a)(2), since "the purpose of the rule is to protect defendants from undue prejudice or inconvenience." *GAF*, 665 F.2d at 369.

II. The Decision Conflicts with Other Circuits re: the Definition of "Zealous Advocacy."

The First Circuit has affirmed the finding that prob-

lematic, material misrepresentations fall within the realm of "zealous advocacy." But other circuits define this term as "hard fought, energetic and honest representation." *Perkins*, 965 F.2d at 600; *Yagman*, 796 F.2d at 1182.

Other circuits, and this Court, have noted that zealous advocacy does not include deception. *Nix v. Whiteside*, 475 U.S. 157, 166 (1986); *U.S. v. Shaffer Equipment Co.*, 11 F.3d 450, 457–458, (4th Cir. 1993) ("Even the slightest accommodation of deceit" can erode the public's confidence that the judicial process's goal is to arrive at truth); *Cleveland Hair Clinic, Inc. v. Puig*, 200 F.3d 1063, 1067 (7th Cir. 2000). Or pettifoggery. *U.S. v. International Broth. of Teamsters*, 948 F.2d 1338, 1344 (2d Cir. 1991). Or the repeated use of legal arguments that no competent attorney would find a basis for. *Johnson v. CIR*, 289 F.3d 452, 457 (7th Cir. 2002). A single word might cross the line. *Jenkins v. Methodist Hosps. Of Dallas, Inc.*, 478 F.3d 255, 263, 265-266 (5th Cir. 2007).

Circuits have also noted that zealous advocacy does not include violating court rules. *U.S. v. Thoreen*, 653 F.2d 1332, 1339 (9th Cir. 1981); *Allen Engineering Corp. v. Bartell Industries*, 299 F.3d 1336, 1356 (Fed.Cir. 2002). Thus, in these circuits, zealous advocacy cannot include intentional misstatements of fact and law in signed filings since such conduct violates Rule 11.

Formerly, the First Circuit held that "[d]eceptions, misrepresentations, or falsities ... will not be tolerated" since they frustrate the court's ultimate goal of finding the truth. *Polansky v. CNA Ins. Co.*, 852 F.2d 626, 632–633 (1st Cir. 1988). And attorneys as court officers were to help in achieving this goal, "thereby making it more difficult for the strong, or wealthy, to use the very costs

of the legal system to undermine its basic objectives." *Unanue-Casal v. Unanue-Casal*, 898 F.2d 839, 842 (1st Cir. 1990).

Thus, redefining "zealous advocacy" redefines the entire legal system.

III. Maintaining Protections of Rules 41(a)(2) and 11 Is of Significant Public Interest.

The significant economic impact of frivolous suits against businesses have prompted calls for tort reform. The chilling effect of the fear of expensive, frivolous SLAPP suits against individuals exercising their petitioning and free speech rights have prompted calls for anti-SLAPP legislation. Circuits generally have seen Rules 41(a)(2) and 11 as protecting against and deterring abuse of the judicial process. It is therefore of great public interest that such protections and deterrents be preserved and consistently interpreted.

This case is an excellent opportunity for this Court to clarify the purpose and interpretation of these rules, particularly Rule 41(a)(2), given how many different ways the decision conflicts with various circuits.

IV. The Decision Squarely Conflicts with *Miller* and *Rowland*.

In *Miller*, this Court determined that account holders have "no legitimate 'expectation of privacy'" in the records of their bank accounts, which records belong to the bank, not the account holder. *Miller*, 425 U.S. at 440–443. Although *Miller* was partly abrogated by the Right to Financial Privacy Act, which limited governmental searches, some courts maintain that *Miller* remains authoritative in the context of civil actions. *Mangum v. Action Collection Serv., Inc.*, 575 F.3d 935, 942–943 (9th Cir.

2009); *Clayton Brokerage Co. v. Clement*, 87 F.R.D. 569, 571–572 (D.Md. 1980); *Robertson v. Cartinhour*, 2010 U.S. Dist. LEXIS 16058, at *3–4 (D.Md., Feb. 23, 2010); *Bush Development Corp. v. Harbour Place Assocs.*, 632 F.Supp. 1359, 1364 (E.D.Va. 1986).

The First Circuit has taken the unusual step of affirming that Shelton has a privacy and ownership interest in bank statements of not only the four accounts that he owns, but also the six corporate accounts that he *doesn't* own. App., *infra*, 4a. 3ABN, owner of five accounts, never objected to petitioners' subpoena upon MidCountry Bank. DLS, owner of one account, never entered an appearance in any of the related district court or appellate cases.

Thus, the decision also squarely conflicts with *Rowland*, ignoring two centuries of precedent that requires corporations to appear in federal court only through licensed counsel, not through non-attorneys like Shelton. *Rowland v. California Men's Colony*, 506 U.S. 194, 201–202 (1993).

The decision affirms the use of Shelton's asserted privacy and ownership interest to justify removing material from the record on appeal, and to deprive petitioners of $3,534.59 worth of discovery resulting from an *already enforced* subpoena, discovery that fully complies with the terms of the confidentiality order entered in the underlying case. Shelton's motion to quash and respondents' motion for an *in camera* review *were denied!* And yet even though respondents lost these motions, petitioners still ended up $3,534.59 worse off than if Shelton had won his motion to quash, all due to a privacy and ownership interest that this Court in *Miller* said that Shelton never had!

Is *Miller* still authoritative in civil matters?

V. The Decision Sanctions the Taking of Property Without Due Process or Just Compensation, As Well As the Withholding of Evidence.

Petitioners were told by the district court that $3,534.59 worth of copies of sealed bank statements were lost, and were never given notice otherwise. Subsequently, the district court ordered those documents to be returned to the bank that produced them, surrendered them to respondents instead, found that petitioners' cost for copies was only $206.70, refused to amend that finding to include the $3,534.59, and denied reimbursement by respondents to petitioners of the same $3,534.59.

$3,534.59 of petitioners' discovery was therefore transferred from petitioners to respondents for private use, without compensation, without respondents winning a judgment, and without sanctions being imposed.

Additional due process concerns: Respondents never gave notice that they were using their dismissal motion to attempt to alter the terms of the confidentiality order. Prior to ordering the return of MidCountry's records, no discussion occurred during the October 30, 2008, status conference regarding that return. Even after ordering their return, the district judge on the record expressed unfamiliarity with the confidentiality order's terms. App., *infra*, 27a, 29a.

The district court contended that payment of costs "does not confer ownership" of discovery upon petitioners. App., *infra*, 4a. Yet the Tenth Circuit has held that an attorney's client has "ownership rights" to the materials in his file which he has "presumably paid for." *In re*

Grand Jury Proceedings, 727 F.2d 941, 944–945 (10th Cir. 1984). Mass.R.Prof.C. 1.16(e)(3) explicitly includes in that file "all ... discovery documents for which the client has paid the lawyer's out-of-pocket costs."

The constitutional question presented turns upon whether Shelton's alleged privacy interest in MidCountry's records, even for accounts he did not own, trumps petitioners' ownership right to discovery they paid for, when no legal reason remained for petitioners not obtaining those records, and despite the absence of due process. The question also derives additional importance from its intertwining with those questions pertaining to the protection of defendants under Rule 41(a)(2).

VI. Departures Call for Exercise of Supervisory Powers.

This case conflicts with so much established precedent that this Court's supervisory powers are called for, and summary reversal may be appropriate for some of the questions presented.

A. The Decision Departs from the Accepted and Usual Course of Judicial Proceedings.

The court of appeals summarily affirmed using 1st Cir. Loc. R. 27.0(c), which permits the court to summarily affirm "if it shall clearly appear that no substantial question is presented." App., *infra*, 1a, 64a. In a different context, courts have consider a "substantial question" to be one that is fairly debatable or close, or one that could very well be decided the other way. *U.S. v. Bayko*, 774 F.2d 516, 523 (1st Cir. 1985). Certainly at least one of the following questions was substantial:

- Should petitioners' malicious prosecution claims be precluded given the circumstances of the un-

derlying case?

- Does the lone condition of requiring respondents to refile their claims in the same court, unless petitioners are forced to file their claims elsewhere, cure "any potential legal prejudice" (App., *infra*, 16a–17a), including duplicative expense and effort?
- Given the entire order, was the return of MidCountry's records conditioned on whatever the confidentiality order required?
- Did the expropriation and misappropriation without just compensation of MidCountry's records, after petitioners were told that these records were lost, offend due process, constitute an impermissible *de facto* taking of property, or constitute a dismissal condition impermissibly imposed upon petitioners?
- Given all the material in the record to the contrary, was the district court's finding clearly erroneous that nothing in the record suggests abuse of process and malicious prosecution?
- Is Rule 52(b) applicable to motions to amend findings on motions?
- Is Rule 41(a)(2) constrained by either 28 U.S.C. § 1920 or the American Rule?
- Was it clearly erroneous for the district court to exclude the cost of MidCountry's records and other copies from § 1920 costs?
- Since the district court conditioned the return of confidential materials upon whatever the confidentiality order required, explicitly allowing peti-

tioners to retain copies if that order permitted, did the district court err by excluding evidence on the basis that petitioners should not still possess such evidence?

- Did the district court err by rejecting new evidence on the basis that all such evidence either already had been or should have been presented, when some of that evidence did not exist until respondents created it on March 23, 2009?
- On a motion to reconsider, must evidence that only clarifies newly discovered evidence also itself be newly discovered?
- Do intentional misrepresentations upon which the court relies in its rulings fall outside the realm of zealous advocacy?

Besides summarily affirming even though substantial questions had been presented, the court of appeals departed from its own precedents regarding Rule 41(a)(2). Previously, whether or not discovery could be utilized in future litigation, or whether the defendants might be precluded from asserting any claims, were factors to consider under Rule 41(a)(2). *Puerto Rico Mar. Shipping Auth. v. Leith*, 668 F.2d 46, 50–51 (1st Cir. 1981). Though petitioners' opposition to the motion to dismiss made clear that petitioners had claims against respondents and needed discovery transferred (App., *infra*, 75a–76a, 89a–90a), nothing in the record shows why petitioners' claims were precluded and discovery wasn't transferred.

And that leads to why this case must seem so incongruous: the court of appeals must have departed from what has been generally accepted as constituting abuse of discretion:

(a) Mistake of law. *Baella-Silva v. Hulsey*, 454 F.3d 5, 11 (1st Cir. 2006).

(b) Clearly erroneous finding of fact. *Id.*

(c) Failure to exercise discretion. *Alamance Indus., Inc. v. Filene's*, 291 F.2d 142, 146–47 (1st Cir. 1961) (re: motion for voluntary dismissal); *Ohlander v. Larson*, 114 F.3d 1531, 1537 (10th Cir. 1997) (failure "to consider the applicable legal standard or the facts upon which the exercise of its discretionary judgment is based" is abuse of discretion); *Charles v. U.S.*, 215 F.2d 825, 828 (9th Cir. 1954); *Martin v. Graybar Electric Company*, 266 F.2d 202, 203 (7th Cir. 1959).

(d) Internally inconsistent rulings. *Todd v. Corporate Life Ins. Co.*, 945 F.2d 204, 208 (7th Cir. 1991).

Petitioners highlighted clear examples of each type of abuse. *Supra*, 17–18 n.14–n.17. Respondents then argued that a "clearly erroneous" finding of fact was not an abuse of discretion. App., *infra*, 67a. Subsequently, the court of appeals affirmed, stating that the district court had not abused its discretion. App., *infra*, 1a.

Another departure from the usual course of proceedings was the court of appeals' ruling that petitioners' use of a valid court order was without merit. App., *infra*, 1a. Certainly the district judge's own determination that an appearance of bias existed (App., *infra*, 6a) lends merit to petitioners' modest request for greater scrutiny under the abuse of discretion standard.

If the mere filing of the misconduct complaint (independent of the factual basis underneath it) was what triggered the judge's recusal, then perhaps petitioners' use of that order could be meritless. But that conjecture is unacceptable since it impermissibly opens the door to

judge shopping, and conflicts with other circuits that hold that the mere filing of a judicial misconduct complaint is not grounds for recusal. *In re Evergreen Sec., Ltd.*, 570 F.3d 1257, 1265 (11th Cir. 2009); *In re Mann*, 229 F.3d 657, 658 (7th Cir. 2000).

Even though 1st Cir. Loc. R. 11.0(b) states that the entire record will be forwarded to the court of appeals in *pro se* cases, MidCountry's records were not forwarded. The court of appeals declined to rectify the matter when moved to do so prior to the record on appeal being declared complete in petitioners' second appeal, even though the district judge's order to return those records to MidCountry Bank had never yet been executed. But the Federal Rules do not permit the district court to eliminate any part of the occurrences below which Defendants wish included in the record on appeal. *Belt v. Holton*, 197 F.2d 579, 581 (D.C. Cir. 1952).

B. The Decision Sanctions the District Court's Departure from the Accepted and Usual Course of Judicial Proceedings.

The accepted and usual course when considering a Rule 41(a)(2) motion is to apply a series of factors to the case. Nothing in the record shows that this was properly done prior to granting the motion to dismiss, and yet the court of appeals affirmed.

Petitioners presented three lines of evidence that a number of their briefs were not read (indicating a failure to exercise discretion), while at the same time respondents' assertions were uncritically adopted as fact. The court of appeals affirmed anyway.

Why? The Judicial Council of the First Circuit has ruled that whether or not a judge reads already submit-

ted briefs is itself a matter of discretion. *In Re Complaint No. 01-10-90001*, *supra*, at 11.

Even if this were accepted practice in some courts, it is not accepted by the general public. Litigation and representation are proverbially expensive. The idea that courts might not read legal briefs that cost so much to produce is repugnant. Besides, LR, D.Mass. 7.1(f) implies that briefs will be read. (Motions not set down for hearing "will be decided on the papers submitted.")

VII. Supreme Court Should Decide Whether 28 U.S.C. § 455(b)(1) Applies to Knowledge Obtained from Judicial Conduct Proceedings.

Proceedings concerning judicial misconduct complaints are by design non-public, and materials and information considered by the chief judge and the judicial council, including communications from the subject judge and his clerks, are off the record. Rules for Judicial Conduct 23(a), 11(b), 18(c)(2)(B).

28 U.S.C. § 455(b)(1) states that a judge shall disqualify himself when he has personal knowledge of disputed evidentiary facts. Some circuits have found that such personal knowledge includes "[o]ff-the-record briefings in chambers" which "leave no trace in the record," since such knowledge cannot be "controverted or tested by the tools of the adversary process." *Edgar v. K.L.*, 93 F.3d 256, 259 (7th Cir. 1996); *U.S. v. Craven*, 239 F.3d 91, 103 (1st Cir. 2001). *See also In re Kensington Intern. Ltd.*, 368 F.3d 289, 307 (3d Cir. 2004); *Onishea v. Hopper*, 126 F.3d 1323, 1341 (11th Cir. 1997).

Two members of the appellate panel in this case were involved in proceedings initiated by petitioners' judicial misconduct complaint. To what extent this majority ob-

tained personal knowledge from those proceedings is unknown, since those proceedings were secret and off the record. However, that knowledge was apparently enough to utterly impeach significant evidence in the record regarding the mishandling of MidCountry's records. *Supra*, 16. Yet despite this personal knowledge of disputed evidentiary facts, the majority did not recuse themselves, and petitioners' request to submit their appeals for rehearing before a new panel was denied.

