UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., an Illinois non-profit corporation, and Danny Lee Shelton, individually, Plaintiffs, v. Gailon Arthur Joy and Robert Pickle, Defendants.	Case No.: 07-40098-FDS

DEFENDANTS' MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTIONS TO RECONSIDER, AND MOTION TO AMEND FINDINGS

INTRODUCTION

Defendants' motion to impose costs (Doc. 130) was denied without ruling on Defendants' motion to file under seal (Doc. 153) and without reviewing the Remnant documents. The Court's April 13 and 15, 2009, orders contain clearly erroneous findings, findings impossible to make if the Court had reviewed those documents. Defendants are now at risk of having no curative conditions whatsoever to alleviate the prejudice they find themselves in. Pursuant to Rule 59(e) and Rule 52(b), Defendants therefore seek reconsideration of Defendants' motions to impose costs and file under seal, and amendment of findings in the April 13 and 15 orders.

Plaintiffs argued on appeal that the order of November 3, 2008, was not final because the matter of costs was unresolved. (Affidavit of Robert Pickle ("Pickle Aff.") Ex. A pp. 2–4). Defendants believe Plaintiffs to be incorrect on this jurisdictional question. However, if Plaintiffs are correct, and only if Plaintiffs are correct, Defendants hereby incorporate the facts, arguments,

and request for relief found in their appellants' brief. (Pickle Aff. Ex. B pp. 10–68, Ex. C).

FACTS

Relevant Procedural History

Plaintiffs filed their case with an *ex parte* motion to impound, but this Court denied Plaintiffs' outrageous attempt to violate the First Amendment and permanently shield this case from the public eye. (Doc. 2; Electronic Court's Notes entered on June 21, 2007).

The parties made their initial disclosures by August 3, 2007. (Doc. 37-2 p. 7; Doc. 152-14 p. 8). While Defendants produced thousands of documents in connection with those disclosures, Plaintiffs refused to produce anything until March 28, 2008, after being compelled by court order. (Doc. 71 ¶ 1–2; Doc. 81 ¶ 1; Doc. 89 p. 40; Electronic Order of March 10, 2008).

The initial productions of 12,825 pages in 3 unindexed PDF files[1] contained 9 pages not pertaining to the lawsuit, and these included a roll-over contribution form for James R. Greupner ("Greupner"), a partner in Plaintiffs' counsel's law firm, which contained Greupner's unredacted social security number, birthdate, and financial account numbers. (Pickle Aff. ¶¶ 4–5, Ex. D p. 1). Defendants immediately notified Plaintiffs' counsel and Greupner of this problem, and never published or disseminated any of the 9 extraneous pages. (Pickle Aff. ¶¶ 4, 6, Ex. D p. 1).

Plaintiffs claimed that their initial disclosures consisted of less than 500 pages of highly sensitive and confidential business records. (Doc. 37-2 p. 24). But the vast majority of the 207 pages of "confidential" Rule 26(a)(1) materials Plaintiffs produced on May 14, 2008, was anything but that. (Doc. 81 ¶¶ 13–14, Table 4; Doc. 126 p. 9).

Defendants reported stories that were corroborated by two or more sources. However, Plaintiffs' claims of defamation *per se* shifted the burden of proof to Defendants. Because of the information obtained from Defendants' sources, Defendants knew what to look for and where.

[1] This Court strongly reprimanded Plaintiffs for producing their documents without any indexing. (Doc. 107 p. 4). Indexing these documents took a lot of Defendants' time. (Pickle Aff. ¶ 29, Ex. H at Folders 2–4; 7–9).

Accordingly, Defendant Pickle crafted document requests which he served upon Plaintiffs on November 29 and December 7, 2007. (Doc. 63-20 p. 16; Doc. 63-21 p. 17).

Despite the obligation of Rule 34(b)(2)(C) to permit inspection of the portion of a request not objected to, Plaintiffs refused to produce a single page until June 13, 2008, four weeks after Defendant Pickle filed his second motion to compel. (Doc. 68-2 p. 4; Doc. 61).

Motions for protective orders should be filed "at the outset of discovery or, at the latest, before Rule 34's 30-day time limit has expired." *Burlington N. & Santa Fe Ry. Co. v. U.S. Dist. Court for Dist. of Mont.*, 408 F.3d 1142, 1149 n.3 (9th Cir. 2005). Instead, Plaintiffs filed their first such motion 5½ months after the start of discovery, and the second such motion 6 months after the first motion and 5½ months after Rule 34's 30-day time limit. (Doc. 40; Doc. 74).

Prior to Plaintiffs filing their first motion for a protective order, Defendants sought documents from MidCountry Bank ("MidCountry"), Gray Hunter Stenn LLP ("GHS"), and Remnant Publications, Inc. ("Remnant"). (Doc. 42 pp. 38, 43, 49). Plaintiffs encouraged GHS and Remnant to resist. (Doc. 114-26 ¶ 7; Doc. 75 p. 4; Doc. 161 pp. 3–4). Defendants moved to compel Remnant. (Doc. 81-2 pp. 121–143). MidCountry and GHS decided to comply, but Plaintiffs filed motions to quash. (Doc. 63-27 pp. 1, 5; Doc. 114-26 p. 1, ¶ 7). Plaintiffs' motion to quash the subpoena of GHS was untimely by 60 days. (Doc. 76-3 p. 5; Doc. 114-26 p. 4). The courts in Michigan and Minnesota enforced the subpoenas, and the court in Michigan found that the documents sought from Remnant were relevant. (Doc. 127-38; Doc. 63-36).

