

No. 09-2615

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

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

Plaintiffs-Appellees,

v.

GAILON ARTHUR JOY; ROBERT PICKLE,

Defendants-Appellants.

On Appeal from the United States District Court
for the District of Massachusetts
Case No. 07-40098

REPLY BRIEF OF DEFENDANTS-APPELLANTS,
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APPELLANTS' REPLY BRIEF
TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	iv
REPLY TO PLAINTIFFS' REASONS WHY ORAL ARGUMENT SHOULD BE HEARD	vi
REPLY TO PLAINTIFFS' JURISDICTIONAL STATEMENT.....	1
REPLY TO PLAINTIFFS' STATEMENT OF LEGAL ISSUES	1
REPLY TO PLAINTIFFS' STATEMENT OF THE CASE	1
STATEMENT OF FACTS, IN REPLY	3
A. Plaintiffs' Factual Errors	3
B. Plaintiffs' Distortions	7
C. Alleged EEOC Vindication	8
ARGUMENT IN REPLY	8
re: Standard of Review	8
Discussion of the Issues	9
I. Three Capitulations by Plaintiffs	9
A. re: Thompson's Testimony	9
B. re: MidCountry's Records	10
C. Defendants Should Have Costs or Documents	11
II. Plaintiffs' Contradictory Arguments	12
III. Whether Issues Were First Raised Below	13

A.	Defendants’ Opposition to Plaintiffs’ Dismissal Motion	14
B.	Defendants’ Motion to Reconsider	15
C.	Delivery of MidCountry’s Records After <i>In Camera</i> Review Request Denied	16
D.	Issues Raised in Reply Briefs	16
IV.	More re: The Confidentiality Order	17
V.	More re: Expropriation of Property (Fifth Amendment)	19
VI.	More re: The Motion to Dismiss	19
A.	Preclusion of Defendants’ Malicious Prosecution Claims	19
B.	The Factor of Vexatiousness	20
C.	Shelton’s Lack of Reasons to Dismiss	21
D.	Dismissing to Avoid Expense and Discovery	22
E.	Evidentiary Hearing Should Have Been Held	22
F.	Familiarity with Case; Reading Defendants’ Opposition	22
G.	Dismissal Conditions Must Protect Evidence from Spoliation	23
H.	Counts vs. Prayer for Relief	23
I.	Who Protracted the Pre-dismissal Litigation	24
J.	LR, D.Mass 7.1(a)(2) Certification	24
VII.	More re: Motion for Costs	24

VIII. re: Motion to Amend Findings	25
IX. More re: Motion to Reconsider	25
X. More re: Motions to File Under Seal	26
XI. re: Motion for Sanctions	27
CONCLUSION	29
CERTIFICATE OF COMPLIANCE	31
CERTIFICATE OF SERVICE	31
REFERENCED	Record on Appeal (“RA”)
	Defendants’ Brief of Defendants-Appellants (“DB”)
	Defendants’ Addendum (“DA”)
	Joint Appendix (“JA”)
	Exhibits for Appendix (“EX”)
	Sealed Supplemental Brief of Defendants-Appellants (“SB”)
	Sealed Exhibits for Supplemental Appendix (“SE”)
	Plaintiffs’ Brief of Appellees (“PB”)

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Pages</u>
<i>Americana Indus., Inc. v. Wometco de Puerto Rico, Inc.</i> , 556 F.2d 625, 628 (1st Cir. 1977)	21
<i>Blackburn v. City of Columbus</i> , 60 F.R.D. 197, 198 (S.D. Ohio 1973)	24
<i>Camilli v. Grimes</i> , 436 F.3d 120, 124 (2d Cir. 2006)	19–20
<i>Copeland v. Marshall</i> , 641 F.2d 880, 905 (D.C.Cir. 1980) (en banc)	22
<i>Doe v. Urohealth Systems, Inc.</i> , 216 F.3d 157, 160 (1st Cir. 2000)	13, 20
<i>Global Naps, Inc. v. Verizon New England, Inc.</i> , 489 F.3d 13, 25 (1st Cir. 2007)	25
<i>In re Boston Herald, Inc.</i> , 321 F.3d 174 (1st Cir. 2003)	19
<i>In re Boston Regional Medical Center, Inc.</i> , 328 F.Supp.2d 130, 142 (D.Mass. 2004)	16
<i>In re E.R. Fegert, Inc.</i> , 887 F.2d 955, 957 (9th Cir.1989)	13–14
<i>Local 285 v. Nonotuck Resources Assocs.</i> , 64 F.3d 735, 737 (1st Cir. 1995) ...	20–21
<i>Marie v. Allied Home Mortgage Corp.</i> , 402 F.3d 1, 7 n.2 (1st Cir. 2005)	25
<i>McLaughlin v. Cheshire</i> , 676 F.2d 855, 857 (D.C.Cir. 1982)	22
<i>Pace v. Southern Express Co.</i> , 409 F.2d 331, 334 (7th Cir. 1969)	20
<i>Palmer v. Champion Mortgage</i> , 465 F.3d 24, 30 (1st Cir. 2006)	25
<i>Puerto Rico Maritime Shipping Auth. v. Leith</i> , 668 F.2d 46, 51 (1st Cir. 1981)	24
<i>Siedle v. Putnam Investments, Inc.</i> , 147 F.3d 7, 10 (1st Cir. 1998)	27
<i>United States v. Krynicki</i> , 689 F.2d 289, 291 (1st Cir. 1982)	13

Statutes

28 U.S.C. §1920 17, 24
28 U.S.C. §1927 17
225 ILCS 460/2(f), 4(a) 18

Other Authority

First Amendment 18
Fifth Amendment 19
Fed.R.App.P. 10(a)(1) 11
Fed.R.App.P. 11 27
Fed.R.Civ.P. 41(a)(2) 12, 17, 20, 24
Fed.R.Civ.P. 52(a)(3), 52(b) 25
Fed.R.Civ.P. 59(e) 25
Fed.R.Civ.P. 60(b)(1), (3) 25
Fed.R.Evid. 801(d)(2)(D) 22
Fed.R.Evid. 803(6) 10
Fed.R.Evid. 805 10
1st Cir.Loc.R. 11.0(b) 11
LR, D.Mass. 7.1(a)(2) 24
Mass.R.Prof.C. 1.16(e)(3) 19
8 *Moore's Federal Practice* §41.40[6] (3d ed.) 20
19 *Moore's Federal Practice* §§ 206.03[2], 206.04[1]–[2] (3d ed.) 8

REPLY TO PLAINTIFFS'
REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Though uncertain what Plaintiffs would gain thereby, Defendants make no objection to Plaintiffs' request for oral argument.

