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

BRIEF OF DEFENDANTS-APPELLANTS, GAILON ARTHUR JOY AND ROBERT PICKLE

GAILON ARTHUR JOY, *PRO SE*
P.O. Box 37
Sterling, MA 01564
(508) 499-6292

ROBERT PICKLE, *PRO SE*
1354 County Highway 21
Halstad, MN 56548
(218) 456-2568

APPELLANT BRIEF
TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Pages**

Statutes

Other Authority

JURISDICTIONAL STATEMENT

Plaintiffs asserted trademark violations, copyright violations, complete diversity, and damages exceeding $75,000, giving the district court subject matter jurisdiction. 15 U.S.C. §1121; 28 U.S.C. §§1338, 1332. (Joint Appendix ("JA") 37).

The April 13, 2009, order denying costs (Defendants' Addendum ("DA") 22–25) was final and appealable under 28 U.S.C. §1921 because the court was left with nothing to do (and nothing to enforce). Defendants timely moved to reconsider on April 27 (Record on Appeal Doc. # ("RA") 169), which was denied on October 26. (DA 27–29). Defendants timely appealed on November 23, 2009. (JA 493).

Plaintiffs argued in 1st Cir. Case No. 08-2459 that the November 3, 2008, dismissal order wasn't final until the issue of whether to impose costs was resolved. (Exhibits for Appendix ("EX") 723–725). To the extent Plaintiffs are correct, Defendants appeal that order in this appeal, since, by Plaintiffs' reasoning, this Court now has jurisdiction over that order. Most circuits hold that voluntary dismissals are appealable final orders. *John's Insulation, Inc. v. L. Addison & Assocs. Inc.*, 156 F.3d 101, 107 (1st Cir. 1998).

STATEMENT OF THE ISSUES

Whether the district court abused its discretion in granting Plaintiffs' motion for voluntary dismissal, and/or in denying Defendants' motions for costs, to file

under seal, to reconsider, to amend findings, and/or for sanctions.

STATEMENT OF THE CASE

On April 6, 2007, Plaintiffs filed suit in the District of Massachusetts ("*3ABN v. Joy*") accusing Gailon Arthur Joy ("Joy") and Robert Pickle ("Pickle") of copyright infringement, trademark infringement, trademark dilution, defamation, defamation *per se*, and intentional interference with prospective economic business advantage. (JA 36, 43, 54).

Plaintiffs refused to produce substantive documents (JA 150–158, 190–191), stalled the litigation through motions for protective orders (RA 40; RA 74), and blocked discovery in three other districts.[1] Defendants vigorously prepared their defense and were successfully overcoming Plaintiffs' obstruction of discovery. (JA 9–10, 204–206; EX 643–648). But after Remnant Publications, Inc. ("Remnant") produced documents on September 22, 2008, giving Defendants *prima facie* evidence of abuse of process and malicious prosecution against Plaintiffs' counsel (EX 700, 546), the case took a marked turn.

Plaintiffs obtained a voluntary dismissal without prejudice to evade discovery and deprive Defendants of their malicious prosecution claims (EX 608; DA 8, 10–11), simultaneously seeking to covertly alter the confidentiality order entered in the case ("Confidentiality Order") and wrongfully remove critical

[1] *See* W.D.Mich. 1:08-mc-00003; D.Minn. 0:08-mc-00007; S.D.Ill. 4:08-mc-00016.

evidence from Defendants. (JA 218).

At the district court's invitation, Defendants filed a motion to impose costs, which was denied. (RA 130; DA 22–25). Defendants moved to reconsider and amend findings, which was also denied. (RA 169; DA 27–29). Defendants appealed. (JA 493).

Subsequently: (a) Defendants discovered that the district court gave sealed records to a different party than the district court had ordered. (DA 15; RA 212 pp. 3–4). (b) The district judge recused himself. (JA 538). (c) Three Angels Broadcasting Network, Inc. ("3ABN") belatedly filed its 2008 Form 990 in January 2010, reporting figures contradicting Walter Thompson's ("Thompson") testimony at dismissal, figures showing 3ABN's donations from the public still below pre-June/July 2006 levels. (RA 224 pp. 3–4; RA 224-5 p. 13).

Plaintiffs have threatened Defendants with additional litigation. (EX 692–694; RA 224-11).

STATEMENT OF FACTS[2]

Early History

3ABN is a supporting ministry of the Seventh-day Adventist Church. (JA 114). Shelton, 3ABN's sole remaining co-founder, accused his wife Linda Shelton

[2]Danny Lee Shelton's ("Shelton") tax returns were filed under seal below to keep them off PACER, not to keep the information confidential. Other documents are filed under seal because of Plaintiffs' confidentiality designation.

Defendants refer to these documents here in the same manner as below.