The formation of the Breyer Committee at the Chief Justice's direction, and the subsequent report issued by that committee, illustrate the supervisory role this Court has exercised in the past over the process of handling judicial misconduct complaints.

In light of that supervisory role, the Supreme Court itself should determine whether judges who acquire personal knowledge during judicial conduct proceedings should disqualify themselves from sitting on appellate panels that will consider the same case and the same disputed issues (unless a rule of necessity arises). An objective observer might reasonably conclude that this Court can rule on this question more impartially than the court of appeals, since the court of appeals arrived at a finding so contradictory to the public record, and this Court is more removed from the controversy.

The whole purpose of § 455 is to "promote public confidence in the judicial system by avoiding even the appearance of partiality." *Easley v. Univ. of Mich. Board of Regents*, 853 F.2d 1351, 1355 (6th Cir. 1988); *Health Services Acquisition Corp. v. Liljeberg*, 796 F. 2d 796, 800 (5th Cir. 1986). This question directly affects that public confidence, and thus it is of exceptional importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 6, 2011

APPENDIX A

United States Court of Appeals
For the First Circuit

Nos. 08-2457, 09-2615

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, ET AL., PLAINTIFFS, APPELLEES,

v.

GAILON ARTHUR JOY, ET AL., DEFENDANTS, APPELLANTS.

Lynch, Chief Judge,
Torruella and Lipez, Circuit Judges.

JUDGMENT

Entered: May 10, 2011

Defendants challenge a voluntary dismissal order and the denial of various post-dismissal motions. Having carefully reviewed the parties' submissions and the record, we conclude that there was no abuse of discretion in the district court's rulings, and we affirm the district court. Defendants' allegations of judicial bias are without merit. All pending motions, including the parties' motions for sanctions, are denied.

Affirmed. See 1st Cir. R. 27.0(c).

By the Court:

/s/ Margaret Carter, Clerk.

APPENDIX B

United States District Court
District of Massachusetts

Civil Action No. 07-40098-RWZ

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY

v.

GAILON ARTHUR JOY AND ROBERT PICKLE

ORDER

October 19, 2010

Zobel, D.J.

This case began as a straight forward trademark infringement action with claims for defamation and interference with business by a non-profit corporation, Three Angels Broadcasting Network, Inc. ("Network"), and its founder and president Danny Lee Shelton. The primary business of Network is to operate and manage a Christian television and radio broadcast ministry. Although, according to the complaint, plaintiff Shelton, is a member of the Seventh Day Adventist faith, Network is nondenominational and is not affiliated with any specific church. Defendants, who are pro se, are also members of the Seventh Day Adventist Church. This straight forward case rapidly degenerated into a discovery morass accompanied by a series of ad hominem attacks on plaintiff and his counsel and, eventually, on the district judge initially assigned to this case.

One issue which has occupied considerable time of the court revolved around defendants' efforts to obtain, and keep, plaintiff Shelton's personal financial records at MidCountry Bank in Minnesota. Defendants sought these records with a subpoena issued by the Federal District Court in Minnesota which ordered them to be sent under seal to Magistrate Judge Hillman who, by reference from the District Judge, was managing the discovery in the case. Plaintiffs moved for a confidentiality order which was allowed. (Docket # 60.)

When, on October 23, 2008, plaintiffs moved to dismiss the case voluntarily, they included a request that the MidCountry Bank records be returned to them. The district judge, after a hearing on October 30, 2008, orally allowed the motion to dismiss with conditions and ordered all confidential records to be returned to plaintiffs. A written order was docketed on November 3, 2008. Defendants filed a notice of appeal on November 13, 2008. Magistrate Judge Hillman returned the records to plaintiffs.

On December 9, 2009, more than a year after defendants' notice of appeal from the order of dismissal, defendants moved to designate as part of the record and forward to the Court of Appeals the MidCountry Bank documents (Docket # 204). On December 18, 2009, they moved for an order to plaintiffs to return them to this court (Docket # 210). Magistrate Judge Hillman denied both motions on January 29, 2010, and defendants filed objections to both rulings on February 3, 2010 (Docket # 229). Because the case was pending in the Court of Appeals, this court failed to rule on the objections.

Upon consideration of the parties' briefs, the objections are overruled. Magistrate Judge Hillman's orders, while entered well after dismissal of the case, are prop-

erly considered part of pretrial discovery and, as such, may be reconsidered by the district judge only if clearly erroneous or contrary to law, 28 U.S.C. § 636 (b)(1)(A). The magistrate judge committed no error. Contrary to defendants' assertion, brevity, even extreme brevity, does not mean, nor suggest impropriety on the part of the judge. The fact that defendants paid for the copying of these records does not confer ownership on them and until a ruling by the magistrate judge that defendants were entitled to these documents, plaintiff Shelton's right to this private information trumped defendants' right to see and distribute them.

Defendants' objections to the Magistrate Judge orders (Docket # 229) are overruled.

October 19, 2010
Date

/s/Rya W. Zobel
Rya W. Zobel
United States District Judge

APPENDIX C

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: January 29, 2010]

Magistrate Judge Timothy S. Hillman: Electronic ORDER entered denying 204 Motion to Forward Part of the Record by Gailon Arthur Joy, Robert Pickle.

Magistrate Judge Timothy S. Hillman: Electronic ORDER entered denying 210 Motion to Compel Plaintiffs' Counsel to Return the MidCountry Records by Gailon Arthur Joy, Robert Pickle.

Case no longer referred to Magistrate Judge Timothy S. Hillman.

APPENDIX D

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: January 15, 2010]

ORDER OF RECUSAL

SAYLOR, J.

Defendants Robert Pickle and Gailon Arthur Joy have filed a complaint of judicial misconduct against me in connection with this matter. An order of dismissal was entered on November 3, 2008, but the litigation has continued thereafter and certain matters remain pending. Under the circumstances, and because my impartiality might reasonably be questioned by an objective observer, I hereby recuse myself from presiding over this matter.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: January 15, 2010

APPENDIX E

United States Court of Appeals
For the First Circuit

No. 08-2457

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, ET AL., PLAINTIFFS, APPELLEES,

v.

GAILON ARTHUR JOY, ET AL., DEFENDANTS, APPELLANTS.

[Bruce M. Selya, Appellate Judge.]

ORDER OF COURT

Entered: December 4, 2009

Appellants move to enlarge the record in this appeal (Appeal No. 08-2457) to include certain documents. 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 and, accordingly, the motion to enlarge the record on appeal is denied.

We note that, in any event, appellants filed a subsequent notice of appeal from the district court's refusal to accept the proffered documents. This new appeal has been docketed in this court as *Three Angels Broadcasting Network, Inc. v. Joy*, No. 09-2615, and the documents in question are part of the record on appeal in this subsequent appeal. To the extent that appellants intend to argue that the district court erred in refusing to accept

the documents in question, that issue may be raised in Appeal No. 09-2615.

By the Court:

/s/ Margaret Carter, Chief Deputy Clerk.

APPENDIX F

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: October 26, 2009]

ORDER ON DEFENDANTS' MOTION TO RECONSIDER AND TO AMEND FINDINGS, MOTION FOR LEAVE TO FILE UNDER SEAL, AND MOTION FOR SANCTIONS

SAYLOR, J.

On October 30, 2008, pursuant to Fed. R. Civ. P. 41(a)(2), this Court granted plaintiffs' motion to dismiss without prejudice on the condition that any renewed claims brought by plaintiffs shall be brought in this Court. On November 13, 2008, defendants, proceeding *pro se*, filed a motion for costs in connection with that dismissal.

On April 13, 2009, the Court issued an order denying defendants' motion for costs. On April 15, 2009, the Court issued a further order denying defendants' motion for leave to file certain documents under seal.

On April 27, 2009, defendants filed a Motion to Reconsider and to Amend Findings. That motion sought reconsideration of the Court's Orders of April 13 and 15, 2009, and sought amendment or alteration of the judgment under Fed. R. Civ. P. 59(e) and relief from judgment under Fed. R. Civ. P. 60(b).[1] The same day, defendants filed a further Motion for Leave to File Under Seal seeking to seal certain documents filed in support of the Motion to Reconsider. Plaintiffs opposed both motions in pleadings filed on May 11, 2009. Defendants then filed, on June 24, 2009, a Motion for Sanctions under Fed. R. Civ. P. 11(c)(2), and the Court's inherent powers, alleging various misstatements in plaintiffs' opposition filings.

For the reasons stated below, all three motions will be denied.

A. Motion for Reconsideration and to Amend or Alter the Judgment

A motion under rule 59(e) to alter or amend a judgment may not be used to relitigate matters already determined by the court. *See In re Williams*, 188 B.R. 721, 725 (D. R.I. 1995). Similarly, a motion to amend may not be used to raise arguments, or to present evidence, that could reasonably have been raised or presented before the entry of judgment. *Williams v. Poulos*, 11 F.3d 271, 289 (1st Cir. 1993); *FDIC v. World Univ. Inc.*, 978 F.2d 10, 16 (1st Cir. 1992). The party seeking to amend a judgment must demonstrate a manifest error of law or present newly discovered evidence. *FDIC v. World Univ. Inc.*, 978 F.2d at 16. Reconsideration of a previous order is an extraordinary remedy, to be used sparingly when necessary to achieve justice, and with due consideration

[1]Defendants also sought relief under Fed. R. Civ. P. 52(b), which is clearly inapplicable here.

for the interests of finality and conservation of judicial resources.

Defendants make no argument, and present no evidence, that was not either raised previously or should have been raised previously. Defendants are not entitled to argue the same matter twice simply because they are unhappy with the result. Accordingly, the Court is not convinced that it should reconsider its previous decision, much less reverse it. The motion for reconsideration and to amend or alter the judgment (Docket #169) is therefore DENIED.

B. Motion for Leave to File Under Seal

Defendants' motion for leave to file under seal seeks an order permitting plaintiffs to file certain exhibits and a related affidavit under seal. The relevance of the documents is unclear, and plaintiffs have not demonstrated that the information is newly discovered and could not reasonably have been submitted with the original motion. Furthermore, to the extent that the materials are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman in this matter on April 17, 2008, they should have been returned to plaintiffs some time ago. The motion for leave to file under seal (Docket #173) is therefore DENIED.

C. Motion for Sanctions

Defendants also seek sanctions against plaintiffs under Fed. R. Civ. P. 11 and pursuant to the Court's inherent powers to redress litigation abuses. In substance, defendants contend that plaintiffs' memoranda opposing the foregoing motions were "riddled with misstatements of fact that have no evidentiary support" and, in some instances, are "demonstrably intentional." The Court has carefully reviewed defendants' submissions. It appears

to the Court that all of the disputed assertions fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions. Defendants' motion for sanctions (Docket #183) is therefore DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: October 26, 2009

APPENDIX G

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: April 15, 2009]

Judge F. Dennis Saylor, IV: Electronic ORDER entered denying 153 Motion for Leave to File under seal. The documents do not appear to be relevant and were not considered by the Court in connection with the underlying dispute.

APPENDIX H

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., PLAINTIFF,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: April 13, 2009]

ORDER ON DEFENDANT'S BILL OF COSTS

SAYLOR, J.

On October 30, 2008, pursuant to Fed. R. Civ. P. 41(a)(2), this Court granted plaintiff's motion to dismiss without prejudice on the condition that any renewed claims brought by plaintiff shall be brought in this Court.

On November 13, 2008, defendants, proceeding *pro se*, filed a motion for costs. They seek to recover from plaintiff some or all of the costs incurred during this lawsuit in order to alleviate substantial prejudice resulting from the voluntary dismissal. Defendants seek reimbursement for the following costs: (1) mileage attributable to two fact-finding trips by defendant Pickle, in the amount of $993.62; (2) various miscellaneous expenditures by defendant Pickle over the course of the lawsuit, in the amount of $4,614.09; (3) costs for copies made on defendant Pickle's equipment for filing, in the amount of

$206.70; (4) cost of time invested in research and motion preparation by defendant Pickle, in the amount of $30,114.75; (5) invoices from an expert retained by the defendants, in the amount of $20,342.32; and (6) invoices from an attorney in the amount of $54,266.94.

Plaintiff argues that none of the items claimed as costs by the defendant qualify as costs under 28 U.S.C. § 1920. Plaintiff further argues that the costs are not necessary to avoid prejudice arising from the dismissal because the defendants have not suffered any form of legal prejudice that would be lessened by an award of costs and fees.

Defendants were not the prevailing party, so recovery of costs is not governed by Fed. R. Civ. P. 54(d). When granting dismissal without prejudice under Fed. R. Civ. P. 41(a)(2), the decision of whether to impose costs on the plaintiff lies within the discretion of the judge. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981) (finding no abuse of discretion in court's failure to impose any terms or conditions to voluntary dismissal when parties alleged abuse of the discovery process). Rule 41(a)(2) does not require the imposition of costs, but it is often considered necessary for the protection of the defendant. *Id.*

Recovery of costs is governed by 28 U.S.C. § 1920, which states that the "judge or clerk of any court of the United States may tax as costs" various fees, including:

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and wit-

nesses;

(4) Fees for exemplification and copies of papers necessarily obtained for use in the case; [and]

(5) Docket fees . . . .

28 U.S.C. § 1920.

Four items on defendants' list of requested costs are neither attorneys' fees nor costs delineated in § 1920: (1) mileage attributable to two fact-finding trips by defendant Pickle; (2) various miscellaneous expenditures by defendant Pickle over the course of this lawsuit; (3) cost of time invested in research and motion preparation by defendant Pickle; or (4) invoices from an expert retained by the defendants.[1] Accordingly, the defendants are not entitled to recover those costs. What remains are (1) costs for copies made on defendant Pickle's equipment for filings and (2) attorney's fees.

The Court concludes that costs should not be awarded. While the Court is sympathetic to the time and money expended by the defendants in preparing their defense, the Court addressed any potential legal prejudice when the dismissal was conditioned upon the fact

[1]Although § 1920 provides for witness fees, expert witness fees are not recoverable beyond a statutorily prescribed per diem. *See Denny v. Westfield State College*, 880 F.2d 1465, 1468 (1st Cir. 1989) (citing the Supreme Court's decision in *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987), for the proposition that Fed. R. Civ. P. 54(d) does "not constitute an independent source of judicial discretion sufficient to shift the burden of expert witness fees"); *Walden v. City of Providence*, 2008 U.S. Dist. LEXIS 82002, at *34-*35 (D.R.I. Oct. 15, 2008) ("The First Circuit has declined to allow the fees of expert witnesses in excess of the witness fees provided in 28 U.S.C. § 1821.") (collecting cases). Thus, in accordance with § 1821, defendants would only be allowed to recover an "attendance fee of $40 per day for each day" of a witness's appearance in court.

that any renewed claims brought by plaintiff shall be brought in this Court.

The decision whether to impose attorneys' fees also lies within the discretion of the judge. *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973); *Less v. Berkshire Hous. Servs.*, 2000 U.S. Dist. LEXIS 13700, at *15 (D. Mass. Aug. 18, 2000). Attorneys' fees are awarded less frequently than other litigation costs. Courts have declined to award attorney fees unless there is evidence that the suit was brought "to harass, embarrass, or abuse either the named defendants or the civil process," or that a plaintiff "deliberately sought to increase the defendants' costs by unduly protracting the litigation." *See Less* at *16, citing *Blackburn*, 60 F.R.D. at 198. There is nothing in the record to suggest that the plaintiffs filed this suit simply to harass, embarrass, or abuse the defendants or that they sought to increase their costs, and the Court sees no other reason to award attorneys' fees under the circumstances.