REPLY TO PLAINTIFFS' JURISDICTIONAL STATEMENT

Defendants have appealed no order “by incorporation.” (cf. Plaintiffs’ [Brief of Appellees](#) p. (“PB”) 2).

REPLY TO PLAINTIFFS' STATEMENT OF LEGAL ISSUES

The district court’s October 26, 2009, order never addressed whether to reconsider or amend the October 30, 2008, dismissal (cf. [PB](#) 3), as if the district court believed it had no jurisdiction to do so during Defendants’ first appeal.

The purchase orders for mere printing which Defendants sought to file below unquestionably contain nothing confidential. (Defendants’ Dec. 16, 2010, [Motion to File Under Seal](#) p. 2; cf. [PB](#) 3).

REPLY TO PLAINTIFFS' STATEMENT OF THE CASE

Plaintiffs admitted that some of the “24 specific defamatory statements” in their complaint were in fact “broad,” “sweeping allegations.” (Exhibits for Appendix p. (“EX”) 672; cf. [PB](#) 4).

From July to September 2007, Defendants disclosed at least 163 potential witnesses. (Joint Appendix pp. (“JA”) 332, 348–350; [Record on Appeal Docket Entry # \(“RA”\) 152-13](#); [RA 152-14](#); [RA 152-15](#)). Yet Plaintiffs assert that Defendants “refused to reveal their sources”! ([PB](#) 4).

Plaintiffs here state that Defendants sought “virtually every financial ... record ... dating back to ... the mid-1980’s,” but later admit that Defendants sought

Danny Lee Shelton’s (“Shelton”) bank records only back to 1998 (the year of Shelton’s privately inuring real estate deal). ([PB](#) 4, 10; EX 626–642).

Plaintiffs previously asserted that Defendants served nine (not six) subpoenas upon (not from) third parties. (JA 129; cf. [PB](#) 4).

The lower court prohibited *Plaintiffs* and Defendants from issuing additional third-party subpoenas without obtaining leave of court. (JA 206; [RA 80](#) pp. 6–7; JA 159; EX 308–314; cf. [PB](#) 5).

Case	Up to 11/3/2008	After 11/3/2008	Up to 4/13/2009	After 4/13/2009
D.Mass. 07-cv-40098	129	133	166	96
D.Minn. 08-mc-00007	37 ¹		37 ¹	
W.D.Mich. 08-mc-00003	46 ²		46 ²	
S.D.Ill. 08-mc-00016	28 ³	2	30 ³	
D.Mass. 08-mc-40019	1 ⁴		1 ⁴	
Totals	241	135	280	96

**TABLE 1: Docket Entry Numbers by Related Case
(Pre- and Post-Dismissal, Pre- and Post-Ruling on Costs)**

Plaintiffs’ numbers for “electronic court filings” ([PB](#) 5–6) are false and skewed. *See* Tables 1–2 which also include conventionally filed documents and appendices. Since Plaintiffs contend that the dismissal order was not a final order,

¹[RA 92](#) p. 30 is marked #37.

²EX 647–648 is #43, and cites #32 and #33. [RA 96-9](#) p. 5 cites #34.

³[RA 125-2](#) is #27. [RA 152-6](#) is #29, dated 11/17/2008.

⁴This entry, #28, is the entire S.D.Ill. case after being transferred to D.Mass. on October 28, 2008, and assigned to the main case’s presiding judge. Both it and the S.D.Ill. Case were therefore before the lower court.

the proper date for Plaintiffs' calculations should be April 13, 2009, not November 3, 2008.

Case	On PACER	Other (by Parties)	Totals
1st Cir. 08-2457	44	17	61
1st Cir. 09-2615	40	5	45
Totals	84	22	106

TABLE 2: Docket Entries Related to Documents Through 01/16/11 (Documents Available on PACER, or Unavailable But Filed by Parties)

Plaintiffs' obstruction of discovery made the pre-dismissal litigation much more intensive.

The two motions to file under seal below did not concern material already "twice rejected." (cf. [PB 6](#)). Thus far, Defendants haven't moved to enlarge the appellate record in the instant appeal. (cf. [Id.](#)).

If Plaintiffs really want to end the litigation ([PB 7](#)), Plaintiffs would negotiate with Defendants and, *inter alia*, abandon attempted confidentiality designations that indisputably do not qualify. ([RA 224-11](#)). Defendants will not be unreasonable, but will not surrender their constitutional rights. ([RA 223](#) pp. 6–7).

STATEMENT OF FACTS, IN REPLY

A. Plaintiffs' Factual Errors.

Though three motions for sanctions against Plaintiffs' counsel are either pending or under appeal, Plaintiffs' brief is riddled with obvious factual errors, far

beyond a few clerical mistakes.

The most glaring concern Plaintiffs' fallacious end-run theory. According to Plaintiffs, Robert Pickle ("Pickle") served his "late November and early December 2007" requests to produce "while the above-discussed [December 14 and 18, 2007] motions were pending"! ([PB](#) 8–9).

Plaintiffs ignore four incontrovertible facts: (a) Gailon Arthur Joy's ("Joy") January 20, 2008, email states, "I have deliberately dragged My feet" regarding "substantially expand[ing] the case," indisputably showing that any discovery efforts prior to January 20 were not what Joy meant by "expand the case." ([RA 76-5](#) p. 33). (b) Of all Defendants' discovery efforts, only the subpoena upon Kathy Bottomley was not initially served by January 20. (JA 492). (c) Defendants intended to expand the case by adding parties. (EX 696–699). (d) The district judge explicitly stated that discovery would not be stayed while a motion for a protective order was pending (JA 304, 306–307), so efforts to proceed were not an end-run.

Other corrections to Plaintiffs' brief should include:

- Joy filed his notice of appearance *pro se* on June 8, 2007 (not in November 2007). (JA 2; cf. [PB](#) 7 n.1).
- Plaintiffs' complaint never alleged that Defendants ever used Three Angels Broadcasting Network, Inc.'s ("3ABN") logo. (JA 36–56; cf. [PB](#) 7). None of the articles in the record from the 17 Save 3ABN websites use 3ABN's logo. (e.g. EX 8–41, 611–642).

