

**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-RWZ

v.

Gailon Arthur Joy and Robert Pickle,

Defendants.

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

INTRODUCTION

This is the fourth time that Defendants Gailon Arthur Joy and Robert Pickle have attempted to add the “Remnant documents” to the record after this case was dismissed. The Remnant documents were never part of the substantive district court record because the district court never reviewed their contents when deciding to dismiss this case. As such, they are not properly part of the appellate record. This Court first denied their attempt to add these documents after dismissing the case in conjunction with their motion for costs. This Court then denied defendants’ motion to reconsider adding these documents to the post-judgment record. After Pickle and Joy appealed this order denying reconsideration, they attempted to add the same documents into the appellate record in the First Circuit. The First Circuit denied this attempt to end-run the appellate process.

The proper method for review of whether the Remnant documents should have been added to the district court record is the current appeal.

Now, incredibly, defendants again attempt to add the Remnant documents into the post-judgment record as an alleged response to plaintiffs' response to defendants' objections to Magistrate Judge Hillman's order. This attempt to add additional documents to the post-judgment record is so far removed from any procedurally proper method of litigation that it can only be characterized as frivolous and an additional attempt to increase the cost of litigation and waste judicial resources. After defendants have accused Judge Saylor and Court staff of improper conduct, perhaps now defendants assume that any newly assigned judge or magistrate will quickly acquiesce to their repeated demands or face ethical inquiry. Yet the fact remains: defendants' fourth request to add the Remnant documents is procedurally unauthorized, redundant, and frivolous. This is an additional example of Pickle and Joy's unending and ironic efforts to continue costly litigation *against themselves* despite plaintiffs' efforts to end it. This court should not consider defendants' request. Further, this Court should — through its inherent power to regulate the conduct of abusive litigants — enjoin defendants from filing any further motions to enlarge the post-judgment record.

FACTS

This case arises from a lawsuit by Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to as "3ABN") alleging trade infringement, dilution of trademark, defamation, and intentional interference with

advantageous economic relations against Pickle and Joy. (Docket #1).¹ The allegations in the Complaint were that Pickle and Joy had been operating a web site that used the “3ABN” moniker or logo to attract viewers and then bombarded them with disparaging and defamatory statements about 3ABN. When Joy filed for bankruptcy protection, 3ABN acquired the offending web site from the bankruptcy trustee and shut it down. It soon became apparent to 3ABN that no further relief could be obtained by continuing the litigation. Pickle and Joy controlled no other web sites and had no apparent assets from which a judgment could be paid. In addition, as their appeal to this Court reflects, they had an apparently inexhaustible taste for litigation even though they were the defendants and had asserted no counterclaims.

Therefore, on October 23, 2008, 3ABN moved to voluntarily dismiss this lawsuit under Fed. R. Civ. P. 41(a)(2) because it believed that it had obtained all tangible relief that could have been gained through this lawsuit by other means and that the lawsuit could not achieve additional meaningful relief. (Docket # 120, 121). The district court accepted the evidence and argument in support of the motion and dismissed this case on October 30, 2008. (Docket #129).

Pickle and Joy then filed a Notice of Appeal with this Court on November 13, 2008. (Docket #133). On the same day, Pickle and Joy filed a motion for costs. (Docket #130). It was only in conjunction with Pickle and Joy’s reply brief in support of their motion for costs that they first made a motion to file the Remnant documents and other

¹ “Docket #” refers to the United States District Court District of Massachusetts Civil Docket number of the document.

documents under seal. (Docket #153). In Robert Pickle's affidavit in support of that motion, he failed to specifically identify what he now identifies as the "Remnant documents:"

The Defendants will seek to file under seal as Exhibit A a selection of the documents from Remnant pertaining to payments of kickbacks and/or royalties from Remnant to DLS Publishing Inc. (hereafter "DLS") from 2005 through 2007.

(Docket # 152). The unspecified documents of Exhibit A were never identified by Bates number.

On April 13, 2009, the district court denied Pickle and Joy's motion for costs and attorneys fees. (Docket # 166). Two days later, the court also denied their motion for leave to file under seal. (Electronic Order dated 4/15/09). Thus, this Court has already denied Pickle and Joy's motion to file the Remnant documents.

Pickle and Joy then filed a motion to reconsider and to amend findings on April 27, 2009. (Docket # 169). That motion sought reconsideration of the district court's Orders of April 13 and 15, 2009, amendment or alteration of the judgment under Fed. R. Civ. P. 59(e) and relief from judgment under Fed. R. Civ. P. 60(b). (Docket #170).

