

**UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS**

Three Angels Broadcasting Network, Inc.,
An Illinois non-profit corporation, and Danny
Lee Shelton, individually,

Plaintiffs,

Case No. 07-40098-FDS

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

**PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION
TO CERTIFY AND FORWARD PART OF THE RECORD**

INTRODUCTION

Defendants Gailon Arthur Joy and Robert Pickle (Pickle and Joy) ask this Court to reverse its October 30, 2008 order, which is currently on appeal to the First Circuit Court of Appeals, directing Magistrate Judge Hillman to return a box of raw discovery materials to the Plaintiffs, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton. The MidCountry Bank documents are the personal financial records of Plaintiff Shelton. Pickle and Joy had sought them with a subpoena issued from a Minnesota federal court. Plaintiffs opposed the production of the bank records on the basis that they had nothing to do with the case. The U.S. District Court for the District of Minnesota ultimately ordered them disclosed *under seal* to Massachusetts Magistrate Judge Hillman, whereby Judge Hillman would make further decisions concerning whether they should be released to Pickle and Joy and if so, under what conditions.



This Court granted Plaintiffs' motion for voluntary dismissal before Judge Hillman was asked to review the MidCountry Bank documents. As raw discovery materials, they were never part of the district court record for any purpose, and specifically were not part of the record upon which this Court issued the Orders that Pickle and Joy have challenged in their appeal to the First Circuit Court of Appeals.

When 3ABN moved to voluntarily dismiss this lawsuit, it specifically requested return of these documents in its motion papers. This Court agreed and ordered their return. Pickle and Joy did not seek a stay of the order directing Magistrate Judge Hillman to return the MidCountry Bank records, nor did they seek reconsideration of that part of the order in any of their many post-judgment filings. Once Pickle and Joy filed their notice of appeal, this Court was divested of jurisdiction to revisit its decisions concerning the physical disposition of the MidCountry Bank documents. Now that Pickle and Joy have appealed, this Court lacks jurisdiction to grant the relief they seek. Moreover, to the extent that the present motion is in substance a motion for reconsideration of the order granting return of the MidCountry records and is being made more than a year after the order was issued, it is extremely untimely. Pickle and Joy's only legal recourse is to seek appellate review of this Court's order directing that the documents be returned. Thus, this Court must deny Pickle and Joy's motion to certify and forward the MidCountry Bank documents to the appellate court.

STATEMENT OF FACTS

This case arises from a lawsuit by Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to as "3ABN") alleging trademark

infringement, trademark dilution, defamation, and intentional interference with advantageous economic relations against Pickle and Joy. (Docket #1).¹ The allegations in the Complaint were based upon Pickle and Joy operating a web site that used the “3ABN” logo to attract viewers and then bombarded them with disparaging and defamatory statements about 3ABN. (*Id.*).

The parties commenced discovery in this Court. Pickle and Joy served written Requests for Production of Documents upon 3ABN requesting financial records and bank statements. (*Affidavit of Gregory Simpson*, Ex. A at Ex. C). Around this time, Pickle and Joy also issued a subpoena from the U.S. District Court for the District of Minnesota on a branch of MidCountry Bank located in Minnesota, served on January 16, 2008. (*Id.*, Ex. A at Ex. F). This subpoena sought Appellees’ sensitive, confidential, business, financial and operational records. (*Id.*). The subpoena was strikingly similar to document requests in this Court that were the subject of 3ABN’s motion for protective order, which was still unresolved at that time. (*Id.*, Ex. A at Ex. H, ¶ 10). 3ABN moved to quash this subpoena based on the fact that a directly-related motion for protective order was pending in this Court. (*Simpson Aff.*, Ex. B).

The Minnesota Court, the Honorable Arthur J. Boylan presiding, denied 3ABN’s motion to quash the subpoena on July 1, 2008, but with specific conditions. (*Simpson Aff.*, Ex. C). The Court ordered Pickle and Joy to pay MidCountry Bank’s reasonable costs in responding to the subpoena. (*Id.* at 2). Upon payment of these costs, MidCountry Bank was to ship all documents **under seal** to Magistrate Judge Timothy S.

¹ “Docket #” refers to this Court’s ECF civil docket number.

Hillman in Massachusetts, whereby Judge Hillman could determine what to do with the documents. (*Id.*). Pickle and Joy then moved for reconsideration of this order, which the Minnesota Court denied. (*Simpson Aff.*, Ex. D).

In the meantime, Magistrate Judge Hillman issued a confidentiality order that governed “all documents and information produced, or to be produced by any party of third party in connection with this litigation” (Docket #60). In September 2008, Magistrate Judge Hillman further ordered that all subpoenas to non-parties could only be issued by leave of court. (Docket #107).

The MidCountry records were then produced and delivered to the Federal Courthouse in Worcester, Massachusetts on September 12, 2008. (*Pickle Aff.*, Ex. 4). There is no ECF record of these documents on this date; thus, they were not filed with the Court. They were simply delivered to the Court with the expectation that Judge Hillman would decide what to do with them.