- Parties engaged in initial discovery in July and August 2007 *before* the November 21, 2007, lifting of the automatic stay, not *after* (EX 48–53; [RA 152-14](#); [RA 122-2](#) p. 1; [Defendants’ Addendum](#) p. (“DA”) 38; cf. [PB 8](#)), and Plaintiffs proposed a confidentiality order by July 20, 2007.⁵ ([RA 18](#) p. 4; [RA 19](#) pp. 3–4).
- Defendants sought records from Remnant Publication, Inc.’s (“Remnant”) bank, Century Bank & Trust (“CB&T”), located in Michigan⁶ (not Massachusetts). (EX 836; [RA 80](#) p. 7; cf. [PB 10](#)).
- The subpoena upon Glenn Dryden of Virginia (not West Virginia) is dated May 7, 2008, after (not before) the April 17 confidentiality order (“Confidentiality Order”) had issued. ([RA 76-3](#) p. 16; JA 10; [RA 80](#) p. 9; cf. [PB 10](#)).
- No documents from Grey Hunter Stenn were ever ordered produced. (JA 240–243; cf. [PB 10](#)).
- Shelton (not 3ABN)⁷ moved in Minnesota to quash the subpoena of

⁵Plaintiffs’ erroneous dating of confidentiality order negotiations makes Plaintiffs’ December 18, 2007, motion for such an order (JA 7) seem less untimely.

⁶Remnant’s attorney cc’ed Plaintiffs’ counsel from his office in the CB&T building. (EX 701).

⁷Plaintiffs thrice identify “3ABN” as collectively meaning both Plaintiffs ([PB 1, 4, 7](#)), and yet use the phrases “3ABN and Shelton” and “Shelton and 3ABN” 19 times, as if “3ABN” does not include Shelton. ([PB ii, 4, 7–9, 13, 24–26, 28, 31, 36, 46](#)). Plaintiffs want to confuse Plaintiffs’ identities, since Shelton lacked standing to contest the subpoena of MidCountry on behalf of the corporations 3ABN and DLS Publishing, Inc. (JA 357–358; [RA 185](#) pp. 4–5).

- copies of bank statements (not operational records) from MidCountry Bank (“MidCountry”) (“MidCountry’s records”). ([RA 76-3](#) pp. 18–19, 12–13; cf. [PB 11](#)).
- Only one website (not two) was ever shut down; [Save3ABN.org](#) was never a website. (JA 272–273; [RA10-3](#) p. 3; cf. [PB 12, 23](#)).
 - Twice Defendants are called plaintiffs ([PB 33, 39](#)), two or three times the motion to dismiss is identified as Defendants’ motion which Defendants supported ([PB 27, 35, 52](#)), and twice the district court is called “this Court.” ([PB 13, 15](#)).
 - Plaintiffs refused to stipulate to an extension of discovery deadlines. (EX 480; cf. [PB 14, 29](#)).
 - Defendants first sought to file documents produced by Remnant (“Remnant documents”) with their opposition to the motion to dismiss (not in connection with Defendants’ motion for costs). (EX 781, 701, 709; JA 409; [RA 171](#) p. 8; cf. [PB 15, 51–52](#)).
 - Defendants’ December 8, 2008, motion to file under seal was filed before (not after) the December 9, 2008, briefing schedule in Defendants’ first appeal was issued. (JA 22; [RA 206-8](#) p. 1; cf. [PB 15](#)).
 - MidCountry’s records couldn’t be “returned” to Plaintiffs’ counsel since Plaintiffs’ counsel never had them before. (EX 692–693; cf. [PB 16](#)).
 - Defendants’ November 19, 2009, [motion to enlarge the record](#) in 1st Cir.

Case No. 08-2457 was filed before (not after) Defendants' November 23 second notice of appeal. (JA 27; cf. [PB 17](#)).

- The district judge conducted five status conferences (not six). (JA 3, 6, 10, 17, 20; cf. [PB 30](#)).
- Defendants disclosed expert (not expert witness) Lynette Rhodes on or about June 10, 2008. (JA 351, 406; [RA 152-19](#); cf. [PB 38](#)).
- Plaintiffs' brief as served upon Defendants both electronically and in paper form had a type size of 12.6pt (not 14pt). ([PB 57](#)).

B. Plaintiffs' Distortions.

Corrections to what might better be called distortions include:

- Plaintiffs' complaint's defamation claim is based on statements allegedly made on at least four non-Save 3ABN websites,⁸ not just [Save3ABN.com](#). (JA 46, 54; cf. [PB 8, 4](#)).
- Plaintiffs used Joy's Rule 2004 examination⁹ as a deposition for the underlying case. (JA 207–208; EX 749–778; cf. [PB 14, 29](#)).
- On October 30, 2008, Plaintiffs' counsel insisted that the lower court had that day ordered all confidential documents to be “return[ed] ... to the

⁸Ignoring other websites, whether Save 3ABN sites or not, supports the illusion that merely purchasing two out of 18 Save 3ABN domain names from Joy's bankruptcy estate accomplished the lawsuit's objectives.

⁹That examination is how Plaintiffs obtained Joy's January 20, 2008, email about expanding the case. (EX 649–650, 764–766; [RA 171-20](#) p. 129; [RA 76-5](#) p. 33).

originator,” which was NOT what Plaintiffs requested in their motion. (EX 692–693; JA 218). Thus, Plaintiffs know that the court never granted Plaintiffs’ motion *per se*, and that the October 26, 2009, order never “confirm[ed] that the[Remnant] documents ‘should have been returned to *plaintiffs* some time ago.’”¹⁰ (cf. [PB](#) 12, 15, 49 n.12, italics added).

C. **Alleged EEOC Vindication.**

The EEOC right-to-sue letter states, “This does not certify that the respondent is in compliance with the statutes.” (EX 780).

Any alleged finding of “insufficient evidence” ([PB](#) 13, 25) must be due to Plaintiffs’ failure to produce Sealed Exhibits for Supplemental Appendix pp. (“SE”) 156–158. *See* Sealed Supplemental Brief of Defendants-Appellants p. (“SB”) 3.

ARGUMENT IN REPLY

re: Standard of Review

Shockingly, Plaintiffs outright deny that an “abuse of discretion” includes a “clearly erroneous” finding of fact. ([PB](#) 34–35). An internally inconsistent factual finding *is* clearly erroneous (cf. [PB](#) 33 n.8), and conclusions of law must be reviewed *de novo*. 19 *Moore’s Federal Practice* §§ 206.03[2], 206.04[1]–[2] (3d

¹⁰Besides, the words Plaintiffs quote from the October 26, 2009, order refer to documents produced by Plaintiffs, not by Remnant. ([DA](#) 29, 50–52; [RA 180](#) p. 1; JA 406).

ed.). Since Plaintiffs misunderstand what “abuse of discretion” means, Plaintiffs inadequately respond to the legal and factual errors Defendants raise.