In the meantime, the appellate briefing schedule continued. Both Pickle and Joy and 3ABN filed briefs concerning the district court's October 2008 order. On August 19, 2009, the First Circuit Court of Appeals ordered the appeal held in abeyance pending the disposition of the motion for reconsideration by the district court. (Order dated 8/19/09). The Court stated that, "In the event that defendants are dissatisfied with the district

court's rulings on their motion for reconsideration, they should file a new timely notice of appeal." (*Id.*).

On October 26, 2009, the district 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 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) Pickle and Joy then appealed from this order on November 23, 2009. The First Circuit has yet to set the briefing schedule for this second appeal.

Pickle and Joy then brought a third motion to file the Remnant documents under seal in the First Circuit Court of Appeals. Attached to the motion was the affidavit of Robert Pickle and Bates-stamped portions of documents produced by Remnant Publications. The Pickle Affidavit — dated November 17, 2009 — was entirely new and had never been submitted to the district court. Furthermore, the Remnant documents were never specifically identified to the district court, they were merely referred to as "a selection of the documents from Remnant." (Docket #152). The First Circuit has denied this motion. (First Circuit Order dated 12/4/09).

Pickle and Joy's current effort now marks the *fourth time* that they have attempted to add these Remnant documents to the record. They do so under the guise of objecting to plaintiff's response to the defendant's objections to the Magistrate Judge's orders of January 2010. On January 29, 2010, Magistrate Judge Hillman denied Pickle and Joy's

(1) motion to forward copies of the MidCountry Bank records to the First Circuit Court of Appeals; and (2) motion to compel plaintiffs' counsel to return the MidCountry Bank records and stay the pending appeals. (Electronic Order dated January 29, 2010). Defendants objected to this order under Fed. R. Civ. P. 72(a). (Docket # 229). Plaintiff then responded to this objection. (Docket # 231). Defendants filed a reply brief. (Docket # 233). Defendants' motion to file under seal is an attempt to respond to Plaintiffs' response to defendant's objections to the Magistrate's order. (Plt.'s Brf. at 1).

ARGUMENT

I. There is no procedural basis under which Pickle and Joy can add already rejected documents to the post-judgment record while this case is on appeal.

Pickle and Joy's motion to add the "Remnant documents" — the same documents that they attempted to add to the appellate record under seal on November 19, 2009 — to the post-judgment district court record is unauthorized by the Federal Rules of Civil Procedure. At the outset, plaintiffs disagree with and object to all of Pickle and Joy's allegedly substantive arguments in support of this motion to file under seal. Yet a substantive response is irrelevant and unnecessary here because Pickle and Joy simply have no legal basis on which to add the Remnant documents to the record while this case is on appeal. In other words, whether Pickle and Joy personally believe that these documents are relevant is of no consequence because there is no federal rule that would allow these documents into the post-judgment record.

These particular documents — which Pickle and Joy attempted to add to the appellate record in November 2009 — were never part of the original district court

record. Pickle and Joy first attempted to add the Remnant documents to the district court record *after* this Court dismissed this case in their reply brief in support of their motion for costs. (Docket #153). This Court denied this motion to file these documents under seal in April of 2009. (Electronic Order dated 4/15/09). Pickle and Joy then filed a motion to reconsider and to amend findings seeking, in part, reconsideration of this Court's April 15 electronic order denying their motion to file the Remnant documents under seal. This Court denied the motion for reconsideration, confirming its denial of Pickle and Joy's motion to file the documents under seal. (Docket #193). Thus, the substantive information in these documents was never properly before the district court. The proper venue for Pickle and Joy's objection to the district court's order is the current First Circuit appeal. Although Pickle and Joy have a proper channel whereby they can again argue that these documents should have been entered into the district court record in the first place, they continue to attempt to enter the documents into the record.

Pickle and Joy then attempted for the third time to get the substantive information in the Remnant documents into the record by moving to expand the appellate record to include these documents despite the fact that the district court never allowed the substantive information in these documents into the record. (Docket #152). The First Circuit has rightly denied this motion (First Circuit Order dated 12/4/0). Now — for the fourth time — Pickle and Joy attempt to add the same substantive information in the Remnant documents into the record. They do so post-judgment and post-appeal. Pickle and Joy's latest attempt takes the form of a reply to a response to their own objections to

the magistrate judge's order denying return of the MidCountry Bank documents. There is simply no federal rule that authorizes this attempt.