Thus, throughout this case, Plaintiffs clearly sought to obstruct and delay discovery, protract the litigation, and increase Defendants' costs.

Newly Discovered Evidence

Plaintiffs' Sweeping Admission in Plaintiffs' Appellees' Brief Served on March 23, 2009

In Defendants' appellants' brief, Defendants repeatedly cited the voluminous record of

this case to show that Plaintiffs filed a frivolous suit in bad faith, vexatiously multiplied proceedings, and engaged in abuse of process. (Pickle Aff. Ex. B at pp. 8–38, 50–52, 55–58, 64). In response, Plaintiffs made the following, astonishing admission in their appellees' brief:

> 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.

(Pickle Aff. Ex. A at p. 5). The implications of this March 23, 2009, statement are four-fold.

First, Plaintiffs admit that Plaintiffs need evidence in support of Plaintiffs' claims in order to rebut Defendants' many citations to the voluminous record. Thus, Plaintiffs admit that Defendants' exhibits and testimony in the record are relevant to Plaintiffs' claims.

Second, Plaintiffs have seven attorneys of record in this case, and Defendants of necessity are proceeding *pro se*. Throughout 18 months of litigation, Defendants filed a multitude of exhibits, often consisting of Plaintiffs' own statements or public, government records. Plaintiffs' assertion that seven well-paid attorneys could not rebut Defendants' exhibits by filing evidence to the contrary is a tacit admission that *no such evidence exists*. Plaintiffs therefore tacitly admit that their lawsuit and its claims were baseless.

Third, most or all of Plaintiffs' exhibits concerning Defendants' pre-lawsuit activities were filed by May 24, 2007. In particular, Three Angels Broadcasting Network Inc. ("3ABN") corporate secretary Mollie Steenson filed an affidavit on that day in which she asserted that her exhibits were in support of Plaintiffs' case against Defendants and Save3ABN.com. (Doc. 10-3 ¶¶ 5–11). Plaintiffs' admission that those exhibits weren't in support of the merits after all demonstrates that this suit was baseless from the beginning, and that Mollie Steenson's affidavit contains misstatements of material fact.

Fourth, and most importantly: This Court found that there was nothing in the record to

"suggest" that Plaintiffs filed a frivolous suit in bad faith. Defendants' appellants' brief had already repeatedly cited the voluminous record to the contrary. Since Plaintiffs admit that there is nothing in the record to rebut Defendants on this point, Plaintiffs therefore state on the record that the finding of this Court must be in error.

Recording by Shelton, Meaning Camouflaged by Inaccurate Wording

On May 14, 2003, Pastor Glenn Dryden ("Dryden") wrote 3ABN Board chairman Walter Thompson ("Thompson"), telling him that Tommy Shelton, brother of Danny Lee Shelton ("Shelton"), had molested six boys. (Doc. 81-2 pp. 1–3; Pickle Aff. Ex. E–G). Dryden attached a separate sheet of action items suggested for Tommy Shelton in light of Illinois Senate Bill 1035, which would extend the civil and criminal statute of limitations for child sexual abuse. (*Id.*).

On May 23, 2003, Shelton called Dryden and left a recorded message in which he spoke of an unsigned letter written by Dryden which referred to a bill regarding extending the statute of limitations. (Pickle Aff. ¶¶ 10–11). Shelton twice spoke of how "in this case" the statute of limitations had already run out, and Shelton asserted that the bill would not affect that. (Pickle Aff. ¶ 11). Thus, Shelton made clear that Tommy Shelton had indeed sexually assaulted a minor for which the statute of limitations would apply.

Shelton left a second message on the same day that referred to a second letter by Dryden, a letter that stated as fact that Tommy had molested six boys. (Pickle Aff. ¶¶ 10, 12).

Both messages contained veiled threats, referring to attorneys, to liability for defamation, and to Dryden bringing reproach upon himself and ruining his credibility. (Pickle Aff. ¶¶ 11–12).

Shelton referred to two letters from Dryden when there was but one letter, the one referring to Tommy Shelton molesting six boys. In reviewing the recordings again in early 2009, Defendants realized that what Shelton called a letter in his first message was instead the sheet of action items attached to Dryden's letter, since it was that sheet that referred to Senate Bill 1035

and the extending of the statute of limitations. (Pickle Aff. ¶ 13–14).

This proves that Shelton had and read the action items which called for Tommy Shelton to apologize to the Community Church of God in Virginia for deceit and inappropriate behavior, a church Tommy Shelton pastored from about 1995 to about 2000. (Pickle Aff. ¶ 14, Ex. G; Doc. 63-15 p. 3). Thus, Shelton must have lied to Thompson when Shelton told Thompson that the allegations against Tommy Shelton were all 30 years old. (Doc. 81-2 pp. 50–66, 61).