Discussion of the Issues

I. Three Capitulations by Plaintiffs.

A. re: Thompson’s Testimony.

Plaintiffs previously argued that Walter Thompson’s (“Thompson”) tales of IRS and EEOC vindications, and donation level restoration (due to restored public confidence), was “[m]anifestly” not hearsay, but was Thompson’s “personal knowledge” of “objectively verifiable” facts. (Plaintiffs’ [Brief of the Appellees](#) in 1st Cir. Case No. 08-2457 pp. 26, 28). Now Plaintiffs admit that Thompson’s tales are but information and belief¹¹:

... 3ABN’s Board of Directors believed that donation levels to 3ABN had been restored. ...

... 3ABN’s board’s review of their financial figures which they believed showed donation levels to be restored

([PB](#) 5, 30).

Plaintiffs demote Thompson’s testimony not just on donation levels but also on whether any of the litigation’s objectives have already been met ([PB](#) 7, 26–28), which includes every one of the alleged reasons for dismissal Thompson gave. (JA

¹¹Plaintiffs cannot maintain the farce because 3ABN’s own figures on its belated 2008 Form 990 clearly contradict Thompson’s testimony. ([RA 224](#) pp. 3–4; [RA 224-5](#) p. 13).

236–239). Defendants’ concerns about Thompson’s affidavit and Plaintiffs’ reasons for dismissal (JA 254, 260–261) were therefore always justified.

Plaintiffs contend that Thompson’s testimony “concerning the board’s beliefs” isn’t hearsay. ([PB](#) 26–27). But hearsay within hearsay is only admissible “if each part of the combined statements conforms with an exception to the hearsay rule.” Fed.R.Evid. 805. Plaintiffs make no attempt to show how the hearsay within Thompson’s testimony so conforms. Even if Plaintiffs belatedly produced the figures Thompson allegedly reviewed, those figures were probably specially prepared to justify dismissal, and thus do not fall within the hearsay exception of Fed.R.Evid. 803(6).

Plaintiffs previously asserted without support that the IRS found not one infraction or discrepancy. (JA 237–238; EX 397–398, 489–491). Now Plaintiffs admit that any alleged IRS vindication only concerned criminal liability, not civil liability. ([PB](#) 13, 24). Thus, the IRS never completely exonerated Plaintiffs.

B. re: MidCountry’s Records.

Plaintiffs twice refer to documents “filed under seal” when discussing what the court ordered on October 30, 2008, concerning returning documents: “Thus, the district court’s order to return the documents filed under seal” ([PB](#) 48). But on October 30, the only sealed documents in the court’s custody were RA 93 and MidCountry’s records. Since neither Plaintiffs’ motion to dismiss nor the lower court said anything about RA 93 (JA 218–219; [DA](#) 13–15), Plaintiffs must here be

referring to MidCountry's records.

Plaintiffs argued below that MidCountry's records were never filed ([RA 207](#) pp. 4, 8–9; [RA 216](#) p. 11), but later admitted that they “were filed under seal.” ([RA 231](#) p. 7). Defendants reported this damaging admission to this Court. (April 6, 2010, [Status Report](#) pp. 1–2). Plaintiffs denied it was a damaging admission of any sort (April 7, 2010, [Motion to Strike Defendants' Status Reports](#) p. 5), and Defendants consequently moved for sanctions. Plaintiffs responded:

“Filed” in the context of this sentence, however, simply means “delivered to the courthouse.” ... the MidCountry Bank records were never filed in the sense that a brief is filed.

(April 28, 2010, [Response to Defendants' Motion for Sanctions](#) p. 12).

Now in Plaintiffs' appellate brief, Plaintiffs yet again reverse their position, admitting that MidCountry's records were filed below after all! MidCountry's records are therefore part of the record on appeal, and should have been forwarded to this Court. Fed.R.App.P. 10(a)(1); 1st Cir.Loc.R. 11.0(b).

C. Defendants Should Have Costs or Documents.

Speaking of Defendants, Plaintiffs state that costs for copies should not be awarded because, “if additional litigation were to follow, plaintiffs [*sic.*] would still have the benefit of these documents.”¹² ([PB 39](#)). Therefore, according to Plaintiffs' own logic, Defendants should “have the benefit of” MidCountry's records in future

¹²Plaintiffs here refer to \$219 worth of copies Defendants no longer possess, since they were long ago filed in court or served upon Plaintiffs or third parties. (JA 354–356). Plaintiffs' logic, therefore, cannot apply to these copies.

litigation, if Defendants are not reimbursed for the cost of those copies.

If the Confidentiality Order required litigants to return documents, which it does not, Plaintiffs' logic demands that Defendants be compensated for the duplicative effort and expense of obtaining second copies of any documents now returned.

II. Plaintiffs' Contradictory Arguments.

Defendants' initial pleadings asserted that Plaintiffs' action was "frivolous, without merit and a fraud upon the court" (JA 68–71, 75; [RA 9-2](#) p. 20), and that "Defendants should be compensated for the need to defend this frivolous action which is without basis in fact or law," including "fair and reasonable attorney fees and costs as a sanction." (JA 76). Plaintiffs repeatedly argue against considering the merits of claims and defenses (e.g. [PB](#) 14, 28–29), yet welcome the lower court's April 13, 2009, findings on the merits of the above ([PB](#) 41), the consideration of which, Plaintiffs contend, was the only basis for imposing attorney's fees under Fed.R.Civ.P. 41(a)(2). ([PB](#) 39–40).

Plaintiffs argue that the April 13, 2009, order (not the October 30, 2008, order) was the final order. ([PB](#) 6, 15). But Plaintiffs also argue that certain evidence had to be filed by October 30, not April 13 ([PB](#) 6, 12, 19, 35, 52, 55), even though the question that that evidence pertained to, Plaintiffs contend, wasn't relevant until the November 13, 2008, motion for costs. ([PB](#) 28).

Plaintiffs seem to argue that the district judge on October 30, 2008, was

familiar with the case ([PB 32](#)), yet also argue that recently filed exhibits impeaching Thompson had to be mentioned again ([PB 27](#)), as if the district judge was unfamiliar with them.