Accordingly, Defendant's Motion to Impose Costs is DENIED.

So Ordered.

/s/ F. Dennis Saylor
F. Dennis Saylor IV
United States District Judge

Dated: April 13, 2009

APPENDIX I

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING, ET AL., PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: November 3, 2008]

ORDER OF DISMISSAL

Saylor, D. J.

In accordance with the Court's Order on 10/30/08, granting the plaintiff's motion to dismiss, it is hereby ORDERED that the above entitled action be and hereby is dismissed without prejudice.

By the Court,

11/3/08	/s/ Martin Castles
Date	Deputy Clerk

APPENDIX J

United States District Court
District of Massachusetts

No. 07cv40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

vs.

GAILON ARTHUR JOY, AND ROBERT PICKLE, DEFENDANTS.

[Held: October 30, 2008;
Entered: November 28, 2008]

BEFORE: The Honorable F. Dennis Saylor, IV

STATUS CONFERENCE/MOTION FOR VOLUNTARY DISMISSAL [*3]

PROCEEDINGS

THE CLERK: Case No. 07-40098, Three Angels Broadcasting versus Joy.

Counsel and defendants, please identify yourself for the record.

MR. SIMPSON: This is M. Gregory Simpson, on behalf of the plaintiffs, Three Angels Broadcasting Network and Danny Lee Shelton.

MR. PUCCI: And John Pucci here in chambers, on behalf of the same parties.

THE COURT: Good afternoon.

MR. JOY: Gailon Arthur Joy, pro se.

THE COURT: Good afternoon.

MR. PICKLE: And Bob Pickle, pro se.

THE COURT: All right. Good afternoon.

All right. This is — it was originally scheduled as a status conference in this case. I now have pending a motion for a voluntary dismissal.

Do the defendants wish to be heard on that? I've read the papers.

Mr. Pickle and Mr. Joy?

MR. JOY: Yes, sir.

THE COURT: Who — who's this?

MR. JOY: I'm sorry. This is Mr. Joy, sir. **[*4]**

THE COURT: Yes.

MR. JOY: Your Honor, I think you'll find that we have filed an opposition, including a memorandum and affidavits along with exhibits.

THE COURT: When was that filed?

MR. JOY: It was —

THE COURT: Oh, I'm sorry. Yes, I did see it. I'm sorry. Yes.

MR. JOY: I'm sorry.

THE COURT: Yes. Okay.

MR. JOY: In summary, the difficulty here is that this is really just another maneuver on the part of the

plaintiffs to very simply avoid their duty of discovery, and they're doing it at a point in the case where, frankly, we should have been close to a completion, which the case law clearly indicates is an inappropriate situation and prejudices the defendants' scenario, particularly reserve the right to relitigate at a future point.

So, for that reason, we feel it's imperative that the — that the — obviously, the dismissal be denied to preserve our rights, obviously, and to prevent the — the great prejudice that has incurred to us, if this had to be relitigated in the future, which frankly we believe it's going to have to be.

THE COURT: All right. Anything else? **[*5]**

MR. SIMPSON: This is Mr. Simpson —

THE COURT: Well, before I —

MR. SIMPSON: Sure.

THE COURT: Anything else from the defendants?

MR. JOY: Yes.

THE COURT: Okay.

MR. JOY: I think — you know, I think we've outlined specifically our basis for that in the memorandum, in support — or pardon me — in our opposition, and it's quite exhaustive. I'm sure you don't want us to go through that, but in any event, I think it pretty well outlines the case law as well as the basis for the case law applying in this particular case where it's already over 18 months in, and we're getting ready for trial.

THE COURT: All right. Mr. Simpson, why should this not be with prejudice, if I dismiss it?

MR. SIMPSON: Well, let me just begin by saying

that the — that I think that is the issue whether it should be with or without prejudice. If this is — to my reading of the case law, it's a factor of the test, so it's within the discretion of the court to determine whether it should be with or without prejudice.

The case looks a lot older than it really is, because it was filed in May of '07, and you had us submit interrogatories and some documents exchanged and mandatory **[*6]** discovery exchange; and then Mr. Joy filed for bankruptcy, and there was a stay in effect until almost December; and then there was a four-month period where we were working on getting that confidentiality order out. When that was finally signed, and, in fact, it was already April, and then there has been a period of document discovery since then, and depositions were scheduled, and they were canceled, because there was — because the document exchange had not been completed.

So, it's not as old as — as the date of filing would indicate. We're actually at the preliminary stages in terms of discovery. The factor test, if you run through it, and I'm sure you will, would indicate that it should be, I think, without prejudice. If it's with prejudice, I don't think the litigation ends, because there has been repeated threats, including in the brief that was just filed today by Mr. Pickle and Mr. Joy, that there will be a malicious prosecution counterclaim or a new lawsuit filed raising that issue, Judge; and so if the case is dismissed without prejudice, there would — the elements of that tort would not be present, because one of the elements of a malicious prosecution tort is dismissal of the underlying — there's a favorable resolution of the underlying lawsuit.

So, if the lawsuit is resolved with prejudice, that could give them one of the elements necessary to continue this

— this dispute, and the dispute would not end. **[*7]**

The question, I believe, for the court is a legal matter; and so, that would be a strategic or a tactical reason why the case would not end. There would still be litigation if the case were not dismissed without prejudice.

As a legal matter, Rule 41 is concerned with alleviating any prejudice to the defendants, and the Court is empowered to impose such terms and conditions as it feels will alleviate any prejudice that results from a dismissal. So, the question really is whether dismissal with prejudice is necessary to alleviate any prejudice.

And the cases say that in talking about prejudice, we're not talking about — we're not talking about the prospect of a second lawsuit. That's not the kind of prejudice that the rule is concerned with, nor is it concerned with a technical advantage to the plaintiff. That should not bar dismissal. That's not the kind of prejudice we're talking about in legal prejudice; that is, are they worse off as a legal matter if it's dismissed with prejudice versus without prejudice. In other words, is it necessary to dismiss it with prejudice in order to alleviate them from legal prejudice, and the answer to that is just simply no. They are no worse off than they were before the lawsuit began. They're in exactly the same legal position whether — in fact, they're in a better position legally than when the case began, because the three years statute of limitations for defamation has expired as to some of **[*8]** the, if not all, of the original statements that they've made.

So, there is no legal prejudice, which is what the rule is concerned about, if the case were to be dismissed without prejudice.

THE COURT: Well, my concern, obviously, is I — I

strongly encourage both sides to, if that's what they want to do, to walk away from this dispute in whole or in part. My concern, obviously, is I don't know, and I'm just — I'm not stating this because I — I mean this in a pejorative way, or I don't — I have any particular reason to distrust you, but I'm concerned that the same claim or — or — or a similar claim could simply be brought in some other forum, and that's the most obvious danger to me is that there's, you know, the possibility of some tactical issue going on here where plaintiffs decide they'd rather be in a different court.

MR. PICKLE: Your Honor, could I address that?

THE COURT: Well, let me hear from Mr. Simpson first.

MR. SIMPSON: Well, I — I can assure you that that's not the concern. The only concern is that these gentlemen have indicated throughout and in the most recent filing that they intend to sue us for malicious prosecution, and they said that they were going to file counterclaims in this lawsuit, and they said then they were going to — now, they said they're going to commence a separate lawsuit, but if we don't have at least a prospect of raising affirmative claims against them, I think **[*9]** that would keep them in check. Maybe it would keep them in check. They would have to think twice about filing a lawsuit. I can tell you that there is no forum shopping going on, and I think Rule 41 also has some — something to say about that.

The costs — if we bring a second lawsuit after dismissing the first one, costs would ordinarily be imposed. We would have to reimburse them for all of that that occurred in the first lawsuit. So, there's — so, there's mechanisms for dealing with that, and I think we would

have quite a bit of explaining to do to a subsequent court if we were — if we were to pull — pull a fast one, and I can just tell you that that's not — that's not the intent.

THE COURT: All right. I'm sorry. Do one of the defendants wish to be heard?

MR. PICKLE: Yes, your Honor. This is Bob Pickle.

THE COURT: Yes.

MR. PICKLE: In our memorandum, we've outlined eight different factors, I believe, that are supposed to be taken into consideration regarding legal prejudice or that different circuits have taken into consideration. One of those is adequacy of the plaintiffs' explanation for the need to dismiss; and one of the explanations they gave is that they've achieved one of the goals of their — their suit. That is just one — one aspect that we bring out in the memorandum. And they say that through the bankruptcy, they bought the domain **[*10]** names, save3abn.com and save3abn.org. What they don't tell the Court is that there are at least 16 times as many save3abn websites now than when the plaintiffs filed suit, and these other websites were in operation prior to their purchase of save3abn.com.

And so I do have definite concern of a dismissal of this case without prejudice, and their referencing, well, you know, they say that, you know, a technical — if they gain a technical advantage, that shouldn't be an obstacle. You know, that just raises red flags to me. And what you express about them raising the same claims in another forum, I really don't want to face that. I'd like to have the — these issues resolved once and for all.

MR. SIMPSON: May I just say, your Honor —

THE COURT: Yes.

MR. SIMPSON: — I wouldn't oppose the court imposing a restriction that if we were to bring an affirmative claim arising out of the same events that it would have to be brought in the same court. That would be — that would seem perfectly fine and appropriate as a remedy as a — to make sure we don't do that. I think that if — if the plaintiffs — I mean the defendants here, Mr. Pickle and Mr. Joy, were to bring a separate lawsuit for malicious prosecution, it probably would have to be brought in state court, because they wouldn't meet — well, I'm just thinking they wouldn't have diversity or **[*11]** jurisdiction. Maybe they would be able to get jurisdiction in the federal court. So, it's not — it's not — if we were — if the plaintiffs were to want to raise their defamation claims by way of a counterclaim, as a defensive matter, we couldn't guarantee that it would be in the same court. It would be in your court, but I think if we — I think the court could impose a restriction on dismissal that if we were to refile the same claims or any claims arising out of the same operative set of facts, it would have to be brought in the same court. I think that would be appropriate.

THE COURT: All right. Here's what I'm going to do. I'm going to grant the motion. I'm going to dismiss it without prejudice and with some conditions, which include the condition that any claims brought by the plaintiffs, based on the same facts and circumstances or — or — or nucleus of operative events may only be brought in the Central Division of Massachusetts, but let me be more formal about that.

The motion for voluntary dismissal is granted. I order that this lawsuit be dismissed without prejudice. I make no finding of any kind as to the merits or lack of merits of any of the claims or factual defenses set forth

in the pleadings, and I'm dismissing the claim principally based on the representation by the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can accomplish — or achieve any meaningful relief **[*12]** based on the facts and circumstances as they now exist, including, but not limited to, the bankruptcy of one of the defendants.

I am imposing this dismissal with the condition that any claim or claims brought by plaintiffs based on the same or similar facts and circumstances may only be brought in the Central Division of the District of Massachusetts, so that if this lawsuit in some ways comes back to life, it will be in front of me, and I'll have all the facts and circumstances at my disposal at that point and can make such orders as I think are just under the circumstances.

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

Destruction of the documents will only be permitted if consistent with the terms of the order; and similarly, any photocopying or other copying of any such materials will only be permitted if permitted under that order.

Any pending third-party subpoenas are deemed moot, and the party will — any party having issued such a third-party subpoena will take reasonable steps to notify the recipient of the subpoena that the lawsuit has been dismissed, and the subpoenas are no longer in effect.

MR. PICKLE: Your Honor, could I — could I — **[*13]**

THE COURT: Let me — let me just finish. And any

records that were delivered under seal and that are in the custody of the magistrate judge shall be returned to the party that produced those documents.

Yes, sir. Is this Mr. Pickle?

MR. PICKLE: Yes, it is.

THE COURT: Yes.

MR. PICKLE: Your Honor, one of the concerns that the case law brings up is that — see — a voluntarily dismissal without prejudice, one of the questions is well, will there be plain legal prejudice to the defendants, and one of the things that is, like, undue expense.

We've had — and one of the factors they look at is amount of time and effort and expense the defendants have expended. We bring this out in our memorandum. Okay. What the — what the plaintiffs are doing — see, our basis for counterclaim —

THE COURT: Hold on. Hold on, Mr. Pickle. There's no counterclaim filed, as I understand; is that right?

MR. PUCCI: Right.

THE COURT: In this case.

MR. PICKLE: That is correct, your Honor.

THE COURT: You know, and — and, you know, whether you have some future claim against the plaintiffs, I make no comment on of any kind whatsoever. **[*14]**

MR. PICKLE: It is —

THE COURT: In terms of — just let — let me, if I can. Just in terms of your costs and expense and attorney's fees, my understanding is that but for a brief ap-

pearance by Mr. Heal, I think, at the beginning of the litigation, you've been proceeding pro se; and let me add as a further condition that I will at least permit defendants to seek recovery of reasonable costs, fees, expenses — reasonable cost of attorney's fees or expenses, if they file something within 21 days of the date of this order. I'm not promising that I will allow those to be paid, and I'll permit plaintiffs to oppose it, but I will give you the opportunity to make that argument formally and with a specific itemized detailing of your costs and expenses.

MR. PICKLE: Okay. Your Honor, if the discovery in this case and work product is not transferable to — to the other — the future actions, either by the plaintiff or ourselves, that would prejudice the defendants.

THE COURT: Well, it's — it is transferable, unless it's subject to the confidentiality order. If it's subject to the confidentiality order, you have to return it, or do whatever the order says you're supposed to do with it; and, you know, you have gained presumably a certain amount of information. You're not required to erase it from your brain, and you can use it consistent with the terms of the order **[*15]** as — as may be permitted by that order, but that's —

MR. PICKLE: That would mean, your Honor, that we would have to spend months and months litigating again to get the documents from Remnant, for example.

THE COURT: There is going to be no lawsuit pending. You'll have — we'll have to wait and see how that plays out and in what court.

MR. PICKLE: And the one other thing, your Honor, is that the MidCountry Bank records, as far as I know, they were never designated confidential by MidCountry Bank, and it cost us $3,500 to get those.

THE COURT: Again, I'm giving you 21 days to file something with me setting forth what you believe are your reasonable costs, expenses, and attorney's fees incurred in this litigation.

Again, I'm not promising I'm going to pay any of them, or permit them to be paid, but I will entertain any filing you wish to make.

MR. JOY: Your Honor, are you looking for — this is now Gailon Joy again.

Are you looking for our motion's total cost or —

THE COURT: Please characterize it as a motion, so that it — under the computer system, it — it's flagged as something requiring my action.

MR. JOY: Thank you. **[*16]**

THE COURT: But you can, you know, designate it however you wish or think it's appropriate, and I'll permit plaintiffs to oppose whatever it is you file, and I'll make whatever decision I think is right under the circumstances. I'll simply give you that opportunity is all I'm doing at this point. Okay?

And if I do award — decide to award any kind of costs or expenses or fees, it will obviously be a further condition of the order of voluntary dismissal, but we'll — we'll take that up as it comes.

MR. SIMPSON: Thank you, your Honor.

THE COURT: And I'll retain jurisdiction for that purpose.

Okay. All right. If there's nothing further, then we'll stand in recess.

MR. SIMPSON: Nothing further from the plaintiffs.

THE COURT: Okay.