3ABN World *Articles Which Plaintiffs Refused to Produce*

Defendants sought copies of the widely distributed *3ABN World*. (Doc. 63-20 pp. 10–11). Plaintiffs refused to produce any copies whatsoever, even though they can't possibly be confidential. (Doc. 63-25 p. 5; Doc. 81-11 p. 40). Defendants sought copies partly because every issue was obtainable in one way or another from 3ABN's website except for the September and November 2004, and the August 2005 issues; the September and November 2004 issues appear to have gone missing by February 5, 2005. (Doc. 81-11 p. 40; Pickle Aff. ¶¶ 15–16, Ex. I–N). This suggests that these missing issues contained something that Shelton and 3ABN conspired to hide, and Defendants wanted to know what that might be.

In January 2009, Defendants purchased copies of the missing issues from a library. (Pickle Aff. ¶ 17). An article in the September 2004 issue referred to 3ABN Books' plans to publish *Mending Broken People* ("*MBP*"), a book by Kay Kuzma ("Kuzma"). The article also referenced "Danny Shelton's and Shelley Quinn's book about the Sabbath," later titled, *Antichrist Agenda* ("*AA*"), of which *Ten Commandments Twice Removed* ("*TCTR*") is an excerpt. (Pickle Aff. Ex. O). An article about *MBP* in the November 2004 issue claimed *MBP* would be published that very month, and that Kuzma began writing it in 1997. (Pickle Aff. Ex. P). Shelton receives royalties through DLS Publishing, Inc. ("DLS") on sales of *MBP*.[2] (Doc. 96-11 pp. 12–13).

[2] Though *MBP* was supposed to be published in November 2004, DLS wasn't incorporated until November 30, 2004, and the *MBP* contract wasn't signed until January 2005. (Doc. 96-11 pp. 11–13). These facts coupled with the November 2004 issue being missing suggests that Plaintiffs artificially distanced *MBP* from Shelton's divorce.

Probably the September issue arrived back from the press toward the beginning of August. (Pickle Aff. ¶ 18, Ex. Q–R). Thus it must have been completed and gone to press by around early to mid-July. The September issue was announced by July 27, and a copy was posted online on August 24. (Pickle Aff. Ex. S).

Shelley Quinn ("Quinn") claimed that Shelton completed the manuscript for *AA* before Quinn saw it while visiting 3ABN, and that after that Quinn rewrote it. (Pickle Aff. Ex. T at pp. 4–5). Since by early to mid-July or so, the article in the September 2004 issue which announced *AA* was already completed, we now have documentary evidence that Shelton's manuscript predates Shelton's June 25, 2004, Guam divorce. (Doc. 96-11 pp. 9–10; Pickle Aff. ¶ 21). And since *MBP*'s beginnings go back to 1997, *MBP* also predates Shelton's divorce.

This evidence suggests that Shelton and 3ABN conspired to hide evidence of assets and income relevant to Shelton's still-unsettled marital property division case.

Fraud and Misrepresentation re: Motions in Question

Plaintiffs falsely stated yet again that their complaint contains "24 specific defamatory statements." (Doc. 140 pp. 2–3). On October 22, 2008, Magistrate Judge Frazier found that ¶ 46(g) of Plaintiffs' complaint is "pretty broad," and Plaintiffs' counsel admitted that more than one allegation in the complaint was indeed "broad." (Doc. 152-6 pp. 9–11; Doc. 126 pp. 10–11).

Plaintiffs falsely suggested yet again that the thousands of pages of Rule 26(a)(1) materials Plaintiffs produced were substantive. (Doc. 140 p. 3). Defendants filed their analysis of those documents long ago. (Doc. 81 pp. 1–8). Plaintiffs have never rebutted that analysis. And Plaintiffs' claim to have produced "virtually all of 3ABN's corporate records and tax filings" is fallacious. (Doc. 103 ¶¶ 5(c), (ak), (at), (bz); Doc. 74 p. 2 at ¶ 3; Doc. 92 p. 9; Pickle Aff. ¶ 22).

Plaintiffs falsely stated that Defendants first caused to be issued third-party subpoenas *duces tecum* after Plaintiffs had produced documents, when the original subpoenas were served

before Plaintiffs had filed their *first* motion for a protective order. (Doc. 140 p. 3; Doc. 42 pp. 38, 43, 49). On December 14, 2007, Plaintiffs' counsel complained to the Court that these subpoenas shouldn't have been issued from this district. (Doc. 144 p. 12). Therefore, it is fraudulent for Plaintiffs to now blame Defendants for following Rule 45(a)(2)(C). (Doc. 140 p. 5).