("Linda") of "spiritual adultery"[3] in 2004, rapidly divorcing her after she hid his gun. (EX 475–477, 521–526). Subsequently, public criticism arose as varied allegations against Shelton came to light. (JA 108; EX 93).

Alyssa Moore's July 7, 2006, confidential statement accused Shelton of sexual assault. (EX 94). Shelton retaliated in an August 2006 broadcast that prompted Pickle to begin investigating Plaintiffs on August 13. (EX 338–340). On August 14, Pickle obtained Glenn Dryden's ("Dryden") May 14, 2003, letter to 3ABN Board chairman Thompson, which warned that Shelton's brother Tommy Shelton ("Tommy"), a 3ABN employee, had molested six boys. Joy obtained this letter on August 15, and also began investigating. (EX 407; 208–210).

In November 2006, Thompson admitted relying on Shelton's assertion that the allegations were all 30 years old, and admitted never contacting Tommy's victims as Dryden suggested. (EX 213–216). Yet Dryden's letter's "Action Items" asked Tommy to apologize for deceit and inappropriate behavior to the Community Church of God ("CCoG") where Tommy pastored from 1995 to 2000. (EX 208–210).

Defendants therefore concluded Shelton lied about the age of the allegations, putting 3ABN at risk of liability if Tommy victimized more boys. (EX 97). About December 5–6, 2006, Joy and Pickle published reports on Shelton's cover up. (EX 95–98). This news sickened 3ABN supporters. (EX 336; JA 160).

[3]Contradictorily, Shelton denied making this accusation. (EX 478–479, 517).

New allegations against Tommy surfaced in Virginia. (EX 99, 344–345). Shelton televised a tribute to Tommy on December 31, 2006, and threatened legal action. (EX 346–354, 782; JA 115). In January 2007, Defendants launched Save3ABN.com to expose Shelton's gross misconduct, exclusively covering the pedophilia allegations until January 28. (EX 318–319).

Plaintiffs' January 30, 2007, cease and desist letter alleged trademark infringement and defamation *per se*, with all five defamation examples pertaining to Tommy's pedophilia. (EX 102–104). Defendants published an article with citations to *Taubman Company v. Webfeats*, 319 F.3d 770 (6th Cir. 2003) and *Bosley Medical v. Kremer*, 403 F.3d 672 (9th Cir. 2005), showing that the Lanham Act doesn't prohibit Defendants' use of Save3ABN.com. (EX 8–18).

Plaintiffs filed suit. The case was assigned to a judge with a journalism degree and experience prosecuting, defending, and investigating characters like Shelton. (EX 841–849). Plaintiffs filed several of Defendants' articles, omitting pages referencing *Taubman*, *Bosley Medical*, pedophilia allegations, and perjurious portions of Shelton's July 2006 financial affidavit. (EX 1–4, 8–38).

What Plaintiffs Knew About Their Claims

Copyright Infringement

Plaintiffs previously advertised and argued in court that Plaintiffs' programming isn't copyrighted, and thus fraudulently registered the Tommy tribute broadcast before suing Defendants. (EX 547–560).

Defamation Claims

¶46(a). Growing number of serious allegations: Thousands of pages of publicly available webpages in Plaintiffs' Rule 26(a)(1) materials (most posts not written by Defendants) support this allegation. (RA 63-2 through 63-13; JA 151–152).

¶46(g). Board members personally enriched themselves ...: Shelton sued as an individual, but 3ABN is again paying Shelton's personal legal expenses. (DA 38; EX 305–306; Sealed Exhibits for Joint Appendix ("SE") 30–32).

Though 3ABN buys books from Pacific Press Publishing Association ("PPPA"), 3ABN bought Shelton's PPPA booklets from Shelton instead (via D&L Publishing ("D&L") and DLS Publishing, Inc. ("DLS")), and later Remnant, forfeiting roughly a 30% discount. (EX 405–406, 410–414, 420–424; SE 2–3, 11–12, 22–23). Remnant didn't even stock these booklets. (EX 420–421). Since Remnant wasn't the publisher, Remnant's payments to Shelton for these sales were kickbacks. (RA 96-9 p. 3). (*See* Defendants' Sealed Supplemental Brief ("SB") 1).

3ABN paid 3ABN personality Brenda Walsh ("Walsh") and Linda's personal vacation travel. (EX 447–449; JA 185).

Shelton bought a house from 3ABN on September 25, 1998, for $6,139, selling it one week later for $135,000. (EX 86–88).

¶46(g). ... in violation of the Internal Revenue Code: Shelton signed 3ABN's 1998 Form 990, perjuriously failing to report the 1998 house deal as compensation,

and falsely denying engaging in a §4958 excess benefit transaction, though 3ABN sold the house at a loss. (DA 46, 56–60).

For 2003, Shelton reported donations of horses as cash at inflated values, and didn't file the required Form 8283 and appraisal(s); Shelton tried to corruptly persuade Linda to do the same for 2004. (EX 267, 280–285, 289; SE 1, 10, 14–16, 21; DA 61–66).