MR. JOY: Your Honor, I do have another question. I was noticing this week, I think it was, that there are three items on the docket that aren't visible on Pacer. Nos. — I think it's Nos. 22, 28, and 88, and at some point are those unsealed?

THE COURT: Not unless someone — if they're sealed, they're not going to be unsealed, unless someone moves to unseal them. **[*17]**

MR. JOY: Thank you, your Honor.

MR. PICKLE: And, your Honor, this is Bob Pickle again.

Attorney Simpson told me on Friday, the 17th — well, he called me up and made a settlement proposal, and one thing he said was that if we didn't agree, you know, to settle, that one thing that the plaintiffs could do is to file a motion to dismiss, and it would be just kind of automatic, and there wouldn't be anything further we could do about it. So, I point blank asked him, Are you going to file a — a motion to dismiss? And he told me no. And then six days later, he went ahead and filed it, and it just took us by surprise.

In our opinion, he didn't follow — and he never talked to Mr. Joy about it at all. In our opinion, he did not comply with local Rule 7.1.

MR. SIMPSON: May I address that, your Honor?

THE COURT: Very — very briefly, yes.

MR. SIMPSON: Just, it's a certain Alice in Wonderland quality to this whole litigation and hearing my conversations with Mr. Pickle translated back to you, your Honor, that's not at all what the conversation was like.

I read the rule to Mr. Pickle, Rule 41, including the terms and conditions, and we discussed whether there was any possible — possible basis on which they would agree to the dismissal of the lawsuit. He said that he would speak with Mr. **[*18]** Joy over the weekend, get back to me on Monday, if there was an interest; and he didn't get back to me and continued to move forward with the lawsuit.

THE COURT: All right. All right.

MR. SIMPSON: So that's — that's all I want to say.

THE COURT: Okay. I've heard enough. My order will issue. It will be an electronic order, as indicated, and we'll stand in recess.

Thank you.

MR. SIMPSON: Thank you, Judge.

MR. JOY: Thank you.

MR. SIMPSON: Bye-bye.

(At 3:33 p.m., Court was adjourned.)

APPENDIX K

United States District Court
For the Southern District of Illinois

No. 08-MC-00016

THREE ANGELS BROADCASTING NETWORK, PLAINTIFF,

vs.

GAILON ARTHUR JOY, ROBERT PICKLE, DEFENDANTS.

October 22, 2008
[Entered in S.D.Ill.: November 17, 2008;
Entered in D.Mass.: December 8, 2008]

TELEPHONIC MOTION HEARING
Before The Honorable Philip M. Frazier
United States District Court Magistrate Judge

* * *

[p. 9] MR. PICKLE: This lawsuit — I'll make this really brief. This lawsuit was conceived as we believe as retaliation for us blowing the whistle on Dan Shelton's coverup on child molestation allegations. By the time they filed this suit, there was too much evidence regarding that so they tried to stay away from that, and they did spend a bit of time talking about the dealing with the financial allegations.

You know, one thing that the complaint says is that we have lied by saying that the officers and directors of 3ABN have privately enriched themselves in violation of the Internal Revenue Code.

THE COURT: Did you make those statements?

MR. PICKLE: I would be hard pressed, Your Honor, to find anything that said, that stated that way.

THE COURT: Well, let me ask you this: Those are pretty broad. Are the allegations — let me go back here to Mr. Simpson. Does your complaint state it that broadly, that there were just general allegations of financial impropriety?

MR. SIMPSON: I'm looking for the one that says that. They say Dashawn (phonetic) purchase. I'm reading from the complaint. It's the paragraphs 46 and 48 of the **[*10]** complaint are where the specific allegations are of defamation. I think that that should be an attachment to something that you've received.

There are some that are broad, and there are some that are narrow, Judge. And they've made these allegations broadly, and then we've asked them for what exactly are they talking about. You know, personally enrich themselves as officers and directors. That is an allegation, the one he just quoted. * * *

[p. 11] THE COURT: * * * But it seems to me that if you are going to be successful in proving these, in proving defamation, you are going to have to narrow it down to some specific statements. Instead, you just can't go in at a trial, for example, and say, "Well, they generally implied that we were benefiting personally in violation of IRS rules." That's not going to get to a jury. You're going to have to come up with specifics.

* * *

[p. 12] What you need to do is force them to narrow exactly what statements and when they were made and how they were made that they believe to be defamatory.

They cannot be successful in their case just by generally alleging that you and Mr. Joy made some generalized statements or implications about the folks at Three Angels Broadcasting in retaliation for you supposedly blowing the whistle on some family problems that Mr. Shelton had that this was defamatory. **[*13]**

All right. Just because they — I mean I can say, well, generally speaking, I believe that so and so cheats on his taxes. Well, there's going to have to be a little bit more than that. Okay?

Now, obviously, they're trying to back you down for some reason. I don't know to whom these statements were made or how wide. How widely are these statements circulated?

* * *

[p. 22] THE COURT: I have no doubt that you are entitled to a large amount of the financial information that pertains to Three Angels Broadcasting, and it's — anything concerning these transactions that were referred to surrounding the supposed defamatory statements. And, you know, there's just **[*23]** no easy or cheap way to do this.

You know, I kind of think Three Angels probably should have thought this through a little bit. My guess is that Three Angels probably thought that these guys had probably backed down pretty quick when this defamation lawsuit was filed. And that I understand that organizations like Three Angels operate a lot of their fiscal viability * * * depends upon regular contributions from people who are frequent listeners and watchers, and these kinds of little nasty bits such as of the revelation involving Mr. Shelton's brother tend to or any impropriety on behalf of Mr. Shelton himself would probably tend

to erode some of those. And so a nice public way of refuting those statements is by filing a defamation action, and, you know, saying it ain't so, Joe.

But the problem is, is now Three Angels has opened up a very large can of worms here. And it's a very large can of worms. And there are a lot of different ways that financial impropriety could be disguised by clever bookkeeping. There are a lot of — I'm not saying that that's happened here. Don't anybody get all flustered. I'm just saying that, you know, at this stage of the proceedings, we have to presume that anything is possible. Anything is provable. And there are a number of other transactions, changes in accounting methods, any number of these that might **[*24]** be relevant to prove that on a particular day that something happened.

* * *

[p. 29] MR. SIMPSON: * * * And Mr. Pickle and I have been in negotiations talking at kind of a pre — before we respond to **[*30]** it formally and then our response is due in the very near future to their document requests. * * *

* * *

[p. 32] THE COURT: Let me ask you a question here. Would it be relevant or at least interesting to you if you were on the other side of this case, Mr. Simpson, if it turns out that the documents that the accountant has are different from the documents that actually exist or maintained by Three Angels Broadcasting, that perhaps if Three Angels Broadcasting was selective about the documents they turn over to their accountants?

MR. SIMPSON: If it related — well, how is that — I would certainly want the information for the reasons that you said. * * *

[p. 33] THE COURT: Mr. Shelton, though — here's the problem. Mr. Shelton is not some disgruntled clerk who is stealing out of the small, you know, cubby that may be relegated to a particular file clerk or something. You know, Mr. Shelton has access to the whole piggy bank. And I'm not saying, obviously, that he is or was doing anything, but what I'm saying is that if a person who has access to everything were to be using it for private gain, then it is not unreasonable to believe that perhaps other instances might exist where the corporate entity was used improperly for private gain, and that would tend to, even if it had nothing to do.

Let's just say for argument sake that further investigation into this were to disclose that on a different date in a different year that Mr. Shelton stole a hundred thousand dollars from Three Angels Broadcasting using a completely different means than — that would be relevant to the defamation action now, wouldn't it?

* * *

[p. 34] MR. SIMPSON: Let me go back to where you were originally going. What's going to happen now is that these defendants are going to get a subset of the financial records, and what subset they get is going to be determined based on how they craft these second set of document requests, and which and how Judge Hillman narrows them if we can't agree how they should be interpreted. * * *

* * *

[p. 35] THE COURT: I hear you. Gray Hunter wouldn't. Has Three Angels provided that information?

MR. SIMPSON: We've provided them with thousands of pages of documents. And we are not yet, the time to respond to their narrow document request has

not yet expired, but in the next —

THE COURT: In that case —

MR. SIMPSON: — in the next production we will either identify where we've already produced it or produce additional records that pertain to the specific transactions that they identified.

* * *

APPENDIX L

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC.,
DANNY LEE SHELTON, PLAINTIFFS,

vs.

GAILON ARTHUR JOY, ROBERT PICKLE, DEFENDANTS.

Amended Order

September 11, 2008

Hillman, M.J.

Nature of the Case

On April 6, 2007, Three Angels Broadcasting Network, Inc. (hereinafter "3ABN") and Danny Lee Shelton (hereinafter "Shelton") filed a complaint against Gailon Arthur Joy (hereinafter "Joy") and Robert Pickle (hereinafter "Pickle") for trademark infringement, trademark dilution, defamation, and intentional interference with advantageous economic prospective business advantage.

Nature of the Proceeding

By Order of Reference dated July 10, 2008, Defendant Robert Pickle's Motion to Compel Three Angels Broadcasting Network, Inc. To Produce Documents and Things, and His Motion to Compel Danny Lee Shelton To Produce Documents and Things (Docket No. 61), and Plaintiff's Motion for Protective Order (Docket No. 74)

have been referred to me for disposition.

Background

On November 29, 2007, Pickle served a request to produce under Federal Rule of Civil Procedure 34(a) on plaintiff 3ABN, which contained 36 requests for production of documents. On December 7, 2007, Pickle served a second request to produce documents on Shelton, which contains 44 requests for production of documents. Pickle contends that plaintiffs have failed to produce any documents responsive to his requests. Instead, plaintiffs have asserted that all of the documents requested by Pickle are irrelevant, confidential or privileged. The plaintiffs have filed an opposition to the motion to compel. In their opposition, plaintiffs contend that they have produced over twelve thousand non-confidential documents responsive to Pickle's requests, and at the time they filed their opposition, were working to produce confidential documents, subject to the Confidentiality and Protective Order, issued by this Court on April 17, 2008. A hearing was held on the motion on July 24, 2008.

Plaintiff has moved this court for a protective order and for judicial intervention into the discovery process. They assign as reasons for the protective order a series of subpoenas ostensibly issued under Fed.R.Civ.P. 45 on six non-parties to this litigation. Several of those subpoena's have resulted in judicial action or motions to quash in the districts in which they were served.

Discussion

Pickle's production requests and Rule 45 subpoenas appears to be overbroad and far-reaching. Many of the requests are prefaced with the word "all" and thus, fail to describe with particularity each document or thing requested. For example, defendant Pickle seeks "all types

of phone records or other documents enumerating phone calls made by 3ABN officers from January 1, 2003, onward . . .” He also seeks “all” minutes and other documents of the 3ABN Board for the entire length of time of 3ABN’s existence, and on an ongoing basis.” Furthermore, since the parties have not complied with L.R. 37.1 there is no listing of the specific discovery request at issue and their position with respect to it. This failure to comply with L.R. 37.1 results in the referenced regularity of Defendant’s complaints and not a request by request breakdown of why information is sought and the argument for its production. Given the broad definitions utilized by Pickle[1], it is apparent that a substantial number of documents which would fall within the subject matter of the requests would be irrelevant to any claims or defenses, and otherwise outside of the scope of discoverable information under Federal Rule of Civil Procedure 26(b)(1). At the same time, it is apparent from the hearing that plaintiffs are taking much too narrow a view as to whether documents or other things in their possession may be relevant to their claims and/or defendants’ defenses. The plaintiffs also assert that they are about to serve additional responsive documents on the defendants subject to the Confidentiality Agreement. Plaintiffs should not have to be reminded that it is they who have initiated this action and as part of their claims, they are seeking significant monetary damages from the defendants. Documents which they may deem irrelevant to the specific statements they allege were defamatory may well be relevant to put the statements in context, or rel-

[1]At the hearing, defendants indicated that they adopted the definitions utilized by the plaintiffs in their discovery requests. However, defendants did not file a motion for protective order for purposes of narrowing the plaintiffs’ requests and therefore, this Court did not have the opportunity to address whether those requests were overly broad.

evant on the issue of whether the plaintiffs have actually been damaged by the alleged statements. If the plaintiffs fail to produce documents which are relevant to their claims or potential defenses, then they may be subject to sanctions, including limiting evidence which they may introduce at trial, or limiting the scope of any damages to which they could be entitled should they prevail.

The defendants also contend that the plaintiffs' responses are inadequate because they have simply produced volumes of documents without specifying the requests as to which the documents are responsive. The plaintiffs have an obligation to produce the documents as kept in the usual course of business or organize and label them to correspond to the categories of the request. See Fed. R. Civ. P. 34(b)(2)(E)(i). From the parties' submissions and the issues raised during the hearing, the Court has doubts as to whether the plaintiffs have fulfilled their obligation under Rule 34(b)(2)(E)(i).

In light of both parties' noncompliance with the applicable discovery rules, I am denying Pickle's motion to compel, without prejudice, and ordering that defendants re-serve their Rule 34 requests for production of documents and things. The defendants shall be limited to 25 requests for each defendant (including subparts) which shall be tailored to comply with this Court's rules governing discoverable information. The defendants shall serve their revised requests on or before September 26, 2008. Any additional Rule 34 requests may be made only with leave of the Court. The plaintiffs shall respond to such requests within thirty (30) days and such responses shall be indexed and indicate which documents respond to which requests.

With respect to Plaintiff's motion for a protective order, I am allowing that motion with respect to the further

filing of any subpoenas under Fed.R.Civ.P. 45. Any further subpoenas, by any party to this action must only be issued upon leave of the court. I will note that as recently as this week the defendant's have moved for leave of court to issue subpoenas citing the pending motion for protective order. They are to be commended for exercising an abundance of caution.

All further motions to compel filed with this Court shall comply with both the Federal Rules of Civil Procedure and this Court's Local Rules and, in particular, LR, D.Mass. 37.1.

Conclusion

It is ordered that:

Defendant Robert Pickle's Motion to Compel Three Angels Broadcasting Network, Inc. to Produce Documents and Things and His Motion to Compel Danny Lee Shelton to Produce Documents and Things (Docket No. 61) is denied without prejudice. On or before September 26, 2008 defendants shall serve on the plaintiffs a revised request for production of documents pursuant to Fed. R. Civ. P. 34, in accordance with this Order.

Plaintiff's Motion for Protective Order (Docket No. 74), allowed. No party is to issue subpoenas to any non-party under Fed.R.Civ.P. 45 without leave of the court. In all other respects, the Plaintiff's motion is denied.

/s/ Timothy S. Hillman
Timothy S. Hillman
Magistrate Judge

APPENDIX M

United States District Court
Western District of Michigan
Southern Division

No. 1:08-mc-00003

IN RE: OUT OF DISTRICT SUBPOENA.

[Entered in W.D.Mich.: June 20, 2008;
Entered in D.Mass.: June 25, 2008]

ORDER

This matter is before the Court on "Defendant's Motion to Compel" filed pursuant to a third party subpoena issued from this district (Dkt. 2). The matter was heard on June 16, 2008. The third party subpoena arises from a case pending in the District of Massachusetts brought by Three Angels Broadcasting Network, Inc. and Danny Lee Shelton against Gailon Arthur Joy and Robert Pickle for alleged defamation. Documents are sought by defendants Joy and Pickle from Remnant Publications, which is located in the Western District of Michigan. For reasons stated on the record at the hearing held June 16, 2008:

IT IS HEREBY ORDERED that Defendant's Motion to Compel (Dkt. 2) is **granted in part and denied in part.** Specifically, the motion is granted as to documents described in the subpoena involving Three Angels Broadcasting Network, Inc. and Danny Lee Shelton. The motion is denied as to other entities.