Plaintiffs falsely stated that this Court's order of September 11, 2008, vindicated "Plaintiffs' efforts to narrow the scope of discovery," when the order denied those efforts, gave Plaintiffs a tongue lashing, and required Plaintiffs, not just Defendants, to obtain leave of court before issuing any more subpoenas. (Doc. 140 p. 4; Doc. 107 pp. 3–5)

Plaintiffs falsely stated that they believed that the purchase of two domain names from Defendant Joy's bankruptcy estate accomplished the lawsuit's objectives. (Doc 140. p 6). Other post-petition Save 3ABN websites contain the same material: Plaintiffs made this fact part of their basis for their motion to dismiss Defendant Joy's adversarial proceeding, and inquired about these 16 other Save 3ABN sites at Plaintiffs' Rule 2004 examination of Defendant Joy. (Pickle Aff. Ex. U, Ex. V at pp. 37–38, 42–44, 47, 153).

Without advance notice, Plaintiffs converted that Rule 2004 examination into a deposition for this case, asking about whether the Save 3ABN sites are involved in commerce, sources within 3ABN, who reported Plaintiffs to the IRS, etc. (Pickle Aff. Ex. V at pp. 91–96, 114–118, 135–140, 151–154, 194–197). Plaintiffs therefore falsely stated that this case was still in the "document discovery phase" and that no depositions had been conducted. (Doc. 140 p. 8).

Defendant Joy's Rule 2004 examination testimony describes Thompson playing fast and loose with the truth yet again: Thompson falsely stated on January 5, 2008, that the Bankruptcy Court had shut down Save3ABN.com when it had not. (Pickle Aff. Ex. V pp. 45–47, Ex. W). Yet Plaintiffs' sole basis for their reasons for dismissal is an affidavit by Thompson, devoid of any and all documentary support. (Doc. 140 p. 6; Doc. 123; cf. Doc. 105 p. 5; Doc. 113 pp. 3–4).

A favorable ruling from the IRS? Utterly impossible! Shelton admitted falsifying a figure on his 2003 tax return, falsely denied receiving any section 4958 excess benefit transactions on 3ABN's 1998 Form 990, and falsely denied on 3ABN's 2006 Form 990 that Shelton was receiving compensation from related organizations. (Doc. 81-7 pp. 1–3, 6, 12; Doc. 93 at Ex. O (Ex. GG); Doc. 126 pp. 12–13; Doc. 63-31 p. 2; Doc. 49-2 pp. 35–37; Doc. 161 pp. 17–18).

Regarding the allegations investigated by the EEOC, Defendants contend that Shelton, Thompson, and the 3ABN administration believed and knew the allegations to be true. (Pickle Aff. ¶ 25, Ex. X–Y). Plaintiffs therefore fallaciously and fraudulently claim innocence regarding the firing of the Trust Services whistle blowers. (Doc. 140 p. 6). Defendants contend that Plaintiffs characteristically failed to produce these key documents (Ex. X–Y) to state and federal investigative agencies, and that this is why the EEOC could not determine whether or not statutes had been violated. (Doc. 71 ¶ 16; Doc. 126 pp. 16–17; Pickle Aff. Ex. AA).

Plaintiffs falsely assert, without any documentary support whatsoever, that the suit was dismissed because donation levels were restored after the aforesaid favorable rulings restored 3ABN's reputation. (Doc. 140 p. 7; Doc. 121 p. 4). Yet 3ABN's first public statement about the EEOC investigation that Defendants know of is Plaintiffs' motion to dismiss. (Pickle Aff. ¶ 26). Confidence could not have been restored if the public never knew anything about it. And about October 8, 2008, 3ABN president James Gilley wanted to raise a third of 3ABN's total 2007 revenue by October 17, suggesting severe financial distress. (Doc. 127-46; Doc, 162-13 p. 1).

Remnant produced subpoenaed documents on September 22, 2008, documents which Magistrate Judge Carmody found were relevant, a finding which survived appeal. (Doc. 127-38; Doc. 127-40). Though Plaintiffs and their counsel know that these documents are proof of Shelton's private inurement, his failure to disclose his royalties, and his perjury on his July 2006 financial affidavit, and thus relevant to this case, Plaintiffs fraudulently declare that these

documents have "no relevance to the underlying lawsuit." (Doc. 158 p. 2).

Plaintiffs know that their assertions that Defendants will indiscriminately publicize sensitive information are fallacious, for Defendants have still not published Shelton's tax returns, embarrassing correspondence pertaining to Shelton's daughter and sister, and Greupner's rollover contribution form. (Doc. 49 ¶¶ 13–14; Pickle Aff. ¶¶ 4, 6).

ARGUMENT

I. SUBSTANTIVE REQUIREMENTS OF RULE 59(e) MOTIONS

Under Rule 59, motions to reconsider may be granted if there is a clear error of law; newly discovered evidence not previously available; an intervening change in controlling law; or to prevent manifest injustice. *Gencorp, Inc. v. American International Underwriters,* 178 F.3d 804, 834 (6th Cir. 1999). While motions under Rule 59(e) and Rule 60(b) are similar, the former are "not controlled by the same exacting substantive requirements" of the latter. *Lavespere v. Niagara Machine & Tool Works, Inc.*, 910 F.2d 167, 173–174 (5th Cir. 1990).