Plaintiffs argue that Defendants want to “publicly disseminate confidential information,” while simultaneously admitting that Defendants sought to file these documents under seal. ([PB 55](#)).

If the Confidentiality Order really required parties to return documents as Plaintiffs contend ([PB 48](#)), why did Plaintiffs in their dismissal motion seek a brand new order requiring the very same thing? ([PB 13–14](#)).

Plaintiffs argue that the factors listed in *Doe* are the only factors that can be considered in this circuit on a motion to dismiss ([PB 28](#)), one of which factors is “defendants’ efforts in preparing for trial.” ([PB 23](#)). Yet Plaintiffs also argue that Defendants’ time and expense “was not relevant” to the motion to dismiss. ([PB 31](#)).

Plaintiffs seemingly argue that motions to reconsider can raise neither new nor old arguments. ([PB 34–36](#)).

III. Whether Issues Were First Raised Below.

Ordinarily, issues must first be raised below before being considered on appeal in order to give opposing litigants fair opportunity to introduce evidence.

United States v. Krynicki, 689 F.2d 289, 291 (1st Cir. 1982).

There is no bright-line rule to determine whether a matter has been properly raised. A workable standard, however, is that the

argument must be raised sufficiently for the trial court to rule on it.

In re E.R. Fegert, Inc., 887 F.2d 955, 957 (9th Cir. 1989) (citations omitted). The question is whether an issue could have been ruled on, not whether it was. *Id.*

A. Defendants' Opposition to Plaintiffs' Dismissal Motion.

Despite Plaintiffs' contention ([PB 27](#)), the following exhibits or the same information was used, referenced, or explicitly alluded to in Defendants' opposition to Plaintiffs' motion to dismiss:

- **EX 84.** Cited on JA 261 (though mistakenly as p. 17).
- **EX 179.** Same information is on JA 275 at ¶ 43.
- **EX 86–88.** Referenced or alluded to at JA 261, 267, 273–275; EX 626, 634.
- **EX 280–285.** Refiled in another form on October 30, 2008: EX 280–282 as EX 613–615, 618–619; relevant parts of EX 283–285 as EX 621–623.
- **EX 289.** Refiled in another form as EX 624–625.
- **EX 751–754, 773.** Same information is on EX 649–650, and at JA 207–208, which was cited on JA 260.

Four exhibits Plaintiffs reference (EX 359, 473, 495, 498) were filed on July 9, September 8, and October 1, 2008; Defendants cited these exhibits and called Thompson's veracity into question. ([RA 104](#) p. 2; [RA 105](#) pp. 4–5; [RA 113](#) pp. 3–4, 7, 10, 12). On October 30, 2008, Defendants sought again to impeach Thompson

by filing additional evidence (JA 246, 260–261, 266, 275; EX 534–535, 651–654), and by alluding to the recently filed exhibits by referring to Thompson as “repeatedly factually challenged,” and as “repeatedly demonstrat[ing] the unreliability of his statements.” (JA 260, 266).

EX 800 is a May 6, 2009, email filed on May 20, 2009, since the veracity of Thompson’s reasons for dismissal was still at issue in connection with the motion to reconsider. ([RA 177](#) pp. 7–8).

B. Defendants’ Motion to Reconsider.

Plaintiffs admit that Defendants’ motion to reconsider sought reconsideration of the dismissal order. ([PB 3](#), 19, 34, 36; cf. JA 393–394; [RA 169](#) p. 2; [RA 171-3](#)). Plaintiffs, however, never responded to Defendants’ request to reconsider the dismissal order. (JA 421–433).

The arguments that Plaintiffs assert were never raised in Defendants’ motion to reconsider ([PB 31–32](#)) actually were. ([RA 171-3](#) pp. 40–42; [RA 170](#) pp. 12–13, 15–17). Out of Plaintiffs’ list, only bias was later more explicitly stated when it was developed further to include the ties between the district judge and Plaintiffs’ counsel ([RA 213](#) pp. 10–12; EX 839–841, 850), and Plaintiffs then had ample opportunity to respond. ([RA 216](#); [RA 231](#)). The district judge’s recusal order was his ruling on the issue of apparent bias. (JA 538).

Plaintiffs complain that Defendants used the issue of bias to request greater scrutiny when reviewing for abuse of discretion. ([PB 31](#) citing Defendants’ [Brief of](#)

Defendants-Appellants (“DB”) 25). But Plaintiffs cite no authority to show that recusal orders during pending appeals cannot prompt greater scrutiny.

**C. Delivery of MidCountry’s Records After
In Camera Review Request Denied.**

On December 8, 2008, Defendants argued below that the denial of Plaintiffs’ request for an *in camera* review of MidCountry’s records “open[ed] the way for the Defendants to obtain these documents.” (JA 323; cf. PB 49). On May 20, 2009, Defendants argued that it was “an unreasonable monetary burden to deprive Defendants of the MidCountry records without compensation given that ... Plaintiffs’ request to conduct an *in camera* review of those records” was denied. (RA 177 p. 10). The parties have had further opportunity to engage on this issue since Defendants discovered that MidCountry’s records were likely never lost after all. (RA 206 pp. 2–4; RA 212 pp. 3–4; RA 213 p. 11).

D. Issues Raised in Reply Briefs.

As below, Plaintiffs argue here that appellate rules prohibiting raising issues in reply briefs must be imposed on lower courts. (PB 41; JA 423). Plaintiffs’ authority below included a D.Mass. case which clearly found that an issue should have been raised ... in a reply brief! *In re Boston Regional Medical Center, Inc.*, 328 F.Supp.2d 130, 142 (D.Mass. 2004). (JA 423). Defendants sought sanctions for this legal argument. (JA 453).

Plaintiffs' lengthy revisionist response¹³ below to Defendants' short motion for costs rewrote the case's history, and asserted that costs, expenses, and fees could only be awarded under Fed.R.Civ.P. 41(a)(2) (JA 282, 291) as restricted by 28 U.S.C. §1920 and the American Rule. (JA 282–283, 290, 296–298). In direct reply, Defendants rebutted Plaintiffs' revisionism, asserted that costs could also be imposed under 28 U.S.C. §1927 and the court's inherent powers, and sought to file the Remnant documents on that basis. (JA 322, 336–339, 324, 344).

Plaintiffs have had ample opportunity to introduce contrary evidence since then, including after Defendants put the Remnant documents at issue in Defendants' motion for sanctions. (JA 450–451).