IT IS FURTHER ORDERED that Remnant Publications, Inc. shall serve responsive documents on Defendants no later than 14 days from the date of this Order. These documents shall be subject to the Protective Order already entered in the underlying case. Further, on reflection, the Court will not order those documents to be submitted for *in camera* review to the Massachusetts court because the relevance of the documents seems clear and there is already a protective order in the Massachusetts case.

Date: June 20, 2008

/s/ Ellen S. Carmody
Ellen S. Carmody
United States Magistrate Judge

APPENDIX N

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC.,
DANNY LEE SHELTON, PLAINTIFF,

v.

GAILON ARTHUR JOY, ROBERT PICKLE, DEFENDANTS.

[Entered: April 18, 2008]

CONFIDENTIALITY AND PROTECTIVE ORDER

THE ABOVE ENTITLED MATTER came before me for hearing on March 7, 2008 upon Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton's Motion for Protective Order (Document #40). On March 10, 2008, I invited both parties to submit a proposed Confidentiality Order. Based upon the pleadings, the written and oral submissions of the parties, the proceedings before the Court, and the file and record in this matter, this Court hereby ORDERS that, pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the following protections, directives, and procedures shall govern the discovery and production of documents, information and materials by any person or entity in relation to this case.

This Order governs all documents and information produced, or to be produced by any party or third party

in connection with this litigation, including documents and things produced or to be produced, any answers to interrogatories, responses to requests for admissions, and deposition and other testimony disclosed through discovery in this case (the "Subject Discovery Materials"). The Subject Discovery Materials will be used for no other purpose than this litigation. "Confidential Information" as used herein means any type or classification of information in any of the Subject Discovery Materials which is designated as **"CONFIDENTIAL"** by one of the parties, or a third party (the "designating party"), in accordance with this Order.

Confidential Designation

1. Whenever the designating party determines that a disclosure of the Subject Discovery Materials will reveal matters that such party believes in good faith are not generally known or readily available to the public, and that such party deems to constitute proprietary information, confidential business or commercial information, and/or trade secrets relating to its business, such party has the right to designate such information as confidential. In the case of written information, this designation must be made by marking the page or pages where such Confidential Information is contained, **"CONFIDENTIAL"**, either prior to its disclosure to the other party (the "receiving party"), or at the time a copy(ies) of such written information is provided to the receiving party.

Any party wishing to designate a document as Confidential Information shall first discuss with the requesting party whether the production of the requested information in redacted form would be satisfactory, or if some other accommodation regarding the document(s) can be reached. If after consultation, the parties are unable to come to agreement regarding the production in

redacted, or other form; they shall confer per Local Rule 37.1. Thereafter, the requesting party may move to compel the production of the document(s) at issue and the responding party shall file the documents at issue with the court under seal per the provisions of Local Rule 7.2. as part of their opposition to the motion to compel.

Depositions

2. In the case of a deposition or other testimony, testimony containing Confidential Information shall be designated **"CONFIDENTIAL"** either at the time of testimony or within two weeks of receipt of the written transcript. Until such designations are made, the transcript must not be disclosed by the non-designating party to persons other than those persons named or approved according to Paragraph 4 herein.

At any time during the taking of a deposition on oral examination, counsel for the designating party may state that a particular line of questioning should be treated as **"CONFIDENTIAL"** as in the case of written disclosures of information covered by Paragraph 1 above. Counsel for the parties shall then determine whether the line of questioning should not be carried out at that particular time, or whether it should be carried out with the following conditions:

a. The reporter may be instructed to transcribe the questions and answers separate from the transcript for the remainder of the deposition, which pages shall be marked as **"CONFIDENTIAL"**.

b. During any time that the line of questioning involving Confidential Information is being followed, any and all representatives of the receiving party other than counsel, parties, and outside experts subject to the terms of this Agreement as evidenced by the

signing of a document in the form of **Exhibit A** attached hereto and served on opposing counsel prior to disclosure of such Confidential Information may be excluded from the deposition.

c. Any other conditions mutually agreeable to the parties to protect the confidential status of the information.

Use of Confidential Information

3. If any non-designating party or their counsel intends to use at trial, or for the purpose of any motion filed with the Court, any documents, interrogatory answers, deposition testimony, or other discovery responses which have been designated as Confidential Information, he/she shall so advise designating party's counsel seven (7) days prior to such use, and counsel for all parties shall confer in an effort to agree upon a procedure to maintain the confidentiality of such Confidential Information. If no agreement is reached, the matter shall be submitted to the Court by the party opposing the use of Confidential Information by motion with the material at issue filed under seal per the provisions of Local Rule 7.2.

Use of Information Designated "Confidential"

4. All Subject Discovery Materials that are received by either party pursuant to pretrial discovery in this action that have been designated by the other party as containing or comprising Confidential Information must be retained by the receiving party and must not be furnished, shown or disclosed to any other person, except that, and solely for the purposes of this action, any such Confidential Information may be disclosed by counsel to "Qualified Persons." Qualified Persons as used herein means:

i. the Board of Directors, officers or internal experts of receiving party, on a strict need-to-know basis;

ii. legal counsel involved in the present action, including in-house counsel for each party;

iii. any litigation assistant or paralegal employed by and assisting such counsel, and stenographic, secretarial or clerical personnel employed by and assisting such counsel in this action;

iv. any court reporter or typist recording or transcribing testimony given in this action; and

v. outside experts subject to the terms of this Agreement as evidenced by the signing of a document in the form of **Exhibit A** attached hereto and served on opposing counsel prior to such disclosure of Confidential Information.

5. In the event that counsel for the receiving party finds it necessary to make a disclosure of Confidential Information pursuant to Paragraph 3 above to a person other than a Qualified Person, including designated experts who are assisting counsel in the prosecution or defense of this action and who shall not otherwise be employed by or be a consultant to the receiving party, counsel for such party must, no less than ten (10) days in advance of such disclosure, notify the producing party's outside trial counsel in writing of:

i. the Confidential Information to be disclosed; and

ii. the person(s) to whom such disclosure is to be made.

The producing party or their outside trial counsel has ten (10) days after receipt of the written notice within

which to object in writing to the disclosure and, in the event objection is made, no disclosure will be made without Court Order. If no objection is made or if an Order of Court permits the disclosure, counsel for the receiving party must, prior to the disclosure, inform the individual to whom the Confidential Information is to be disclosed as to the terms of this Agreement, and have the individual acknowledge this in writing by signing a document in the form of **Exhibit A** attached hereto, the executed document to be served on the producing party within ten (10) days of the signing, acknowledging that he/she is fully conversant with the terms of this Agreement and agrees to comply with it and be bound by it.

6. If a producing party inadvertently produces to a receiving party any document that it deems confidential without designating it as Confidential Information, upon discovery of such inadvertent disclosure, the producing party must promptly inform the receiving party in writing, and the receiving party shall thereafter treat the document as Confidential Information under this Stipulation.

7. Neither party is obligated to challenge the propriety of any Subject Discovery Materials designated as Confidential Information, and a failure to do so in this action does not preclude a subsequent attack on the propriety of the designation.

8. This Agreement shall not preclude any party from using or disclosing any of its own documents or materials for any lawful purpose.

/s/Timothy S. Hillman
Timothy S. Hillman
Magistrate Judge

April 17, 2008

APPENDIX O

EXHIBIT A

United States District Court
District of Massachusetts

Civil Action No.

*, PLAINTIFF

v.

*, DEFENDANT

[Entered: April 18, 2008]

I, _____, hereby declare under penalty of perjury that:

I confirm that I have read the Stipulation of Confidentiality and Protective Order (the "Stipulation") entered in this case.

I hereby confirm that:

a. I will maintain the confidentiality of the Confidential Information in accordance with the Stipulation, and will use, store and maintain such documents in accordance with the Stipulation so as to prevent the disclosure of such Confidential Information to any unauthorized person.

b. I will use any Confidential Information imparted to me solely for the purpose of the above litigation, and I will make no commercial use or any other litigation or non-litigation use of any part of such Confidential In-

formation and shall not assist or permit any other person to do so.

c. 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 and all copies thereof, including all notes, abstracts, summaries and memoranda relating thereto which contain any of the substance thereof, to the person or party from whom I received the Confidential Information.

I agree to be fully bound by the Stipulation and I hereby submit to the jurisdiction of the United States District Court for the District of Massachusetts, for purposes of enforcement of the Stipulation and this undertaking.

Dated: _____ _____

Signature

Address:

APPENDIX P

United States District Court
District of Minnesota

No. 08-mc-7 (RHK/AJB)

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered in D.Minn.: March 28, 2008;
Entered in D.Mass.: May 15, 2008]

ORDER

This matter is before the Court, United States Magistrate Judge Arthur J. Boylan, on Plaintiff Danny Shelton's Motion to Quash Subpoena Duces Tecum [Docket No. 1] and Defendants' Motion to Dismiss Plaintiff Danny Shelton's Motion to Quash Subpoena Duces Tecum [Docket No. 12]. A hearing was held on March 4, 2008, in the United States District Courthouse, 180 East Fifth Street, St. Paul, MN, 55101. Jerrie M. Hayes, Esq., represented Plaintiffs. Gailon Arthur Joy and Robert Pickle appeared *pro se* by telephone.

Based upon the record, memoranda, and oral arguments of counsel, **IT IS HEREBY ORDERED** that Plaintiff Danny Shelton's Motion to Quash Subpoena [Docket No. 1] is **DENIED** and Defendants' Motion to

Dismiss Plaintiff Danny Shelton's Motion to Quash Subpoena [Docket No. 12] is **DENIED AS MOOT.**

IT IS FURTHER ORDERED that:

1. Defendant Robert Pickle shall pay MidCountry Bank's reasonable costs in responding to the subpoena; and

2. Upon payment of its costs by Defendant Robert Pickle, MidCountry Bank shall send all documents falling within the scope of the subpoena, under seal directly to:

> U.S. Magistrate Judge Timothy S. Hillman
> United States District Court
> District of Massachusetts
> Donohue Federal Building & U.S. Courthouse
> 595 Main Street
> Worcester, MA 01608

3. MidCountry Bank shall not provide copies of the documents to any party herein absent further order of the court.

Dated: March 28, 2008

s/ Arthur J. Boylan
Arthur J. Boylan
United States Magistrate Judge

MEMORANDUM

This Court has been advised by the parties that Plaintiffs' Motion for a Protective Order has been taken under advisement by Magistrate Judge Hillman in the District of Massachusetts. Once the Protective Order is entered by the court, the documents produced under seal by MidCountry Bank in response to Defendant Pickle's subpoena in this district may be reviewed by Magistrate

Judge Hillman for compliance with the approved Protective Order. This Order shall not preclude the parties from seeking relief from Magistrate Judge Hillman as to the disclosure of the documents produced pursuant to the MidCountry Bank subpoena.

AJB

APPENDIX Q

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: March 10, 2008]

Magistrate Judge Timothy S. Hillman: Electronic ORDER entered granting in part and denying in part 40 Motion for Protective Order. "Per the provisions of my order on Defendant Robert Pickle's Motion to Compel Plaintiff to Produce Rule 26(a)(1) Documents and for Sanctions (document #35), the parties are invited to provide this court with a proposed confidentiality order on or before March 20, 2008, which will govern the identification and disclosure of those documents that any party feels are privileged and/or confidential. I will issue a further order regarding the production of privileged and/or confidential documents. Until such time as this court enters a confidentiality order, the plaintiffs may withhold from production those documents referenced in this motion. The parties are warned that abuse of the confidentiality process, including but not limited to the improper designation of documents as privileged or confidential, could result in the imposition of sanctions. In all other respects, the Defendants motion is denied."

APPENDIX R

United States District Court
District of Massachusetts

Civil Action No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AND DANNY LEE SHELTON, PLAINTIFFS,

vs.

GAILON ARTHUR JOY, AND ROBERT PICKLE, DEFENDANTS.

[Held: December 14, 2007;
Entered: December 3, 2008]

TELEPHONIC STATUS CONFERENCE

* * *

[p. 10, MS. HAYES:] Our position, frankly, is that both Mr. Joy and Mr. Pickle should have conferred to the truth of the statements that they made about 3ABN and Danny Shelton or literally satisfied themselves that the statements weren't false, and so they should already have in their possession whatever documents, statements, materials, and other information that they used in order to allay their own concerns about the truth or falsity of those statements. There's nothing, as far as we're concerned, that they would need more to prove a defensive truth at least, and we feel that it's really nothing more than a blatant attempt to harass and abuse the plaintiffs by trying to dig up some scrap of fact that provides post hoc verification of the statements they've

made.

* * *

[p. 11] Basically, the upshot of that is that we are planning again to make a motion for a protective order, and I would assume that will go to Magistrate Hillman for determination; but we would like to — to — to have discovery stayed at least until that motion for a protective order can be heard and decided.

* * *

[p. 12] We have also been notified that four subpoenas have issued, at least two of which are improper, and were not issued from the correct court. * * *

* * *

[p. 22] THE COURT: Let — let me — let me take that issue up as well at the risk of hopping around unduly. I'm not going to stay discovery. If counsel wants to file a motion for a protective order, they should file a motion. It ought to be narrowly tailored, and counsel should consider alternatives to blanket protections, things such as redactions and so forth, but I'm not going to impose a blanket stay of discovery. If a motion for protective order is appropriate, the thing to do is to get the motion on file, and that will be referred to the magistrate judge as well.

And I — I will offer only the general view. It's going to be the magistrate judge's issue to decide, but things do tend to be overdesignated as confidential, which is a constant plague in civil litigation, and so I just ask counsel to be — to pick your spots and to tailor things as narrowly as you think appropriate under the circumstances.

* * *

APPENDIX S

United States Court of Appeals
For the First Circuit

Nos. 08-2457, 09-2615

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, ET AL., PLAINTIFFS, APPELLEES,

v.

GAILON ARTHUR JOY, ET AL., DEFENDANTS, APPELLANTS.

Lynch, *Chief Judge*,
Torruella, Boudin, Lipez, Howard and Thompson,
Circuit Judges.

ORDER OF COURT

Entered: June 9, 2011

The petition for rehearing having been denied by the panel of judges who decided the case and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

By the Court:

/s/ Margaret Carter, Clerk.

APPENDIX T

28 U.S.C. § 455.
Disqualification of justice, judge, or magistrate judge.

(a) Any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

> **(1)** Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

* * *

(e) No justice, judge, or magistrate judge shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.

* * *

28 U.S.C. § 1920.
Taxation of costs

A judge or clerk of any court of the United States may tax as costs the following:

(1) Fees of the clerk and marshal;

(2) Fees for printed or electronically recorded transcripts necessarily obtained for use in the case;

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily

obtained for use in the case;

(5) Docket fees under section 1923 of this title;

(6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs of special interpretation services under section 1828 of this title.

A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree.

* * *

28 U.S.C. § 1927.
Counsel's liability for excessive costs.

Any attorney or other person admitted to conduct cases in any court of the United States or any Territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

* * *

28a U.S.C., Federal Rule of Civil Procedure 11(b).

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

> **(1)** it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

* * *

28a U.S.C., Federal Rule of Civil Procedure 41. Dismissal of Actions.