> Because Rule 59(e) motions are subject to much more stringent time requirements than Rule 60(b) motions, Rule 59(e) motions provide relief for the movant on grounds at least as broad as Rule 60 motions. [citing *Lavespere*, 910 F.2d at 174.] Rule 59(e), therefore, provides district courts with the power to consider equitable factors and provide relief for "any ... reason justifying relief from the operation of the judgment." [citing Fed.R.Civ.P. 60(b)(6); *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 863-64.]

Templet v. HydroChem, Inc., 367 F.3d 473, 483 (5th Cir. 2004).

The Court may thus consider factors enumerated under Rule 60(b) such as mistake, inadvertence, surprise, excusable neglect; and fraud, misrepresentation, or misconduct of an opposing party. However, the strict limitations associated with these factors under Rule 60(b) should not be imposed when they are considered under Rule 59(e). *Lavespere*, 910 F.2d at 174.

II. ORDERS OF APRIL 13 AND 15, 2009, ARE IN ERROR

A. No Legal Authority Cited for Restricting

Dismissal Conditions by 28 U.S.C. § 1920

Neither Plaintiffs in their opposition memorandum nor the Court in its order cite any legal authority for using 28 U.S.C § 1920 to restrict dismissal conditions that may be imposed under Rule 41(a)(2). This absence of legal authority is problematic given that dismissal is "typically" conditioned upon payment of defendant's expenses, "which usually includes reasonable attorneys' fees," and that "the purpose" for doing so "is to compensate the defendant for the unnecessary expense that the litigation has caused." *Marlow v. Winston & Strawn*, 19 F.3d 300, 303 (7th Cir.1994); *Cauley v. Wilson*, 754 F.2d 769, 772 (7th Cir. 1985). This fact alone suggests that Rule 41(a)(2) cannot be restricted by 28 U.S.C. § 1920.

B. Reliance upon *Blackburn* Was an Error

The Court adopted Plaintiffs' reasoning that imposing a condition of payment of attorney fees under Rule 41(a)(2) is restricted by the American Rule, citing *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973). *Blackburn* noted that absent statutory authority or other factors, attorney fees are not awarded. 60 F.R.D. at 199.

But, *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." *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 n.16 (D.C. Cir. 1981). Thus, Rule 41(a)(2) **is** statutory authority for awarding attorney fees apart from the American Rule. Similarly, the 5th Circuit noted:

> [W]e have before us an order made pursuant to a congressionally approved rule, reimbursing costs expended at the behest of a plaintiff who does not wish to continue his suit, but who faces no legal barrier to bringing the same action again at a later date. There is no doubt that a court has ample authority to award attorneys' fees as a term and condition of a Rule 41(a)(2) voluntary dismissal in order to protect defendants.

Yoffe v. Keller Industries, Inc., 580 F.2d 126, 129 n.9 (5th Cir. 1978).

While *Leith* cited *Blackburn* to support the idea that whether to impose attorney's fees lies within the sound discretion of the court, *Leith* did not cite *Blackburn* in support of imposing

the American Rule upon Rule 41(a)(2) dismissals. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 51 (1st Cir. 1981). Thus, the Court's reliance upon *Blackburn* for its standard when considering the question of attorney fees was in error, for as the *GAF* court notes:

> Good faith, however, is simply irrelevant to an award of attorneys' fees or the imposition of any other "terms and conditions" under Rule 41(a)(2). As noted above, the purpose of the rule is to protect defendants from undue prejudice or inconvenience caused by a plaintiff's premature dismissal.

GAF, 665 F.2d at 369. Thus, the question is whether Plaintiffs' "premature dismissal" has caused Defendants "undue prejudice or inconvenience."

C. Rule 41(a)(2) Not the Only Authority for Awarding Costs, Expenses, and Fees

Defendants invoked Rule 41(a)(2), 28 U.S.C. § 1927, and the court's inherent power as a basis for the awarding of costs, expenses, and fees. (Doc. 149 pp. 15–18). The order of April 13 makes no mention of 28 U.S.C. § 1927 and the court's inherent power, implying that the Court did not consider or read Defendants' arguments on this point.

D. The Court Did Not Adequately Address "Potential Legal Prejudice"

In denying Defendants' motion for costs, the Court found that it had already adequately addressed the legal prejudice facing Defendants by requiring Plaintiffs to refile their claims in this division of the District of Massachusetts. (Doc. 166 p. 3). Now that Defendants' motion for costs is denied, this condition effectively becomes the only condition of dismissal.

Yet Plaintiffs knew before the dismissal that Defendants would be forced to file their claims in state court because Defendants lack diversity jurisdiction to sue Plaintiffs' counsel. (Doc. 141. pp. 10–11). The Court understood this complication before granting the dismissal. (Doc. 141 p. 15). Thus, if Plaintiffs can file their claims as counterclaims in a state action after all, the dismissal is left without any curative conditions whatsoever to address the legal prejudice facing the Defendants, and the Court's finding is therefore in error. There is nothing in the record

to suggest that Plaintiffs are absolutely barred from filing counterclaims in state court, and Plaintiffs imply that they will be able to do so defensively if Defendants file suit. (Doc. 140 p. 8).