IV. More re: The Confidentiality Order.

Plaintiffs still cannot quote where the Confidentiality Order requires litigants to sign Exhibit A ([PB](#) 48; [DA](#) 36–37) because it does not so require. ([DA](#) 30–35). Defendants have never signed Exhibit A, though Plaintiffs apparently tried to trick Defendants into doing so. (JA 390–391, 374; [RA 178-2](#) p. 34).

Defendants consider the Confidentiality Order a favorable ruling, and seek its transfer to future litigation unaltered. (JA 263; [DB](#) 40). Therefore, Defendants are not trying to modify or abrogate that order (cf. [PB](#) 46–47, 56), but simply seek to invoke ¶ 7 of the Confidentiality Order which permits post-case challenges to

¹³Plaintiffs' revisionist response seemed written for Defendants' first appeal, and was later incorporated into Plaintiffs' brief for that appeal. ([RA 178-4](#) pp. 3–4).

Plaintiffs' abusive confidentiality designations. ([DA](#) 35).

Plaintiffs argue that “great deference” should be shown the lower court in the matter. ([PB](#) 20). Then by all means let deference be shown: The court’s perception of Plaintiffs led it to threaten sanctions if the confidentiality process was abused by wrongly designating documents as confidential! (JA 9–10).

Plaintiffs’ “good-cause arguments” made when seeking the Confidentiality Order ([PB](#) 47) have absolutely nothing to do with Defendants invoking ¶ 7 of that order to challenge the “confidentiality” of purchase orders for pens, sticky notes, and printing. (EX 372). Besides, those arguments only concerned financial information, not *Catch the Vision, Ten Commandments Twice Removed*, Tommy Shelton’s pedophilia in Virginia, or “employment related information” like SE 156–158. (JA 173, 156–157; EX 187). Part of Plaintiffs’ “good cause” was Mollie Steenson’s perjurious testimony that 3ABN prohibits the public dissemination of its audited financial statements (JA 102–103), when those financial statements are statutorily open to public inspection. 225 ILCS 460/2(f), 4(a) (at [DA](#) 70–71).

Though the Confidentiality Order explicitly excludes documents obtained from other sources as well as public documents ([DA](#) 35, 31), Plaintiffs give evidence that they intend to use that order to prevent Defendants from reporting information within those excluded documents. (EX 692–694, 170, 702–703).¹⁴ From that declared intention arises Defendants’ First Amendment concerns.

¹⁴cf. [RA 224-11](#).

V. More re: Expropriation of Property (Fifth Amendment).

Plaintiffs' lone authority in opposition to Mass.R.Prof.C. 1.16(e)(3) is inapposite. ([PB 50](#)). That case concerns public access to CJA eligibility documents, not a litigant's right to retain discovery that the litigant paid for, unless justly compensated. *In re Boston Herald, Inc.*, 321 F.3d 174 (1st Cir. 2003).

The issue is ownership of paid-for copies produced in discovery, not ownership of a bank's business records. (cf. [PB 50](#)).

Defendants couldn't proffer MidCountry's records in connection with the motions to dismiss or for costs ([PB 49](#)) because the court said MidCountry's records couldn't be found, and no notice was ever given otherwise until December 23, 2008. ([RA 206](#) pp. 2-4; JA 23, 435 n.4; EX 784 n.4).

VI. More re: The Motion to Dismiss.

A. Preclusion of Defendants' Malicious Prosecution Claims.

Plaintiffs' erroneous first quotation mark ([PB 22](#)) wrongly makes *Camilli v. Grimes* propose that preclusion of viable malicious prosecution claims *never* constitutes "plain legal prejudice." Rather, *Camilli*, Plaintiffs' lone authority on this question, explicitly stated:

Although malicious prosecution is a recognized tort that ought not to be precluded without some justification, it is difficult to imagine circumstances more compelling than those of the pending case to warrant foreclosure of the retaliatory strike that Grimes wants to pursue. Judge Sprizzo acted well within his discretion by effectively ending a litigation war, then in its fourteenth year, with a dismissal without prejudice even though

a lawyer, already found to have made an unconscionable claim against his former client, was thereby foreclosed from continuing the war with a malicious prosecution suit.

436 F.3d 120, 124 (2d Cir. 2006) (*italics added*). Thus, *Camilli* is clear that some justification is required before preclusion, and *Camilli* spelled out the justification for that case. In stark contrast, for the underlying litigation, the only “justification” the record really contains for preclusion is the preclusion itself: to prevent Defendants from suing Plaintiffs and their counsel. ([DA](#) 8, 10–11).

Though Defendants were waiting until they had adequate evidence to defeat an anti-SLAPP motion before adding counterclaims, Defendants’ answer to the complaint still refers to abuse of process and malicious prosecution claims. (JA 68–71, 75–76; [RA 9-2](#) p. 20; cf. [PB](#) 30).

B. The Factor of Vexatiousness.

This circuit adopted the factors listed in *Pace*, but explicitly stated that “courts need not ... limit their consideration to these factors” when resolving motions under Fed.R.Civ.P. 41(a)(2). *Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000). *Pace* in turn obtained its list of factors from the 1968 edition of *Moore’s Federal Practice*. *Pace v. Southern Express Co.*, 409 F.2d 331, 334 (7th Cir. 1969). And *Moore’s* includes as yet another factor used by the courts “any vexatious conduct or bad faith on plaintiff’s part.” 8 *Moore’s* §41.40[6].

When considering exceptions to the American Rule, “vexatious” means that the case was “frivolous, unreasonable, or without foundation, even though not

brought in subjective bad faith.” *Local 285 v. Nonotuck Resources Assocs.*, 64 F.3d 735, 737 (1st Cir. 1995) (citation omitted). “Doubtless a case can be so frivolous as to reflect impermissible conduct” *Americana Indus., Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 628 (1st Cir. 1977).

Defendants raised the question of vexatiousness in Defendants’ opposition to Plaintiffs’ motion to dismiss. (JA 250–255). Therefore, whether Plaintiffs’ case was meritless was at issue in the motion to dismiss. (cf. [PB 28](#)).

Plaintiffs didn’t merely file “‘a weak or legally inadequate case’” as Plaintiffs propose. ([PB 53](#)). Rather, Plaintiffs knowingly filed a case they knew was utterly devoid of merit, whether the issue be copyright, trademark, perjury, private inurement, Internal Revenue Code violations, Shelton’s divorce, or whistleblower terminations.