(a) Voluntary Dismissal.

* * *

(2) By Court Order; Effect.

Except as provided in Rule 41(a)(1), an action may be dismissed at the plaintiff's request only by court order, on terms that the court considers proper. If a defendant has pleaded a counterclaim before being served with the plaintiff's motion to dismiss, the action may be dismissed over the defendant's objection only if the counterclaim can remain pending for independent adjudication. Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

* * *

28a U.S.C., Federal Rule of Civil Procedure 52(b). Amended or Additional Findings.

On a party's motion filed no later than 28 days after

the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. * * *

* * *

First Circuit Local Rule 11.0(b).

(b) Transmission of the Record. In counseled appeals, the district court will transmit to the circuit clerk electronically a copy of the notice of appeal, the order(s) being appealed, and a certified copy of the district court docket report in lieu of transmitting the entire record. Papers and exhibits which are not electronically available will also be transmitted to the circuit clerk. In *pro se* cases, the entire record will be transmitted to the circuit clerk.

* * *

First Circuit Local Rule 27.0(c).

(c) Summary Disposition. At any time, on such notice as the court may order, on motion of appellee or *sua sponte*, the court may dismiss the appeal or other request for relief or affirm and enforce the judgment or order below if the court lacks jurisdiction, or if it shall clearly appear that no substantial question is presented. In case of obvious error the court may, similarly, reverse. Motions for such relief should be promptly filed when the occasion appears, and must be accompanied by four copies of a memorandum or brief.

* * *

District of Massachusetts Local Rule 7.1(f).

(f) Decision of Motion Without Hearing. Motions that are not set down for hearing as provided in subsection (e) will be decided on the papers submitted after an

opposition to the motion has been filed, or, if no opposition is filed, after the time for filing an opposition has elapsed.

* * *

District of Massachusetts Local Rule 7.2(d)–(e).

(d) Motions for impoundment must be filed and ruled upon prior to submission of the actual material sought to be impounded, unless the court orders otherwise.

(e) The court will not enter blanket orders that counsel for a party may at any time file material with the clerk, marked confidential, with instructions that the clerk withhold the material from public inspection. A motion for impoundment must be presented each time a document or group of documents is to be filed.

* * *

Massachusetts Rule of Professional Conduct 1.16(e). Declining Or Terminating Representation.

(e) A lawyer must make available to a former client, within a reasonable time following the client's request for his or her file, the following:

* * *

> **(3)** all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs, including but not limited to medical records, photographs, tapes, disks, investigative reports, expert reports, depositions, and demonstrative evidence. The lawyer may at his or her own expense retain copies of any such materials.

APPENDIX U

In the United States Court of Appeals For the First Circuit

No. 09-2615

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION; DANNY LEE SHELTON, APPELLEES,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, APPELLANTS.

[Entered: January 18, 2011]

BRIEF OF APPELLEES

* * *

Pickle and Joy moved to compel Rule 26(a)(1) materials and for sanctions on December 14, 2007. (Docket #35).[3] On December 18, 2007, 3ABN moved for a protective order to ensure that disclosure of trade secret and confidential information would be appropriately limited. (Docket #40). Magistrate Judge Hillman heard these **[*9]** motions on March 7, 2008, granted the motion to compel only with respect to non-confidential materials, granted the motion for protective order, and invited the parties to submit proposed protective orders. (JA009-10). Magistrate Judge Hillman then issued the confidentiality and protective order on April 17, 2008. (DA030).[4]

[3] "Docket #" refers to the docket number in the district court.

[4] "DA" refers to Pickle and Joy's addendum as attached to their appellate brief.

While the above-discussed motions were pending, Pickle served his written requests for production of documents on 3ABN and Shelton in late November and early December 2007. (Docket #76-2 at 1, 17). * * *

* * *

Pickle and Joy argue that the district court's decision not to reconsider its original decision granting voluntary dismissal is "clearly erroneous, giving further evidence that Defendants' submissions weren't read, and Defendants' arguments and evidence weren't considered" because the district court did not find purported "newly discovered evidence" to be significant. (App. Br. at 55). The district court's decision to grant or deny a Rule 59 motion "must be respected absent abuse." *Williams*, 11 F.3d at 289. Thus, the standard of review in this Court is **[*35]** abuse of discretion, it is not a "clearly erroneous" standard as Pickle and Joy repetitively insist. * * *

* * *

Moreover, the federal courts do not have the responsibility to maintain a repository of documents filed under seal after the case has been dismissed. *See, e.g., Littlejohn v. BIC Corp.*, 851 F.2d 673, 681-82 (3d Cir. 1988) (holding that district courts are not responsible for holding documents for public access after case has terminated); *Grundberg v. UpJohn Co.*, 140 F.R.D. 459, 468 (D. Utah 1991) (holding that courts are not obligated to maintain repository of documents filed under seal after case is terminated). Thus, the district court's order to return the documents filed under seal is not only consistent with the protective order, it is consistent with federal law. The court properly exercised its discretion when it **[*49]** ordered the return of confidential discovery documents along with the dismissal of this lawsuit.

* * *

APPENDIX V

United States District Court
District of Massachusetts

Case No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: February 18, 2010]

PLAINTIFFS' RESPONSE TO DEFENDANTS' OBJECTION TO MAGISTRATE JUDGE'S ORDERS

* * *

Their contention that the records contain anything unflattering is pure conjecture because they have never seen them. Pickle and **[*7]** Joy contend that their currently unsupported allegations might be proven through these documents, which were filed under seal and never reviewed by the court or the parties. * * *

* * *

APPENDIX W

United States District Court
District of Massachusetts

Case No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: May 20, 2009]

Defendants' Reply Memorandum in Support of Defendants' Motions to Reconsider, and Motion to Amend Findings

* * *

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. **[*5]** 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).

* * *

[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.

APPENDIX X

In the United States Court of Appeals For the First Circuit

No. 08-2457

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION; DANNY LEE SHELTON,
PLAINTIFFS-APPELLEES,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,
DEFENDANTS-APPELLANTS.

[Entered: May 4, 2009]

Reply Brief of Defendants-Appellants, Gailon Arthur Joy And Robert Pickle

* * *

[p. 4] None of Defendants' subpoenas were quashed. * * * Regarding the subpoena of MidCountry Bank ("MidCountry"), the district judge instructed Defendants to seek relief from the Minnesota court because he could not alter that judge's order, but the Minnesota court then directed Defendants back to the Massachusetts court to obtain relief.[4] (JA 222–223; RA 92 pp. 30–31).

* * *

[4]Defendants did not pursue the matter further since the documents were lost at the courthouse until December 16, 2008. (RA 160).

APPENDIX Y

In the United States Court of Appeals
For the First Circuit

No. 08-2457

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION; DANNY LEE SHELTON, APPELLEES,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, APPELLANTS.

[Entered in 1st Cir.: March 25, 2009;
Entered in D.Mass.: April 27, 2009]

BRIEF OF THE APPELLEES

* * *

[p. 18] It should also be noted that there was never an occasion for 3ABN and Shelton to submit evidence in support of the merits of their claims to the district court, and therefore there is nothing available in the district court record from which 3ABN and Shelton can respond to the web of innuendo and speculation that infests the appellants' brief.

* * *

APPENDIX Z

United States District Court
District of Massachusetts

Case No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: October 30, 2008]

DEFENDANTS' MEMORANDUM IN OPPOSITION TO PLAINTIFFS' MOTION FOR VOLUNTARY DISMISSAL

INTRODUCTION

The Plaintiffs and their counsel file this motion as an attempt to further obstruct discovery, evade disclosure of wrongdoing at trial, dodge misuse of process and malicious prosecution counterclaims by the Defendants, and avoid an adverse result. The explanations of Three Angels Broadcasting Network, Inc. (hereafter "3ABN") for seeking dismissal without prejudice are unconvincing. The motion does not meet accepted standards for granting dismissal without prejudice, or granting dismissal at all. Danny Lee Shelton (hereafter "Shelton"), individually, fails to explain why his claims should be dismissed. Plaintiffs filed their motion just six days after Plaintiffs'

counsel assured Defendant Pickle that no such motion would be filed.

FACTS

Plaintiffs' Initial Motives for the Instant Suit

When the Plaintiffs filed their case on April 6, 2007, they were not "seeking monetary **[*2]** benefit," stated 3ABN Board chairman Walter Thompson (hereafter "Thompson") on October 13, 2007. (Affidavit of Robert Pickle (hereafter "Pickle Aff.") Ex. A p. 1; cf. Doc. 121 p. 3). Thompson gave as reasons for filing the instant suit (a) Defendant Pickle's concerns about the cover up by Danny Lee Shelton (hereafter "Shelton") of the child molestation allegations against Tommy Shelton, and (b) the Defendants' alleged refusal to "cooperate with ASI attempts to develop a procedure for examining the facts on both sides" regarding Shelton's divorce and remarriage. (Pickle Aff. ¶ 1, Ex. A. p. 1). Adventist-laymen's Services and Industries (hereafter "ASI") surprisingly announced on January 5, 2007, that they had pulled out of negotiations the night before. (Pickle Aff. ¶ 2, Ex. B). D. Michael Riva's letter to Community Church of God trustees threatening litigation over the allegations against Tommy Shelton is also dated January 5, 2007. (Doc. 63-17). ¶ 48(d) and 50(a)–(b) of the Plaintiffs' complaint refer to issue (b). (Doc. 1). These issues underlying the instant case remain entirely unresolved.

Finally, a Settlement Proposal

On October 17, 2008, Plaintiffs' counsel telephoned Defendant Pickle, and for the first time during this litigation that Defendant Pickle can recall, explicitly made a settlement proposal to him, based on the need to save expenses associated with *discovery.* (Pickle Aff. ¶¶ 3–5). The proposal was not made in writing. In that telephone

conversation, Plaintiffs' counsel explicitly stated that he would not be filing a motion to dismiss. (Pickle Aff. ¶¶ 6–7). When asked, Defendant Pickle stated that he was interested in settling. (Pickle Aff. ¶ 8).

There have been no subsequent oral or written communications between Plaintiffs' counsel and Defendant Pickle regarding settlement. (Pickle Aff. ¶ 10, Ex. C pp. 6–7). Plaintiffs' counsel did not confer with Defendant Joy. (Pickle Aff. ¶¶ 11–12, Ex. C pp. 4–5).

Defendants Were Preparing a Motion to Ask Leave to Subpoena EEOC Investigative Files

The Court will have noticed the Plaintiffs' motion to enforce protective order that was **[*3]** later withdrawn. (Doc. 112; Doc. 119). This motion concerned key documents produced by 3ABN that were to be used in connection with a motion by the Defendants seeking the investigative files for the complaints of Ervin Thomsen (hereafter "Thomsen") and Kathy Bottomley (hereafter "Bottomley") filed with the Equal Employment Opportunity Commission (hereafter "EEOC") and the California Department of Fair Employment and Housing (hereafter "DFEH"). Plaintiffs' counsel represented that he did not oppose the motion.

The Defendants wanted to verify that certain key documents were disclosed by 3ABN to the EEOC and DFEH, since failure to do so could taint the investigation and affect the findings. The Defendants can document similar examples of selective disclosure on the part of the Plaintiffs in both 3ABN's property tax case and the instant suit.

Plaintiffs' counsel took the position that if the Defendants stated in an unsealed memorandum that a

sealed confidential document was evidence that 3ABN management purposely terminated whistleblowers over allegations against Leonard Westphal (hereafter "Westphal"), allegations that 3ABN management knew were true (the essence of the complaints filed with the EEOC), that would be a violation of the confidentiality order. Plaintiffs' counsel stated that nothing could be said regarding a confidential document in an unsealed memorandum that "helps your argument or casts my clients in a bad light," or that "permit[s] anybody to draw negative inferences against my clients." (Pickle Aff. Ex. D). However, Plaintiffs' counsel had explicitly told this Court in the hearing of March 7, 2008, that their December 18, 2007, motion for a protective order was seeking protection of only "financial and business records."

> ... now we're not talking about other information. We're not talking about employment related information, ministry related information, theological information. We're simply talking about this very narrow window of financial bookkeeping and accounting and auditing documents.

(Doc. 89 pp. 24–25). **[*4]**

Defendants Now Have a Basis for Counterclaims

In opposing the appeal of Remnant Publications, Inc. (hereafter "Remnant"), the Defendants filed evidence that Shelton received kickbacks from Remnant pertaining to sales to 3ABN, as well as enormous royalties. (Doc. 96-9 p. 3–4; Doc. 96-11 p. 54). After losing this appeal on September 8, 2008, Remnant decided against appealing further, and produced the documents by September 22, 2008. After reviewing these documents, the Defendants believe them to be key to their defense.

Attorney Gerald Duffy (hereafter "Duffy") asserts

that Plaintiffs' counsel did a thorough review of all of the Plaintiffs' records. (Doc. 96-2). Thompson states that the law firm representing the Plaintiffs thoroughly investigated the Plaintiffs' financial records prior to taking on the instant case. (Pickle Aff. Ex. E). Plaintiffs' counsel therefore knew of evidence of Shelton's kickbacks and substantial royalties attributable to his 3ABN activities, and that Shelton had failed to report all his income and assets on his July 2006 financial affidavit. This lawsuit was therefore without basis, yet the Plaintiffs and their counsel prosecuted this case anyway.

Simpson falsely claims that Defendant Joy revealed confidential information that is "not generally known or readily available to the public," and is "proprietary information, confidential business or commercial information, and/or trade secrets relating to its business." (Doc. 121 pp. 7–8; Doc. 60 p. 2). No information within the confidential documents was disclosed.

Simpson misconstrues the second quotation, which was in answer to "anyman's" assertion that the Remnant documents had been produced under seal to Magistrate Judge Hillman. (Doc. 121 p. 8; Pickle Aff. Ex. F p. 3, Ex. C pp. 1, 4). "anyman" is believed to be the son of Thompson. (Pickle Aff. ¶ 16). Thus, Plaintiffs' counsel may not have informed the Plaintiffs that the Defendants were now in possession of the key evidence from Remnant, and Defendant Joy's posts put the Plaintiffs and their counsel on notice that the Defendants now have **[*5]** a basis for counterclaims of misuse of process and malicious prosecution. (Pickle Aff. Ex. F).

ARGUMENT

I. THE PLAINTIFFS VIOLATED LOCAL RULE 7.1(a)(2)

The instant motion for voluntary dismissal came as a complete surprise, since Simpson had told Defendant Pickle on October 17, 2008, that he would not be filing such a motion, and had not conferred further. (Pickle Aff. ¶¶ 6–7, 10, Ex. C pp. 6–7). Defendant Pickle had made it clear that he was interested in settling on proper terms. (Pickle Aff. ¶ 8). Simpson did not confer with Defendant Joy regarding voluntary dismissal. (Pickle Aff. Ex. C pp. 1, 4–6). Because the vast issues to consider in such a motion have not been narrowed, the Defendants have been prejudiced regarding their attempt to respond. The motion should be denied on that basis.

Given the falsity of Simpson's Local Rule 7.1 certification attached to his motion, and the apparent attempt of Simpson to avoid liability for malicious prosecution and misuse of process, Simpson's conduct could be considered evidence of conflict of interest.