E. Motion to File Under Seal Should Have Been Ruled Upon First

Since Defendants' arguments in support of their motion to impose costs were dependent upon the Court's review of the Remnant documents, the motion to file under seal should have been ruled upon first. That it was not suggests that the Court ruled upon the motion to impose costs without reading all of Defendants' submissions in connection with that motion.

F. Remnant Documents Are Relevant; Court's Orders Inconsistent

The order of April 13 reasons that evidence that a suit was brought to harass, embarrass, or abuse, or that a plaintiff deliberately sought to increase the defendant's costs by unduly protracting the litigation, is relevant to Defendants' motion to impose costs. (Doc. 166 p. 3). Defendants have repeatedly contended that the Remnant documents are *prima facie* evidence of abuse of process and malicious prosecution. (Doc. 126 pp. 4–5, 13–14; Doc. 127 ¶¶ 13, 16; Doc. 149 p. 3; Doc. 161 pp. 2–3, 16–17). Thus, according to both the order of April 13 and Defendants, as well as the Michigan court (Doc. 127-38), these critical documents are relevant.

On April 15, 2009, Defendants inquired about the status of the motion to file under seal. Later that day, the motion was ruled upon without a hearing. In contradiction to the order of April 13, the electronic order of April 15 states that the Remnant documents are irrelevant, *without the Court ever having reviewed them.*

G. Record Does More Than "Suggest" That Plaintiffs Are Guilty of Abuse of Process and Malicious Prosecution

The order of April 13 makes the sweeping finding, "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 ...." Such a finding is clearly erroneous, for to say that the record "suggests" abuse of process and malicious prosecution is an understatement. Plaintiffs

tacitly admitted that the record is rife with evidence to support Defendants' claims in this regard, and that the record is void of any evidence to the contrary. (*supra* 3–5). A review of the Remnant documents would have alleviated any uncertainty the Court may have had regarding this issue.

If the Court has any question as to the veracity of Defendants' unrebutted assertions regarding Plaintiffs' discovery, the Court may review Folders 2–10 on Ex. H, and Folders 1–4 on Ex. BB. (Pickle Aff. ¶¶ 27–32). The Court will find these documents to be all that Defendants have previously claimed. (Doc. 71 pp. 1–2; Doc. 81 pp. 1–8; Doc. 103 pp. 1–10).

This Court repeatedly said it wanted the case to move forward expeditiously. (Doc. 17 pp. 14, 24; Doc. 144 pp. 11, 22; Doc. 146 p. 14–15). But Plaintiffs told the Court on December 14, 2007, that they intended to produce "nothing" in discovery. (Doc. 144 p. 10). When plaintiffs "never had any intention of providing discovery in this case but nonetheless permitted the case to proceed, thereby seeking the advantage of filing [their claims] without having to support them," that is "undue vexatiousness." *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 271 (S.D.N.Y. 1998).

Pursuant to Rule 52(a)(5), Defendants "question the sufficiency of the evidence supporting the findings," and ask that they be amended to reflect the evidence in the record.

H. The Order of April 13 Mischaracterizes Defendants' Experts

As required by the confidentiality order, Defendants served on opposing counsel signed Exhibit A's for each expert Defendants retained. (Doc. 152 ¶ 31). But nowhere have the Defendants designated any of these experts as *expert witnesses.*

I. The Order of April 13 Mischaracterizes Defendants' Expenses

In applying 28 U.S.C. § 1920 to Defendants' itemization of expenses, the Court's order suggests that none of Defendants' miscellaneous expenses fit, when in reality nearly all of those expenses constitute "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." 28 U.S.C. § 1920(4). Of the $4,614.90 total of miscellaneous expenses, $3,534.59

alone was the net fee charged by MidCountry for copies of its records. (Doc. 132 Table 2; Doc. 63-30 pp. 3–7). Other items on the list in Table 2 are clearly marked "Copies," and even fees and costs associated with the fact-finding trips are attributable to obtaining copies of papers necessarily obtained for use in the case. (Doc. 132 Table 2; Doc. 152 ¶¶ 32–36).

III. THE ORDERS OF APRIL 13 AND 15 SUBJECT DEFENDANTS TO MANIFEST INJUSTICE

Only after Defendants had obtained the damning Remnant documents did Plaintiffs file their motion to dismiss. In doing so, Plaintiffs sought the following:

- A dismissal without prejudice to insulate Plaintiffs *and* their counsel from liability for malicious prosecution. (Doc. 141 pp. 6, 8–9; Doc. 140 p. 8).
- Removal from Defendants of the Remnant documents, even though the confidentiality order does not so require. (Doc. 120 p. 1; Doc. 60 pp. 1–6).
- Removal from Defendants of documents Plaintiffs wrongly designated confidential (thus, removal of further evidence of Plaintiffs' abuse of process), even though the confidentiality order does not so require. (*Id.*).
- Return of MidCountry's records, necessitating duplicative discovery expense in future litigation, even though the confidentiality order does not so require. (*Id.*).