C. Shelton’s Lack of Reasons to Dismiss.

Plaintiffs assert that Shelton, individually, and 3ABN had identical claims, and imply that Thompson’s tale of IRS and EEOC vindication applies to Shelton. ([PB 26 n.5](#)). But Plaintiffs fail to explain (a) how Shelton ever asserted trademark claims (JA 51–53), (b) how 3ABN shared with Shelton his personal defamation claims concerning, *inter alia*, divorce, alleged adultery, a Toyota Sequoia’s title, and perjury in divorce-related proceedings (JA 49–50), and (c) how the IRS or EEOC ever vindicated Shelton in any of these specific matters.

D. Dismissing to Avoid Expense and Discovery.

Plaintiffs' counsel's October 17, 2008, statement to Pickle that Plaintiffs wanted to settle right away to avoid the expense of discovery is not hearsay. Fed.R.Evid. 801(d)(2)(D). (JA 267; cf. [PB](#) 31).

E. Evidentiary Hearing Should Have Been Held.

Regarding holding "an evidentiary hearing to resolve issues of fact that cannot be resolved on the papers submitted," *McLaughlin v. Cheshire*, 676 F.2d 855, 857 (D.C.Cir. 1982) cited *Copeland v. Marshall*, 641 F.2d 880, 905 (D.C.Cir. 1980) (en banc). (cf. [PB](#) 26). The latter case affirmed a statutory attorney's fee award without an evidentiary hearing because no such hearing was requested and the issues were thoroughly briefed. In stark contrast, Defendants explicitly requested an evidentiary hearing, and Plaintiffs' veracity and assertions were in doubt. (JA 254, 260–261, 264, 249).

F. Familiarity with Case; Reading Defendants' Opposition.

In their fact section, Defendants cited the district judge's statements from four different status conferences to show his unfamiliarity with the case. ([DB](#) 22–23). In their argument, Defendants cited only the status conferences of September 11 and October 30, 2008 (not December 14, 2007).¹⁵ ([DB](#) 28; cf. [PB](#) 32). During

¹⁵Confusingly, Plaintiffs refer to "cross-motions on the permissible scope of discovery" in connection with the December 14, 2007, status conference ([PB](#) 32), when Plaintiffs' scope of discovery motion wasn't filed until June 25, 2008. (JA 125).

the October 30 conference, the district judge expressed unfamiliarity with the Confidentiality Order, which was at issue in the motion to dismiss. ([DA](#) 14, 16–17; JA 226–227).

When Defendants first referred to their 255 pages worth of opposition filed by 2:23 pm, the district judge said, “When was that filed?” ([DA](#) 6; JA 244, 265). He would not have asked that if he had just finished digesting those 255 pages before the 3:00 pm status conference. (JA 17). His next statement, “Yes, I did see it” ([DA](#) 6), must therefore only mean that he had seen the Notices of Electronic Filing. Defendants repeatedly referred to their opposition brief as if the court was unfamiliar with its contents, and the court never stated that it had already read it. ([DA](#) 6–7, 11, 15).

G. Dismissal Conditions Must Protect Evidence from Spoliation.

In the underlying litigation, Plaintiffs put at issue Shelton’s violations of the Internal Revenue Code, and alleged IRS vindication. (JA 48, 223–224). Did Plaintiffs taint the IRS criminal investigation by selective or fraudulent disclosure? Plaintiffs requested destruction of the only documentary proof that answers that question. (EX 394–395, 489; cf. [PB](#) 35 n.9).

H. Counts vs. Prayer for Relief.

Plaintiffs confuse their Causes of Action with their Prayer for Relief: “Count I and Count II had sought an order” ([PB](#) 12, 23). This obscures the fact that Plaintiffs never obtained their stated objective of obtaining an injunction against

Defendants using “3ABN” in any domain name. (JA 55).

I. Who Protracted the Pre-dismissal Litigation.

Plaintiffs blame Defendants for protracting the pre-dismissal litigation. ([PB](#) 29–30). Since not one of Defendants’ third-party subpoenas was quashed, two were enforced (EX 183–185, 643–648), only Plaintiffs’ allies were reluctant to comply (JA 158), and only one third party had not complied by October 30, 2008 (JA 240–243), Plaintiffs, not Defendants, must be to blame.

J. LR, D.Mass. 7.1(a)(2) Certification.

Plaintiffs’ counsel’s October 23, 2008, LR, D.Mass. 7.1(a)(2) certification ([PB](#) 31) is contradicted by his own statements written the next day, and by Joy’s October 18, 2008, personal message. (EX 539–541, 666–667).

VII. More re: Motion for Costs.

Puerto Rico never adopted *Blackburn*’s position that Fed.R.Civ.P. 41(a)(2) must be restricted by 28 U.S.C. §1920 and the American Rule. It only cited *Blackburn* as one of several cases that show that imposing attorney’s fees “lies within the sound discretion of the district judge.” *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981). (cf. [PB](#) 40). And, for the additional reasons Defendants already noted ([DB](#) 51 n.15), *Puerto Rico* is to some extent distinguishable from the underlying case.

Plaintiffs argue that “the bad faith exception to the American Rule ... ‘requires more than a showing of a weak or legally inadequate case.’” ([PB](#) 53). If it

requires more than that, then it must require that as well. Therefore, Plaintiffs' logic makes the Remnant documents relevant to the motion for costs, whether or not those documents prove that Plaintiffs always knew their case was utterly meritless.

VIII. re: Motion to Amend Findings.

Fed.R.Civ.P. 52(a)(3) pertains to findings "For a Motion." Plaintiffs therefore err when Plaintiffs deny that Rule 52(b) applies to a motion to amend findings for a motion. ([PB](#) 33 n.7).

IX. More re: Motion to Reconsider.

Generally, new arguments should not be presented in a motion to reconsider. *Global Naps, Inc. v. Verizon New England, Inc.*, 489 F.3d 13, 25 (1st Cir. 2007). Plaintiffs' argument that Defendants' arguments are "not new" ([PB](#) 35–36) is therefore not dispositive.

Rule 59(e) motions should (a) show how "the court has misapprehended some material fact or point of law," (b) present "newly discovered or previously unavailable evidence," or (c) show how the ruling results in "manifest injustice." *Palmer v. Champion Mortgage*, 465 F.3d 24, 30 (1st Cir. 2006); *Marie v. Allied Home Mortgage Corp.*, 402 F.3d 1, 7 n.2 (1st Cir. 2005). Defendants' motion to reconsider invoked these specific grounds for relief, as well as Fed.R.Civ.P. 60(b) (1), (3).¹⁶ ([RA 169](#) pp. 1–2; JA 402–412).