II. DISMISSAL MUST NOT PREJUDICE DEFENDANTS

"Voluntary dismissal without prejudice [pursuant to Rule 41(a)(2)] is ... not a matter of right." *Zagano v. Fordham Univ.*, 900 F.2d 12, 14 (2d Cir. 1990). The purpose of Fed. R. Civ. P. 41(a)(2) is to prevent dismissals that prejudice the defendants and to permit the court to impose curative conditions it deems necessary. *Mobil Oil Corp. v. Advanced Env'tl Recycling Techs., Inc.*, 203 F.R.D. 156, 158 (D. Del. 2001). 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. . . .
>
> [T]he factors most commonly considered on a motion for a voluntary dismissal are: (1) the ex-

> tent to which the suit has progressed, including the defendant's effort and expense in preparing for trial, (2) the plaintiffs diligence in prosecuting the action or in bringing the motion, (3) the duplicative expense of relitigation, and (4) the adequacy of plaintiff's explanation for the **[*6]** need to dismiss. Other factors that have been cited include whether the motion is made after the defendant has made a dispositive motion or at some other critical juncture in the case and any vexatious conduct or bad faith on plaintiff's part.

8 *Moore's Federal Practice* § 41.40[6], pp. 41-140 – 41-142 (3d ed. 2003).[1] This list of considerations is not exhaustive. *Id.* at p. 41-141. A voluntary dismissal that strips a defendant of a defense that would otherwise be available may be sufficiently prejudicial to justify denial. *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176, 177 (5th Cir. 1990); *Phillips v. Illinois Cent. Gulf R.R.*, 874 F.2d 984, 987 (5th Cir. 1989).

Dismissal without prejudice ought to be limited to a fairly short period after commencement of the action. *Grover*, 33 F.3d at 719 ("At the point when the law clearly dictates a result for the defendant, it is unfair to subject him to continued exposure to potential liability by dis-

---

[1]*See Zagano*, 900 F.2d at 14; *Grover By Grover v. Eli Lilly and Co.*, 33 F.3d 716, 718 (6th Cir. 1994); *Catanzano v. Wing*, 277 F.3d 99, 110 (2nd Cir. 2001); *Ellett Bros. Ins. v. U.S. Fidelity & Guar. Co.*, 275 F.3d 384, 388 (4th Cir. 2001); *Paulucci v. City of Duluth*, 826 F.2d 780, 783 (8th Cir. 1987); *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969); *Ferguson v. Eakle*, 492 F.2d 26, 29 (3d Cir. 1974); *Scallen v. Minnesota Vikings Football Club*, 574 F. Supp. 278, 280 (D. Minn 1983) (plaintiff's rule 41(a)(2) motion denied due to prejudice caused by expense of defendant's discovery and motion preparation, plus likelihood plaintiff would bring another lawsuit and future anti-trust claims) .

missing the case without prejudice."); *also Chodorow v. Roswick*, 160 F.R.D. 522, 524 (E.D. Penn. 1995) (when plaintiff's sole motive is his "realization that his case has been weakened by events and his corresponding hope that the passage of time will somehow improve things for him" court should grant plaintiff's motion to dismiss with prejudice); *Millsap v. Jane Lamb Mem'l Hosp.*, 111 F.R.D. 481, 483-84 (S.D. Iowa 1986) (defendant demonstrated adequate prejudice to support dismissal with prejudice, when suit was pending for three years and plaintiffs could not find credible expert opinion evidence).

None of these factors or considerations support the Plaintiffs' motion in this instance.

A. Vexatious Conduct or Bad Faith on Plaintiff's Part

Vexatious conduct has been found where a plaintiff has filed frivolous actions, committed **[*7]** perjury, or entered or maintained an action in bad faith. *Blue v. United States Dep't of Army*, 914 F.2d 525, 532 (4th Cir. 1990).

Despite the fact that the Plaintiffs had stated in public advertising, and in sworn testimony and legal briefs in a case under appeal until March 31, 2008, that 3ABN's programming is not copyrighted, Duffy accused the Defendants of copyright infringement in his letter of January 30, 2007. (Doc. 63-18 p. 2; Pickle Aff. ¶17, Ex. G, H p. 8, I p. 24, J–K). The Plaintiffs prepared to litigate over copyright infringement by registering for the first time ever a broadcast with the U.S. Copyright Office on February 8, 2007. That broadcast was the one containing the tribute to alleged pedophile Tommy Shelton. (Pickle Aff. ¶ 18, Ex. L–M). Though the Plaintiffs included a copyright infringement allegation in their complaint (Doc. 1 ¶

30), they failed to include such as a count since they knew they could not prevail.

Though the only allegedly defamatory statements Duffy referred to in his letter concerned child molestation allegations against Tommy Shelton, no such allegations are explicitly mentioned in the Plaintiffs' complaint, though they do fall under ¶¶ 48(a) and 48(c). (Doc. 63-18 p. 2; Doc. 1). Again, the Plaintiffs knew they could not prevail over these issues. (Pickle Aff. ¶ 19, Ex. N–R).

Duffy's letter also accused the Defendants of trademark infringement and dilution. (Doc. 63-18 pp. 1–2). Duffy claimed non-existent common law copyright in an attempt to cover up Shelton's use of Duffy to silence concerns about child molestation allegations, while claiming that the Defendants' claim that Shelton used lawyers to that end was defamatory. (*Id.*). The Defendants therefore published the letter with commentary in order to let the public know that Shelton was indeed doing what Duffy claimed he was not doing. (Doc. 8-2 pp. 2–12). The attached commentary cited Sixth and Ninth Circuit cases which demonstrated the fallaciousness of the Plaintiffs' trademark claims. (Doc. 8-2 pp. 6–7). While the Plaintiffs included trademark [*8] issues in their complaint and called for a permanent injunction against the Defendants in their prayer for relief, they have failed to move the Court for a preliminary injunction since they knew they could not prevail.

The Court should note that Simpson's out-of-context citations of Defendant Joy in his memorandum are used to bolster Simpson's contention that Defendant Joy is disclosing confidential information when he discloses "wrongdoing" on the part of the Plaintiffs. (Doc. 121 pp. 7–8). A perusal of the record demonstrates that this has been the driving force behind the Plaintiffs' litigation ef-

forts. Rather than to prove that there has been no wrongdoing, the Plaintiffs filed and prosecuted this suit in order to muzzle and intimidate the Defendants, and prevent further disclosures of the Plaintiffs' improprieties, whether financial, ethical, or moral. This, therefore, was the driving force behind the efforts to permanently impound the instant case, to impose an overbroad confidentiality order, and to limit the scope of discovery, as well as to protract out the litigation as long as possible. (Doc. 2; Doc. 10; Doc. 40; Doc. 74).

While the parties served their initial disclosures on or about August 3, 2007, the Plaintiffs did not move for a confidentiality order to protect their Rule 26(a)(1) materials until December 18, 2007. (Doc. 37-2 pp. 2–7; Doc. 40). Though reserving relevancy concerns in that motion, the Plaintiffs did not move for an order limiting the scope of discovery until June 25, 2008. (Doc. 41 p. 3; Doc. 74). While the Plaintiffs explicitly stated that they weren't seeking a confidentiality order to cover employment matters, they subsequently invoked the confidentiality order to hide the egregious misconduct of Westphal which led to the termination of the 3ABN Trust Services whistleblowers. (Doc. 89 p. 25; Doc. 112; Pickle Aff. ¶ 20, Ex. S–BB).

Regarding why the Plaintiffs weren't producing their Rule 26(a)(1) materials, Plaintiffs' counsel stated in the hearing of March 7, 2008:

> Again, we're not making a purposeful delay here. We genuinely want to show that 3ABN is an upright, financially proper ministry, **[*9]** but we don't want to turn those documents over that are proprietary, confidential, trade secret.

(Doc. 89 p. 16). Yet after all that purposeful delay, all the

allegedly proprietary, confidential, and trade secret documents the Plaintiffs ended up producing amounted to but 207 pages: 72 pages of the publicly available 2006 issue of *Catch the Vision*, 74 pages of seven editions of corporate bylaws, at least the first and last of which are part of public record, 39 pages of the 2005 employee handbook, part of which the Defendants had already used as an exhibit, and 22 pages consisting of eight other documents, none of which establish that "3ABN is an upright, financially proper ministry." (Doc. 81 ¶¶ 14, Table 4).

The Plaintiffs objected to every one of Defendant Pickle's Requests to Produce on the basis that everything sought was confidential, privileged, or irrelevant. (Doc. 62 p. 8; Doc. 68 ¶ 6). This Court ordered the Plaintiffs to respond by October 27, 2008, to revised requests, and to evade that order the Plaintiffs filed the instant motion, claiming to the Defendants that they didn't have to comply until this motion is heard. (Doc. 107 p. 4; Pickle Aff. Ex. CC).

The Plaintiffs filed motions to quash the Defendants' subpoenas *duces tecum* of MidCountry Bank (hereafter "MidCountry") and Gray hunter Stenn LLP (hereafter "GHS"), and encouraged GHS and Remnant to resist compliance. (Doc. 76-3 pp. 18–19; Doc. 75 p. 4; Doc 114-26 ¶ 7). Finally, after the Defendants are close to getting access to the records of MidCountry and GHS, the Plaintiffs through the instant motion seek to prohibit that access.

The Plaintiffs invoked the automatic stay of Defendant Joy's bankruptcy case in order to sideline him in the instant case, only to then go after his hard drives. (Pickle Aff. ¶ 22, Ex. DD; Doc. 29). After obtaining an order from this Court allowing them to copy his hard drives, Plaintiffs' counsel then sought to violate that order. (Doc.

108 p. 3). The grievous violation of an automatic stay that the Plaintiffs themselves invoked resulted in Defendant Joy filing adversary proceedings against them and their counsel. (*Joy v. Shelton, et al, D.Ma.* No. 4:08-cv-40090). **[*10]**

The Plaintiffs acknowledge that they released Defendant Joy from all their claims against him way back on November 21, 2007, when the automatic stay was lifted. (Doc. 122-2 p. 1). Yet as late as September 23, 2008, 3ABN still claimed to be a creditor of Defendant Joy, filing its *sixth* motion to Extend Time to Object to Discharge or to Determine Dischargeability of a Debt. (Pickle Aff. Ex. EE).

As already stated, Simpson indicated on October 17, 2007, that the Plaintiffs' wish to settle was motivated by a desire to avoid discovery expenses over the next three months. (Pickle Aff. ¶ 5). This coincides with sources that have indicated that donations are way down and that 3ABN is in deficit mode. (Pickle Aff ¶ 24). Yet the Plaintiffs justify the instant motion on the mere hearsay that donations are now back at the levels they were prior to the Defendants issuing their investigative reports. (Doc. 123 ¶ 8).

In the hearing of March 7, 2008, Plaintiffs' counsel stated:

> The vast bulk of our allegations in the complaint, and if you review the pinpoint allegations of the complaint concerning the specific statements of defamation that we have alleged, those individual statements primarily deal with various specific financial transactions that Mr. Pickle or Mr. Joy or both on the various websites have stated were improper for whatever reason.

(Doc. 89 p. 10). "[T]he specific statements of defamation that [the Plaintiffs] have alleged" may be found under ¶¶ 46(a)–(k), 48(a)–(d), 50(a)–(i). (Doc. 1). On their face, ¶¶ 48(a)–(d) and 50(a)–(i) do not have anything to do with financial transactions. In a recent conversation, Plaintiffs' counsel admitted that they have tried to keep Shelton's divorce out of the lawsuit. (Pickle Aff. ¶ 25). Yet that is what ¶ 50 is supposed to be all about! The Plaintiffs have good reason to avoid the allegations under ¶ 50. (Pickle Aff. ¶¶ 26–27, Ex. FF).

The Honorable Magistrate Judge Philip Frazier in the hearing of October 22, 2008, told Plaintiffs' counsel that ¶ 46(g) of the complaint was quite broad, and yet Plaintiffs' counsel has continually asserted that the complaint's allegations are "specific" or "pinpoint." (Pickle Aff. ¶ **[*11]** 28; Doc. 89 p. 10). At the very least, ¶¶ 46(a), (e), 48(a), and (c) are also quite broad.

As already stated, Plaintiffs' counsel knew that the financial allegations against the Defendants were frivolous, and yet they filed and prosecuted this case anyway. (*supra* p. 4). Plaintiffs' counsel must have known about evidence for Shelton's double dipping book deals whereby he received both royalty and sales revenue from 3ABN's purchases of his books via at least four publishing companies, including kickbacks ranging from 10% to 32%.

In the hearing of March 7, 2008, Plaintiffs' counsel stated:

> [Mr. Pickle and Joy] may easily change their mind as has been shown on their conduct in the various websites which has now been expanded after the bankruptcy matter to include at least seven other save 3ABN based websites where they are post-

ing this exact same information.

(Doc. 89 p. 30). Regarding these 15 or 16 other sites which were in operation before the Plaintiffs purchased and transferred the domain names Save3ABN.com and Save3ABN.org (Pickle Aff. ¶ 29), the Plaintiffs now wish to pretend that these other sites do not exist in order to extricate themselves from a lawsuit they know they cannot win, evade counterclaims of misuse of process and malicious prosecution, and avoid discovery yet again.

Because of the Plaintiffs' vexatious conduct and bad faith, their motion for voluntary dismissal should be denied.

B. Plaintiffs' Diligence in Prosecuting the Action

By no stretch of the imagination have the Plaintiffs been diligent in prosecuting this action, and their motion should be denied on that basis.

The Plaintiffs have never pursued their alleged claims pertaining to Shelton's cover up of the child molestation allegations against Tommy Shelton, failed to include copyright infringement as a count, and failed to seek a preliminary injunction. Long ago they ceased prosecuting any claims pertaining to Shelton's divorce, without amending their complaint, even **[*12]** though a large portion of their defamation claims pertain to that divorce.

The Plaintiffs have served no written discovery requests in this action upon the Defendants since August 20, 2007, other than a request for documents the Defendants received from two subpoenas *duces tecum*. (Pickle Aff. ¶ 30). The Defendants have maintained that the Plaintiffs must produce substantive documents prior to the Defendants scheduling depositions, preventing them

from so scheduling. Yet the Plaintiffs are not so encumbered since the Defendants produced thousands of documents to the Plaintiffs around August and September 2007. Other than subpoenas *duces tecum* to obtain the identities of anonymous posters on two internet forums, of dubious relevance (Doc. 80 pp. 6–7), and a deposition of Linda Shelton that never took place, the Plaintiffs have confined their efforts in this litigation to covering up their own wrongdoing through protective orders, and to obstructing the Defendants' discovery efforts.

Shelton as an individual, though a party to this lawsuit, has apparently thus far refused to cooperate with discovery, not having produced any documents identifiable as coming from him rather than from 3ABN. (Pickle Aff. ¶ 31).

C. Plaintiffs' Diligence in Bringing the Motion

The Plaintiffs bring their motion more than 18 months after the commencement of this action, and, according to a probable typographical error in the electronic order of June 27, 2008, after the current end of discovery. ("The motion to extend all deadlines for discovery by 90 days is GRANTED. ... Discovery to be completed by 9/9/2008.").