This Court granted the dismissal without prejudice, even though Plaintiffs' stated purpose for having it be without prejudice was the stripping from Defendants of their legal right to sue Plaintiffs and their counsel for malicious prosecution. (Doc. 141 pp. 6, 8–9). This constituted the type of plain legal prejudice impermissible under a Rule 41(a)(2) dismissal. *Selas Corp. v. Wilshire Oil Co.*, 57 F.R.D. 3, 6 (E.D.Pa.1972); *Kappa Publishing Group, Inc. v. Poltrack*, 1996 U.S. Dist. LEXIS 3844, at *4 (E.D.Pa. 1996); *In re Sizzler Restaurants International Inc.*, 262 B.R. 811, 821 (Bankr.C.D.Cal. 2000).

The erroneous, post-judgment finding inserted into the record ("There is nothing in the

record to suggest ....") further erodes Defendants' legal right to be heard regarding their claims of misuse of process and malicious prosecution, and undermines Defendants' appeal.

Further, the Court has now declined to require Plaintiffs to reimburse Defendants for any of Defendants' costs, including MidCountry's records, even though Defendants paid considerably for these records and have not yet seen them. (Doc. 166). Defendants should be reimbursed for these records, or Defendants should be allowed to possess what they paid for, or both.

It is manifestly unjust to allow Plaintiffs and their counsel to so control dismissal that they are insulated from liability, the dismissal is at risk of being without any curative conditions, an erroneous finding is inserted into the record, and Defendants' ability to pursue their legal rights in the future, whether as plaintiffs or defendants (Plaintiffs "face[] no legal barrier to bringing the same action again at a later date." *Yoffe*, 580 F.2d at 129 n.9), is hampered financially. The erroneous findings should therefore be corrected, and Plaintiffs should be required to reimburse Defendants for some or all of their costs, expenses, and fees.

IV. PLAINTIFFS' FRAUD, MISREPRESENTATION, OR MISCONDUCT

Defendants hereby incorporate the examples given on pp. 7–10 of this memorandum, as well as the examples given in Doc. 149 pp. 10–15 and Doc. 161 pp. 3–20.

Plaintiffs' complaint contains allegations regarding Shelton's undisclosed royalties, about which Shelton perjured himself in his divorce-related proceedings. (Doc. 1 ¶¶ 46(g)–(h), 50(i)). In August 2008, Defendants argued that Shelton received kickbacks from Remnant for purchases by 3ABN of certain booklets to the tune of 10% to 32%. (Doc. 96-9 p. 3). Defendants in 2007 suggested that Shelton may have received around $572,967 in royalties from Remnant from 2005 to 2006, and now maintain that Shelton's kickbacks and/or royalties from Remnant must amount to between $749,706 and $808,614 from 2005 to 2007. (Doc. 81-7 p. 26; Doc. 154 p. 3).

And, despite the ruling of the Michigan court, Plaintiffs believe them irrelevant? No!

Plaintiffs and their counsel know that these documents prove their claims to be utterly baseless, and give foundation for a counterclaim of misuse of process. The same is true regarding the EEOC-related documents. (Pickle Aff. Ex. X–Y).

V. MISTAKE, INADVERTENCE, SURPRISE, EXCUSABLE NEGLECT

Plaintiffs asserted that the Remnant documents should not be reviewed by the Court because Defendants did not submit them in opposition to Plaintiffs' motion to dismiss. (Doc. 158 p. 4). Such an argument is without merit under the circumstances:

- Plaintiffs surprised Defendants by filing their motion to dismiss on October 23, 2008, only one week before the October 30 status conference, when counsel had explicitly stated that he would not file any such motion. (Doc. 127 ¶¶ 6–7; Doc. 152-5 p. 1).
- On October 23, Defendants contacted Remnant to begin the 7-day process outlined in the confidentiality order for using confidential material, intending to use this material to oppose Plaintiffs' motion to dismiss. (Pickle Aff. Ex. CC; Doc. 60 ¶ 3).
- Both Remnant and Plaintiffs mailed (but, uncharacteristically, didn't email) responses on October 24, which Defendants received on October 27. Remnant denied being the designating party, and Plaintiffs asserted that new negotiations had to be commenced with them. (Pickle Aff. ¶¶ 33–34; Doc. 155-3; Doc. 162-9).
- Defendants barely got their opposition written and filed before the status conference, and were unable to file a motion to file under seal as required by Local Rule 7.2, much less obtain a ruling on such a motion prior to the status conference.
- Therefore, Defendants requested an evidentiary hearing for which Defendants would have submitted these documents, as well as documents relevant to the EEOC investigation. (Doc. 126 p. 20). That request was never considered.

That Plaintiffs and Remnant did not email Defendants suggests that Plaintiffs purposely

sought to use the confidentiality order to shield highly relevant and more or less publicly available information from the Court's review. (Doc. 154 p. 3). The Court should not assist Plaintiffs in this effort. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 860 (7th Cir. 1994).