But on October 23, 2008, before Judge Hillman was asked to do anything with the MidCountry records, 3ABN moved to voluntarily dismiss this lawsuit under Fed. R. Civ. P. 41(a)(2). (Docket # 120, 121). In the same motion, 3ABN moved this Court to order the return of all confidential information pursuant to the Confidentiality and Protective Order issued on April 17, 2008 (Docket #60), including but not limited to the MidCountry Bank records. (Docket #139).

This Court granted the motion for voluntary dismissal on October 30, 2008. (Docket #129). The Court ordered that “all confidential documents be returned, All subpoenas are ordered moot, *Records in possession of Mag. Judge will be returned*”

(Electronic Order dated 10/31/08; see also *Simpson Aff.*, Ex. E at 13-15) (emphasis added). At the time of dismissal, Pickle and Joy complained about the cost to obtain the MidCountry records, and the Court invited them to request reasonable costs and fees by motion. (*Id.* at 15).

Pickle and Joy then filed a Notice of Appeal on November 13, 2008. (Docket #133). On the same day, Pickle and Joy filed a motion for an award of their litigation expenses. (Docket #130). On April 13, 2009, this Court denied Pickle and Joy's motion for costs and attorneys' fees. (Docket # 166). On April 27, 2009, Pickle and Joy filed a motion to reconsider and to amend findings. (Docket # 169). On October 26, 2009, this Court denied Pickle and Joy's motion for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions. (Docket #193). In doing so, the Court confirmed that, "to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago.*" (*Id.* at 3) (emphasis added). Pickle and Joy appealed from this order on November 23, 2009. (Docket # 196). The MidCountry Bank records were returned to 3ABN's counsel by Magistrate Judge Hillman's office. (*Simpson Aff.* at ¶ 8). 3ABN's counsel has assured Pickle and Joy that the records will be maintained in the condition under which they were received until the appellate process has been exhausted. (*Simpson Aff.*, Ex. F). Pickle and Joy continue to ignore this Court's order to return the documents they received under the protective order issued in this case. (*Id.* ¶ 8).

I. This court has no jurisdiction to reverse its own order after a party has appealed to the court of appeals.

The fact that Pickle & Joy filed a notice of appeal to the First Circuit Court of Appeals has absolved this Court of jurisdiction over its order requiring return of the MidCountry Bank documents:

[A] federal district court and a federal court of appeals should not attempt to assert jurisdiction over a case simultaneously. The filing of a notice of appeal is an event of jurisdictional significance — it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.

Griggs v. Provident Consumer Discount Co., 459 U.S. 56, 58, 103 S.Ct. 400, 402, 74 L.Ed.2d 225 (1982). Under the jurisdictional-transfer principle, once a notice of appeal has been filed, the federal district court cannot take any action that would alter the appellate status of the case. *Knutson v. AG Processing, Inc.*, 302 F.Supp.2d 1023, 1030 (N.D. Ia 2004) (citations omitted). Here, this Court cannot reverse its own order requiring return of the MidCountry Bank documents.

This Court has already ruled on the disposition of the MidCountry Bank documents and ordered that they be returned. In their motion to dismiss this lawsuit, 3ABN moved this Court to have the MidCountry Bank documents returned. (Docket #139). The basis for the motion was set forth in 3ABN's brief. It included the fact that all parties had contemplated return of documents produced under the protective order at the conclusion of the litigation. This Court agreed with 3ABN's position and ordered that all confidential documents, including the MidCountry Bank records in the possession of the magistrate judge, be returned. (Electronic Order dated 10/31/08; *see also Simpson*

Aff., Ex. E at 13-15). Pickle and Joy then moved for an award of their litigation expenses, which this Court denied. (Docket # 166).

Pickle and Joy then moved for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions, which the district court also denied. (Docket #193). In doing so, the Court noted that, “to the extent that the materials [considered in the motion to file under seal] are subject to the Confidentiality and Protective Order issued by Magistrate Judge Hillman on this matter on April 17, 2008, *they should have been returned to plaintiffs some time ago.*” (*Id.* at 3) (emphasis added). Pickle and Joy appealed from this order on November 23, 2009. (Docket # 196). The notice of appeal acted to remove this Court’s jurisdiction on all issues related to the appeals. Moreover, to the extent that Pickle and Joy attempt to move again for reconsideration of the same order, this motion is untimely.

Thus, this Court has no jurisdiction to reconsider its decision concerning the MidCountry documents — a decision that is currently on appeal. Review of this order rests with the court of appeals. The proper procedure for Pickle and Joy to object to this Court’s order requiring return of the MidCountry Bank documents is through the appellate process. This Court has no ability to reverse its own order, which is now on

appeal.² Thus, there is no legal basis for this Court to certify and forward the MidCountry Bank documents. Pickle and Joy's motion must be denied.

II. Even if this court had jurisdiction to review its earlier order, Pickle and Joy's motion would be denied because the MidCountry Bank documents were never part of the district court record with respect to the motion to dismiss.