Perhaps ¶ 46(g) was intended to refer to allegations pertaining to Shelton's lucrative book deals, though it is broad enough to cover a host of wrongdoing. After being served with the Plaintiffs' complaint on April 30, 2007, since the allegation was broad, the Defendants researched and published stories by July 2007 pertaining to Shelton's reporting on his 2003 IRS Schedule A of a donation of horse(s) as $20,000 cash, without filing the required Form 8283 and **[*13]** appraisal(s), along with doc-

umentation showing that the reported donation(s) may have been inflated by a factor of 4 to 40. (Pickle Aff. ¶ 32, Ex. GG–HH). The Defendants also published stories documenting Shelton's receiving from 3ABN of a section 4958 excess benefit transaction in 1998, and his denial under penalty of perjury on IRS Form 990 that any such transaction took place. (Doc. 81-8 pp. 45–54; Pickle Aff. ¶ 33, Ex. II–JJ). Thus by July 2007 the Plaintiffs knew that their case was in jeopardy, but they did not file for voluntary dismissal.

In the fall of 2007 when the Defendants published their exposé concerning royalties Shelton received from Remnant, the Plaintiffs knew that the Defendants had the public documents necessary to make a case for subpoenaing documents from Remnant. (Doc. 81-7 pp. 22–29). Even after purchasing Save3ABN.com and Save3-ABN.org in February 2008, the Plaintiffs still did not file for voluntary dismissal. After Magistrate Judge Carmody ruled on June 20, 2008, that Remnant would have to produce documents to the Defendants, after she denied Remnant's motion to amend on July 28, 2008, after Judge Richard Alan Enslen denied Remnant's appeal on September 8, 2008, the Plaintiffs still did not file for voluntary dismissal. (Pickle Aff. Ex. KK–MM). Only after Remnant caved and produced the incriminating documents, and the Defendants put the Plaintiffs on alert that the Defendants knew that they now had a basis for counterclaims of misuse of process and malicious prosecution, only then did the Plaintiffs finally, after so long delay, file their motion. The motion should therefore be denied.

D. Defendants' Efforts and Expense in Preparing for Trial

The Defendants have thus far carried on a four-front

war in the Districts of Massachusetts and Minnesota, the Western District of Michigan, and the Southern District of Illinois, due to the obstructionism of the Plaintiffs and their allies regarding the Defendants' discovery efforts.

The Plaintiffs by the use of their Exhibit 2 for the instant motion acknowledge that Defendant Pickle has devoted his normal work hours to preparing his defense, resulting in **[*14]** substantial loss of income. (Doc. 122-2 p. 4). The resulting, necessary frugality has been to the educational and orthodontic detriment of Defendant Pickle's dependents. (Pickle Aff. ¶ 35).

The Plaintiffs seek the dismissal of their case without prejudice. By referencing the permissibility of dismissal even with the prospect of a second suit or a tactical advantage, the Plaintiffs leave open the possibility of their refiling, perhaps in another jurisdiction. (Doc. 121 p. 5). The only way that Defendant Pickle can match the immense resources of the Plaintiffs is to defend himself *pro se*, and live extremely frugally until the end of the conflict. Yet intense, 18-month conflicts separated by voluntary dismissals without prejudice will exhaust his resources and prejudice his ability to defend himself, even *pro se*. (Pickle Aff. ¶ 36).

Thousands of dollars have been spent by the Defendants, four experts have been retained, and thousands of miles have been traveled in preparing their defense. (Pickle Aff. ¶¶ 37–39). Considering their resources, the Defendants have made a relatively large investment of time, money, and effort, and are nearing the point where they can prove beyond a reasonable doubt the fallacious nature of all of the Plaintiffs' claims. The Defendants would be prejudiced by such a late voluntary dismissal without prejudice.

E. Motion Made at a Critical Juncture in the Case, and Progress of Case

Having obtained documents from Remnant, in possession of Duffy and Thompson's admissions that the law firm thoroughly reviewed the Plaintiffs' financial records, and now with admissions on the record by the Plaintiffs that they have sought the cover up of wrongdoing during this suit rather than an award of monetary damages, the Defendants are at the point where they have a solid basis for counterclaims of misuse of process and malicious prosecution.

If the Court grants a voluntary dismissal, the Defendants will be forced to separately file their counterclaims against the Plaintiffs and their counsel. The Defendants would intend to file those counterclaims in the same venue as the instant case. If the Plaintiffs challenge venue or **[*15]** jurisdiction, the Defendants will be prejudiced by the additional expense and effort necessary to overcome those obstacles. If the Plaintiffs do not so challenge, they gain little by dismissal.

That the instant motion comes on the eve of seeking leave to serve subpoenas upon the DFEH and the EEOC in order to determine whether 3ABN tainted the investigations through selective disclosure is also suspicious, but is not out of character for Plaintiffs that are so paranoid about discovery.

F. Duplicative Expense of Relitigation

We note:

> [A] voluntary dismissal should not be denied when the work product in the dismissed action will not be wasted but may be utilized in subsequent or continuing litigation.

Moore's § 41.40[7][a], p. 41-146 (citing *inter alia Puerto Rico Mar. Shipping Auth. v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981)). By including in their motion a request for an order to return all documents from Remnant, MidCountry, and the Plaintiffs, the Plaintiffs ensure that there will be substantial duplication of expense, especially given the long, protracted war over discovery they have shown themselves prone to fight.

The Defendants believe that MidCountry did not stamp its records confidential. The Defendants also believe that Remnant was the designating party for its records. It is questionable whether the Plaintiffs even have standing to request the return of non-confidential documents on the behalf of MidCountry, or the return of confidential documents on behalf of Remnant.

Given the circumstances, the Defendants do not seek dismissal, but if the Court grants dismissal, the Court should order that all work product and discovery from this case may be utilized in the separate action the Defendants would intend to file, or in any future action over the same or similar claims that the Plaintiffs file against the Defendants. Otherwise, the Plaintiffs' motion should be denied. **[*16]**

G. Adequacy of Plaintiffs' Explanation for the Need to Dismiss

Danny Lee Shelton, individually, gives no reasons whatsoever for the dismissal of his personal claims in the suit. 3ABN fails to establish a need for dismissal, much less give an adequate explanation.

The Plaintiffs pretend that the objectives of their suit have already been achieved (Doc. 123 ¶ 3), and yet only ¶ 5 of the 11 paragraphs of their prayer for relief can be

claimed as being partly accomplished. But the Plaintiffs are estopped from asserting that 3ABN's facetious purchase of the domain names Save3ABN.com and Save3ABN.org (as well as Defendant Joy's alleged prepetition claims against Shelton as an individual) is evidence of an achieved objective. (*supra* p. 11). There are at least 16 times as many Save 3ABN websites now than when the Plaintiffs filed suit. (Pickle Aff. ¶ 29). The Plaintiffs have accomplished nothing if they do not obtain the permanent injunctions they seek in ¶¶ 3–4 of their prayer for relief.

The hearing of March 7, 2008, is not the only time the Plaintiffs have made clear their interest in the other Save 3ABN domain names. The Court will recall our previous reference to the September 9, 2008, Rule 2004 examination of Defendant Joy which included questions concerning matters pertaining to this case, one being the new Save 3ABN domain names. (Doc. 109 ¶ 1–5). Simpson therefore misleads when he states that no depositions have yet been taken (Doc. 121 p. 6), for the Rule 2004 examination was in part a deposition for the instant case. Atop the list of document requests in Exhibit A of the subpoena served for that examination is that which seeks information concerning domain names, including Save 3ABN domain names obtained after Defendant Joy's filing for bankruptcy. (Pickle Aff. Ex. NN).

The Plaintiffs intend for this Court to find as fact that the IRS has vindicated 3ABN, solely on the hearsay testimony of the repeatedly factually challenged Thompson regarding the unsupported assertions of unnamed attorneys. (Doc. 123 ¶ 4–5). Thompson claims that the IRS **[*17]** "conducted a thorough review of 3ABN and Mr. Shelton." Though both he and Shelton made similar claims regarding the state of Illinois to deflect ques-

tions concerning 2006 book royalties and the 1998 real estate deal, Administrative Law Judge Barbara Rowe noted in her denial of 3ABN's petition for a rehearing that 3ABN had refused to produce even their 2000 and 2001 Form 990's when requested by the intervenors! (Doc. 81-4 p. 48; Pickle Aff. Ex. OO, Ex. PP pp. 3–4).

The Plaintiffs intend for this Court to find as fact that the EEOC has vindicated 3ABN by dismissing Thomsen and Bottomley's complaints on the grounds of insufficient evidence. (Doc. 123 ¶ 6). Yet, given what has gone on in this case, it is not difficult to imagine that selective disclosure on the part of 3ABN hid the true, incriminating facts from these investigative agencies.

The Plaintiffs wish this Court to find as fact that donations are back up since 3ABN's reputation has been restored, solely on Thompson's hearsay testimony. If they are indeed up, is it because of donations from the general public, or from insiders like 3ABN Board members or ASI officers? Is it because the public believes that Shelton has been replaced as president by Jim Gilley (hereafter "Gilley"), even though public filings after Gilley took over still report Shelton as being president? (Pickle Aff. ¶ 43, Ex. QQ–RR). Or is Thompson's claim a bald faced lie?

Gilley is reported to be recuperating from triple bypass and heart valve replacement surgery. Finances are so much on his mind that still in the hospital on October 8, 2008, he asked folks, perhaps jokingly, to send in $5 million by October 17. (Pickle Aff. ¶ 44, Ex. SS). $5 million is more than 25% of all of 3ABN's reported expenses for the year 2006. (Doc. 49-2 p. 17 at ln. 17). It is possible that 3ABN's financial picture is not as rosy as what Thompson wants the Court to believe.

G. Defendants Will Lose Favorable Rulings and Defenses Otherwise Available [*18]

Truth is an absolute defense against claims of defamation, and for claims of defamation *per se*, the burden of proof is shifted to a degree upon the Defendant.

The Plaintiffs have encouraged the invocation of accountant-client privilege to prevent discovery by the Defendants of the Plaintiffs' auditor's records. (Doc. 114-26 ¶ 7). Massachusetts has no accountant-client privilege. If the Plaintiffs refile their case in a venue that has such a privilege, they would likely try to invoke this privilege again. Depriving the Defendants of discovery of the auditor's records would severely prejudice the Defendants by depriving them of a way of challenging the Plaintiffs' tax filings, financial statements, and other accounting records, and would make it much more difficult for the Defendants to prepare a truth defense.

We have previously referenced Nicholas Miller's allegation of document fraud concerning billing records, and an anonymous source within 3ABN that alleged that documents have been destroyed prior to the year 2000. (Doc. 63-33 p. 16; Doc. 81-5 p. 33). That source identified 3ABN CFO Larry Ewing (hereafter "Ewing") as the individual involved in that document destruction. (Pickle Aff. ¶ 45). With this filing we provide a document alleging that Ewing was involved in crafting special annuity contracts to circumvent the laws of the state of Washington after 3ABN had already being fined for writing Charitable Gift Annuities without authorization. Then, after circumstances changed, Ewing is alleged to have ordered the destruction of paperwork associated with those contracts. (Pickle Aff. Ex. W at p. 3). Dismissal without prejudice would give the Plaintiffs further opportunity to destroy or alter evidence.

A number of witnesses on the Defendants' witness list are aged or in ill health. (Pickle Aff. ¶ 46). Upon information and belief, 3ABN Board members May Chung and Merlin Fjarli are respectively afflicted with Alzheimer's Disease and incompacitated by a stroke. (*Id.*). The longer the issues in the suit are unresolved, the greater the odds that key witnesses will die, become senile, or become incompacitated before trial. **[*19]**

Since Ewing was until recently the CFO of 3ABN, he is a key witness. However, 3ABN has recently replaced him (Pickle Aff. Ex. RR), and Ewing has returned to Canada, making it more difficult and expensive to subpoena him for testimony and to appear at trial. Postponement of a resolution of the issues in the instant case would give the Plaintiffs additional time to replace and make unavailable other key witnesses.

The Plaintiffs have sought to obtain images of the Defendants' hard drives, to permanently impound the entire case, to impose confidentiality upon even materials the Defendants produced in the Defendants' Rule 26(a)(1) disclosures, and to limit the scope of discovery. The Defendants believe that the rulings on those issues were favorable to the Defendants, as was the decision in the District of Minnesota that MidCountry must produce its records, and as was the decision in the Western District of Michigan that Remnant must produce the requested documents. The Defendants would be prejudiced if they lost these substantial, favorable rulings by dismissal of the instant case without prejudice, especially since these decisions required so much time and effort to obtain.

CONCLUSION

The Defendants believe that the above considerations are a sufficient basis for the Court to outright deny the

instant motion without abusing discretion.

If the Court instead decides to grant the motion, the Defendants pray the Court to impose conditions that would alleviate the prejudice resulting to the Defendants, including but not limited to ordering the transfer of work product and discovery to future actions filed by the Defendants or Plaintiffs, the imposition of all costs and fees pertaining to work product and discovery that cannot be so transferred, and the dismissal of this case with prejudice. The Defendants pray the Court to evaluate the motion for each Plaintiff separately to the extent that the Defendants are less prejudiced thereby. **[*20]**

If the Court dismisses the case with prejudice, the Defendants pray the Court to give notice of that intention to the Plaintiffs, to give the Plaintiffs an opportunity to be heard, and to give the Plaintiffs an opportunity to withdraw their motion for voluntary dismissal and proceed with litigation. *United States v. One Tract*, 95 F.3d 422, 425 (6th Cir. 1996).

If the Court is inclined to dismiss the case without prejudice due to the dubious reasons the Plaintiffs have given for dismissal, the Defendants pray the Court to schedule an evidentiary hearing in order to find as fact (a) what donation levels really were for the years 2002 to present, (b) what months true donations dropped and rose, (c) why donation levels rose and fell, (d) whether any current increased level of donations is due to insiders such as 3ABN Board members or ASI officers rather than to a restoration of 3ABN's reputation, (e) whether or not the IRS criminal investigation vindicated the Plaintiffs by determining that there was nothing wrong with a number of different transactions, and (f) whether 3ABN did not produce certain documents to the EEOC, thus tainting that investigation.

If the Court grants such an evidentiary hearing, the Defendants pray the Court to order the parties to provide a list to the Court of documents and witnesses believed necessary to establish the facts asserted by the Plaintiffs as explanations for their need for dismissal.

The Defendants also pray for whatever further relief the Court deems just and fair.

Respectfully submitted,

Dated: October 30, 2008

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APPENDIX AA

United States District Court
District of Massachusetts

Case No. 07-40098-FDS

THREE ANGELS BROADCASTING NETWORK, INC., AN ILLINOIS NON-PROFIT CORPORATION, AND DANNY LEE SHELTON, INDIVIDUALLY,

v.

GAILON ARTHUR JOY AND ROBERT PICKLE, DEFENDANTS.

[Entered: June 25, 2008]

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PROTECTIVE ORDER

ORAL ARGUMENT IS REQUESTED

* * *

[p. 3] Defendant Pickle served written Requests for Production of Documents upon 3ABN and Danny Shelton and November 29, 2007 and December 7, 2007, respectively. * * *

* * *

Defendants have caused at least six non-party subpoenas to issue in this litigation, all of which seek similarly irrelevant and overly broad classes of information. [Kingsbury Aff. Exs. 3 through 8]. Specifically, Defendants have served the following: **[*4]**

Non-Party	Dated	Venue
Remnant Publications	11/28/2007 01/11/2008	W.D. Mich.
Gray Hunter Stenn LLP	11/30/2007 12/28/2007	S. D. Illinois
MidCountry Bank	12/06/2007 12/12/2007	D. Minn.
Century Bank & Trust	12/06/2007	C.D. Mass.
Kathi Bottomley	03/10/2008	C.D. Cal.
Glenn Dryden	05/07/2008	W.Va.

* * *