Plaintiffs have thus placed in jeopardy the good Local Rule 7.2, which seeks to prevent the unnecessary prohibition of public scrutiny of litigation. In this instance, we have a local rule and a confidentiality order that do not allow for the necessary due process that would enable defendants to file relevant documents declared confidential by plaintiffs, when defendants need to oppose a motion that is at risk of being ruled on outside of a normal briefing schedule.

All the Remnant and EEOC-related documents that Defendants believe relevant to the motion to dismiss and the motion to impose costs, because they demonstrate abuse of process and malicious prosecution, should therefore be allowed to be submitted. Reasons for the failure to file such evidence earlier must be given, and Defendants have provided such. *Lavespere*, 910 F.2d at 174–175; citing *Waltman v. International Paper Co.*, 875 F.2d 468 (5th Cir. 1989).

VI. NEWLY DISCOVERED EVIDENCE PROVE THAT FINDINGS ARE IN ERROR

A. Plaintiffs' Tacit Admission Served on March 23, 2009

In a filing unavailable until after March 23, 2009, Plaintiffs tacitly admit that the record is rife with evidence that Plaintiffs and their counsel are guilty of abuse of process and malicious prosecution, and that there is nothing in the voluminous record to rebut this evidence. (*supra* 3–5). The findings of the April 13 order must therefore be amended, and the evidence in the entire record considered in resolving the question of whether to award some or all costs, expenses, and fees under Rule 41(a)(2), 28 U.S.C. § 1927, and/or the court's inherent powers.

B. Shelton's Recordings, Meaning Camouflaged by Inaccurate Wording

Around early December 2006, Defendants broke the story that Shelton had lied about "the serious nature, wide extent, and recent timing" of the child molestation allegations against

Tommy Shelton, that Thompson and the 3ABN Board had failed to properly investigate these allegations, and that their gross negligence had thus jeopardized the financial stability of 3ABN and the Illinois Conference of Seventh-day Adventists. (Doc. 63-15).

Shelton then threatened to sue. (Doc. 63 ¶ 8; Pickle Aff. Ex. DD at p. 2, Ex. EE). The only cease and desist letter Defendants received accused Defendant Joy of defamation *per se* in regard to the allegations against Tommy Shelton. (Doc. 63-18 p. 2). Tommy Shelton publicized the fact that a suit would be filed against Defendant Joy over these issues. (Doc. 63-19 p. 2).

Plaintiffs' complaint alleges that Defendants lied when Defendants claimed, "The 3ABN Board of Directors has failed in its responsibility to oversee and manage 3ABN's financial assets," and, "The 3ABN Board of Directors has failed in its responsibility to oversee the governance and administration of the organization." (Doc 1 ¶¶ 46(e), 48(c)). Defendants' assertions about the child molestation allegations unquestionably fall under these broad claims.

The recording left by Shelton tacitly admits that Tommy Shelton molested boys, and proves that Shelton read Dryden's action items which made the most recent alleged incidents as recent as 3 years old, not 30 years old. (*supra* 5–6). Thus, Defendants' assertions were true, and Shelton knew it. Thus, Plaintiffs have always known that their claims that Defendants were lying on these points were utterly baseless.

The record already demonstrates Shelton's use of threats of litigation to intimidate and silence, irrespective of truth. (Doc. 81-2 pp. 9–10; Doc. 63-17; Doc. 63 ¶ 8). There is no other motive for this lawsuit.

C. *3ABN World* Articles Which Plaintiffs Refused to Produce

The *3ABN World* articles prove that *AA* (and thus *TCTR*) and *MBP* all predate Shelton's June 25, 2004, divorce, as do his booklets published by Pacific Press Publishing Association. (*supra* 6–7; Doc. 96-11 pp. 1–3, 9–10). Shelton thus lied on his July 2006 financial affidavit in

his divorce-related proceedings by not reporting any assets or income attributable to these books. (Doc. 81-7 pp. 8–13; Doc. 8-2 pp. 20–21). 3ABN conspired with Shelton to hide this evidence by removing the *3ABN World* issues in question from 3ABN's website, and by refusing to produce these issues in this litigation. (*supra* 6–7). 3ABN also allowed Shelton to line his pockets through self-dealing book deals. (Doc. 96-11 pp. 18–38). The Court's review of the Remnant documents will demonstrate to what extent and through what methods Shelton profited in this way.

Thus, Plaintiffs (and their counsel (Doc. 126 p. 4)) have always known that Plaintiffs' allegations regarding perjury in divorce-related proceedings, undisclosed royalties, and private inurement were all utterly baseless. (Doc. 1 ¶¶ 46(g)–(h); 50(i)). And the removal of the *3ABN World* issues from 3ABN's website raises spoliation concerns yet again. (Doc. 126 p. 18).

CONCLUSION

For the various reasons laid out above, and to be presented at oral argument, Defendants seek some or all of the costs, expenses, and fees incurred by Defendants, the filing of certain Remnant documents under seal, and corrections to the findings in the orders of April 13 and 15, 2008, to reflect that the surviving dismissal condition does not adequately address Defendants' potential legal prejudice, that the record does suggest abuse of process and malicious prosecution, and that the Remnant documents are relevant.

Respectfully submitted,

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