Generally, only documents and evidence presented to the district court can be included in the record on appeal. *See, e.g., Commonwealth v. United States Veterans Admin.*, 541 F.2d 119, 123 n. 5 (1st Cir. 1976) (striking portions of appendix that were not part of district court record.). The record on appeal is typically made up of: (1) the original papers and exhibits filed in the district court; (2) transcripts of the proceedings; and (3) a certified copy of the docket entries provided by the district court. FRAP 10(a).

Pickle and Joy argue that the MidCountry records were filed with the Court merely because the clerk of court physically received them. (Def. Brf. at 2). On the contrary, the rules of civil procedure prohibit the filing of discovery materials unless used in connection with a motion or where the court orders that the documents be filed. *See* Fed. R. Civ. P. 5 (d) (1) ("the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: ... requests for documents...."); LR, D. Mass. 26.6 (a) ("any ... requests for or products of the discovery process shall not be filed unless so ordered by the court or for use in the proceeding.").

² Pickle and Joy have threatened to bring yet another motion before the district court to "command" that 3ABN return the MidCountry Bank documents to the district court. (*Simpson Aff.*, Ex. F). However, any additional motion concerning this matter is duplicative and frivolous and the same arguments in this response would apply, i.e., that this court has no jurisdiction to reverse its prior order because it is now on appeal. Finally, 3ABN is in full compliance with the district court's order requiring that these documents be returned.

The conditions necessary to make the MidCountry Bank records part of the district court record did not occur: The Court did not order that they be filed and they were never used in connection with any motion. Thus, the MidCountry Bank records should not be deemed to have been filed merely because they were sent to the magistrate judge for future handling.

The district court administrator treated these records in a manner that acknowledged they were not part of the district court record by not docketing them in the district court's electronic docketing system. Minnesota Magistrate Judge Boylan had merely ordered the confidential bank statements be forwarded by MidCountry Bank under seal for future handling by Magistrate Judge Hillman. There is no record that Judge Hillman ever substantively reviewed them. Judge Saylor did not refer to these confidential records to determine the motion to dismiss. The only question surrounding these confidential documents at the time of the motion to dismiss concerned their physical disposition. Because this Court never substantively reviewed these documents, they are not reviewable on appeal. *See, e.g., Naser Jewelers v. City of Concord, New Hampshire*, 538 F.3d 17, 19 n. 1 (1st Cir. 2008) (holding that documents that were never properly authenticated and attached as affidavit exhibits were not properly before the district court on motion for summary judgment).

A motion to enlarge the record under Rule 10(e) is designed to supplement the record on appeal so that it *accurately reflects* what occurred before the district court. *United States v. Rivera-Rosario*, 300 F.3d 1, 9 (1st Cir. 2002). The rule attempts to confirm that the proceedings in the district court are accurately reflected on appeal:

(2) If anything material to either party is *omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected* and a supplemental record may be certified and forwarded:

(A) on stipulation of the parties;

(B) by the district court before or after the record has been forwarded;

or

(C) by the court of appeals.

FRAP 10(e)(2) (emphasis added). Thus, the purpose of Rule 10(e) is to correct inadvertent errors or accidents. FRAP 10(e) cannot be used to put additional evidence — relevant or not — before the court of appeals that was not before the district court. *Rivera-Rosario*, 300 F.2d at 9. Pickle and Joy cannot ask the appellate court to substantively review documents that the district court never reviewed. This Court can only forward and certify records in order to accurately reflect what was before the district court when it made its decision on 3ABN's motion to dismiss.

Here, this Court did not consider the substance of these records on the motion to dismiss. Thus, to supplement the record with information not used below would enlarge the record rather than accurately reflect what occurred at the district court level. Circuit Courts have confirmed that the purpose of Rule 10(e) is to provide an accurate reflection of events, not to provide an opportunity for retroactive alteration of these events. *United States v. Page*, 661 F.2d 1080, 1082 (5th Cir. 1981). "New proceedings of a substantive nature, designed to supply what might have been done but was not, are beyond the breach of [Rule 10(e)]." *Id.* If Pickle and Joy are dissatisfied with this Court's order requiring return of these documents, they must present this argument on appeal from the order denying their motion for reconsideration. This Court cannot forward or certify as part of the substantive record documents that were never part of the record. This Court should

deny Pickle and Joy's request to certify and to forward the now-retuned MidCountry Bank documents.

CONCLUSION

This Court has no jurisdiction to enlarge the appellate record to include the MidCountry Bank documents. The issue of whether or not this Court properly ordered their return is now on appeal. Furthermore, the substantive information in the MidCountry Bank documents was never part of the record on the motion to dismiss. Thus, this Court should deny Pickle and Joy's motion.

Respectfully submitted,

Dated: December 17, 2009

s/ M. Gregory Simpson

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CERTIFICATE OF SERVICE

I hereby certify that this document(s) filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non registered participants on December 17, 2009.

Dated: December 17, 2009

s/ M. Gregory Simpson
M. GREGORY SIMPSON