Adding *any* documents to the post-judgment record as a reply to a response to objections to the magistrate judge's order is not authorized under the Federal Rules of Civil Procedure. Fed. R. Civ. P. 72(a) — the Federal Rule that allows a party to object to a magistrate judge's order concerning nondispositive matters — does not authorize a party to file a reply brief. Fed. R. Civ. P. 72(a). And it certainly does not authorize a party to file an additional motion to add materials in a reply to a response when these materials were never in the district court record. District courts do not generally permit the submission of new evidence in conjunction with objections to orders from magistrate judges. *See Housing Works v. Turner*, 362 F.Supp.2d 434, 438 (S.D.N.Y. 2005) (holding that supplemental exhibits were inadmissible when objecting to magistrate judge's decision). “The district judge will normally not consider arguments, case law, or evidentiary material which could have been, but was not, presented to the magistrate judge in the first instance.” *Tenen v. Winter*, 15 F.Supp.2d 270, 272 (W.D.N.Y. 1998). Thus, even if these documents were somehow relevant to Pickle and Joy's objections to the magistrate judge's order, they are not permitted to be added to the record. This attempt is not authorized under the rules, their arguments are irrelevant, and this motion should be denied.

Additionally, it bears repeating that this case is on appeal. 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). Thus, the district court has no power to add documents to the appellate record post-judgment and after the appeal has been filed. Only documents and evidence originally presented to the district court are 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 Remnant documents were never attached as exhibits to motions before this case was dismissed. *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). Thus, these documents that were never part of the district court record cannot now be added to the record for the first time while this case is on appeal. Pickle and Joy's motion to add the Remnant documents to the post-judgment district court record in an attempt to have them substantively reviewed on appeal must fail.

II. This Court should not allow Pickle and Joy to docket any further motions in the district court without its permission.

Pickle and Joy's latest motion to this court is both frivolous and redundant. Further, there is no federal rule that allows them to bring this motion. It is the fourth time that Pickle and Joy have attempted to add the same confidential documents into the district court record after three previous denials. And Pickle and Joy will no doubt brief this identical issue on appeal. Ironically, it is plaintiffs who have moved to end this litigation while defendants are the parties attempting to keep the litigation alive. In the

process, Pickle and Joy have not only two parallel appeals in progress, they have continued to bring motions in the district court while the case is on appeal and have initiated a judicial misconduct investigation against Judge Saylor and court staff. At this point, any motions that Pickle and Joy will attempt to bring are redundant. The appellate process should move forward without additional activity in the district court, increased cost to plaintiffs, and use of judicial resources. Thus, plaintiffs suggest that this Court carefully monitor Pickle and Joy's future attempts to bring motions in this Court.

Federal courts possess discretionary power to regulate the conduct of abusive litigants. *Cok v. Family court of Rhode Island*, 985 F.2d 32, 34 (1st Circuit 1993). "Basic rules of courtroom protocol and procedure impose an obligation, both on counsel and on individuals acting as their own counsel, to comply with court rules and not file frivolous motions." *United States v. Gomez-Rosario*, 418 F.3d 90, 101 (1st Circuit 2005). The court's power includes the ability to enjoin a pro se party from filing frivolous and vexatious motions. *Id.* Although courts have historically "loosened the reins" for pro se parties, pro se parties must still comply with the relevant rules of procedural and substantive law. *Eagle Eye Fishing Corp. v. United States Dept. of Commerce*, 20 F.3d 503, 506 (1st Circuit 1994) (noting long line of authority rejecting notion that pro se litigants are entitled to extra procedural swaddling). For example, in *Greenier v. Pace*, the district court affirmed the magistrate judge's order prohibiting the court clerk from docketing any more of the plaintiff's motions without the court's permission. 201 F.Supp.2d 172, 185-86 (D. Maine 2002). Plaintiff had filed approximately 20 miscellaneous motions, most of which are not recognized under the

rules, were frivolous and redundant. *Id.* So, too, should this Court restrict Pickle and Joy's future motions to this Court.

This Court should prohibit Pickle and Joy from docketing any future motions in this case without this Court's permission. This Court should protect against future redundant and frivolous motions that are intended to harass and to increase the cost of this litigation. Pickle and Joy should be prohibited from future abuse of the litigation process while this case is on appeal.

CONCLUSION

Pickle and Joy's motion to file under seal should be rejected based on the fact that it is unauthorized under the federal rules. There is no legal basis to add to the district court record while the case is on appeal. Pickle and Joy's motion represents their latest attempt to add to this costly litigation after it was dismissed. Thus, this Court should prohibit Pickle and Joy from docketing any future motions in this case without this Court's permission.

Respectfully submitted,

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