¹⁶Among other issues, Defendants raised the issues of withholding evidence

Both here and below, Plaintiffs entirely ignore the issue of “manifest injustice.” ([PB](#); JA 421–431). Because Plaintiffs misunderstand the “abuse of discretion” standard of review ([PB](#) 34–35), Plaintiffs fail to address the clear factual and legal errors Defendants highlight.

Plaintiffs never propose that Defendants should have recognized earlier what Shelton meant by “letter” in the recording. ([PB](#) 35–36; cf. [DB](#) 55). Defendants cited the record to show abuse of process and malicious prosecution, and Plaintiffs on March 23, 2009, admit that there is nothing in the record to use in rebuttal. (JA 395–397, 410). How then can the lower court’s April 13, 2009, finding be correct, that nothing in the record *suggests* abuse of process and malicious prosecution? ([DA](#) 24–25). Plaintiffs don’t say. ([PB](#) 35–36). Plaintiffs’ only response to the *3ABN World* evidence is that it supports old, merits-based arguments. ([PB](#) 35).

Plaintiffs cite no authority to show that evidence that merely clarifies newly discovered evidence must also be newly discovered. ([PB](#) 54 n.14).

X. More re: Motions to File Under Seal.

Plaintiffs do not explain how Defendants “misinterpret[ed] ... the requirements of the protective order.” ([PB](#) 51).

Defendants filed below three motions to file under seal. ([RA 86](#); [RA 153](#); [RA154](#); [RA 173](#)). For each motion, Defendants explained the relevance of the proffered documents in the filings the documents pertained to, and did not rehash

and extrinsic fraud. (JA 398, 411–412; [RA 177](#) p. 12; [RA 182](#) p. 12).

all of that within the motions to file under seal. (*Id.*; [RA 80](#) pp. 8, 16; [RA 81](#) pp. 12–13; EX 272; JA 324, 344, 399, 401, 406; [DA 50–52](#); [RA 173](#) p. 2). The lower court never told Defendants that this approach was unacceptable, and granted the first of the three motions. (JA 15).

Plaintiffs cite *Siedle* in support of their argument ([PB 51, 53](#)), but *Siedle* concerns a sealing order’s removal from documents already filed, not an opposing litigant’s obstruction of the filing of substantive documents through confidentiality designations, some of which designations were patently vexatious. *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).

XI. re: Motion for Sanctions.

The lower court’s use of the adverb “sufficiently” to modify “problematic” clearly means that the disputed statements were “problematic,” but not “sufficiently problematic.” ([DA 29](#); cf. [PB 42–43](#)). The only reason the court would invoke the term “zealous advocacy” within the context of a Rule 11 motion for sanctions is because the statements appeared less than truthful.

Plaintiffs’ counsel fails to properly address his misrepresenting (a) Shelton’s kickbacks as “perfectly proper royalty payments,” (b) the timing of Defendants’ discovery efforts, and (c) whether Defendants had already explained the bearing of documents to be filed under seal. ([PB 43–44](#); cf. [DB 52–54](#)). Below, Plaintiffs’ counsel explained his “perfectly proper” statement by asserting that Shelton had switched to Remnant as his booklet publisher. (JA 473). But the counselor dares

not repeat that lie here after Defendants refuted it in reply below. (JA 489–492; EX 815–831).

The only misrepresentation Defendants highlighted that Plaintiffs’ counsel almost addresses is his lie that the Remnant documents “had no relevance to the underlying lawsuit.” (JA 360 (cited at JA 401–402), re-advocated at JA 429). Yet Plaintiffs’ counsel offers no legal basis for asserting as irrelevant the indisputable proof that in 2006 Shelton earned “a good deal more than \$300,000” in kickbacks and royalties, yet perjuriously failed to report it on his financial affidavit. (JA 48, 50; EX 702, 287–288, 290). *See* SB 1–3, citing SE 34–95, 97, 100–133, 135.

Plaintiffs’ brief here contains just more of the same sort of gross misrepresentations seen below: Defendants never argued here “that attorneys’ fees are always required” ([DB](#) 46–47; cf. [PB](#) 40), or that imposing costs would cure the loss of Defendants’ malicious prosecution claim. ([DB](#) 42; cf. [PB](#) 41). Filing under seal in disregard of the Confidentiality Order is impossible since filing under seal preserves the confidentiality that that order is meant to preserve. (cf. [PB](#) 44).

Defendants argued that the lower court’s October 26, 2009, finding was clearly erroneous because of the date of Plaintiffs’ admission ([DB](#) 55), not because the lower court didn’t find that admission “to be significant.” ([PB](#) 34). Defendants never argued that a finding of irrelevance regarding the Remnant documents was impossible because of the finding of the Michigan court. ([DB](#) 45; cf. [PB](#) 52). It is a bold face lie that “[t]he district court had no information” before it to determine the

relevance of the documents at issue in RA 173. ([DA 50–52](#); [RA 173](#) p. 2; cf. [PB 54](#)).

Plaintiffs’ counsel’s predecessor stated that allegations that counsel have been “in any way involved in ‘trying to hide the truth’ or have engaged in ‘concealment’ or ‘duplicitous’ conduct” constituted “a threat to our professional licensure.” ([RA 37-2](#) p. 20). Perhaps it is about time.

CONCLUSION

Joy and Pickle still seek reversal of the order(s) under appeal: (a) Outright denial of the motion to dismiss as to one or both Plaintiffs. (b) To the extent that dismissal is not denied, that dismissal be with prejudice and include curative conditions that preserve evidence, protect Defendants and their claims, prevent exhaustion of Defendants’ resources (such as through transferring discovery and favorable rulings to future litigation), do not revoke ¶ 7 of the Confidentiality Order, and do not impose the Confidentiality Order’s non-litigant return requirements upon litigants. (c) Permit the filing of exhibits that Plaintiffs designated confidential. (d) Impose sanctions against Plaintiffs’ counsel.

Respectfully submitted,

Dated: February 3, 2011

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains a total of 6,662 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using OpenOffice 3.2.1 in 14pt Times.

Dated: February 3, 2011

s/ Bob Pickle
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CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on February 3, 2011, I served a copy of this brief on the Clerk of the Court of Appeals and on the following represented parties via the ECF system:

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