¶46(j). Shelton's personal use of corporate plane: Pickle was but quoting Judge Rowe's order in 3ABN's property tax case. (EX 663–665). Shelton used 3ABN's jet to obtain marriage counseling. (EX 272, 302–303).

¶48(b). Fired whistleblowers: In April 2006, four Trust Services Department employees reported to 3ABN management Leonard Westphal's ("Westphal") misconduct (sexual harassment, racism, padded expense reports, falsified timesheet(s), and rage). (EX 574–600; cf. EX 604–607; JA 270). 3ABN management believed the allegations to be true, but fired the whistleblowers anyway. (*See* SB 3).

¶¶46(e), 48(c). Lack of board oversight: Thompson's reliance on Shelton and failure to contact Tommy's victims exposed 3ABN to significant liability. (EX 213–216).

¶48(d). Plaintiffs' refusal to allow ASI to investigate everything: Seventh-day Adventist officials believed ASI would investigate everything, including the pedophilia allegations. (EX 332–335; JA 160). The 3ABN Board voted to limit the

investigation to Shelton's "legal and moral right to remarry." (EX 324–327).

¶50. Divorce and firing of Linda without grounds: Plaintiffs asserted as such grounds that Linda committed adultery with Arild Abrahamsen ("Abrahamsen"). (JA 212; EX 493, 499). Thompson admitted he never had evidence of adultery. (EX 498).

Walsh, key witness against Linda, claimed Linda bought plane tickets against Walsh's wishes for a trip to Florida to rendezvous with Abrahamsen, and that Linda's ticket was used. (EX 456; JA 186). But Walsh herself reserved the tickets, 3ABN paid for them, Linda's ticket was never used, and, according to Shelton, Linda wasn't in Florida at the time in question. (JA 185; EX 447–449, 660–662, 474).

¶50(e). Shelton's preparing for divorce in 2003: For 2001, Plaintiffs reported D&L as *jointly owned* by Shelton and Linda. (DA 47; SE 2–9). Shelton's 2002 tax return filed in 2003 reported D&L as a *sole proprietorship*. (SE 11–13, 17).

¶50(f). Shelton's relationship with Murray, and board members: In January 2005, 3ABN director Nicholas Miller ("Miller") became "deeply concerned" about Shelton's personal affairs, including Shelton's funneling 3ABN money to Murray through a third-party non-profit. When Miller didn't cave to Shelton's threats, Shelton forced Miller's resignation that fall. (EX 178; SE 32–33; JA 272). In September 2005, Linda accused Shelton of having "sold out God's worldwide network for" "O[ral]S[ex]," an allegation Shelton didn't deny. (EX 609–610).

¶50(g). Title to Linda's Toyota Sequoia: The title faxed from the lending bank shows only Linda's name on it since February 2003. (EX 218–219).

¶¶46(h), 50(i). Shelton's perjury, refusal to disclose royalties in divorce-related proceedings: Shelton's July 2006 financial affidavit filed in his division-of-marital-property case failed to report significant royalty and kickback income from Shelton's PPPA booklets and other books. (EX 287–288, 410–412, 417; RA 96-9 p. 3; RA 154 p. 3). (*See* SB 1–2).

Plaintiffs Refuse/Obstruct Necessary Discovery

Plaintiffs asserted defamation *per se* to transfer the burden of proof to Defendants, but argued that Defendants should receive no more documents than Defendants already had. (JA 54, 86, 303; EX 682). Shelton never produced anything. (JA 273).

Plaintiffs put at issue whether Defendants caused donations to decline, Linda committed adultery, Shelton enriched himself at 3ABN's expense, and Shelton perjuriously omitted assets and royalty income from his July 2006 financial affidavit. (JA 47–50, 54–55).

Donation Levels

Plaintiffs asserted that donations declined beginning in June/July 2006, before Defendants started investigating. (JA 81–83; EX 407). However, negative internet chatter by third parties really began two years earlier, resurging after Shelton's controversial March 2006 remarriage. (EX 93). Viewership declined

when SkyAngel dropped 3ABN in April 2006. (RA 80 p. 4). Defendants therefore had to identify who quit donating and why in order to determine whether Defendants were the cause. (JA 109; RA 108 p. 4).

After the January 2004 property tax case decision, 3ABN began reporting sales of Shelton's books as items given away in exchange for donations, thus concealing Shelton's profiting, and artificially increasing donation levels. (JA 105; EX 85, 264, 239–243, 149–150; DA 48–49). Defendants therefore had to determine what portion of "donations" was actually sales revenue. (RA 48 pp. 4–5).

Plaintiffs' massive give-away of Shelton's book, *Ten Commandments Twice Removed* ("*TCTR*") in the first half of 2006 boosted "donation" levels while increasing expenses by nearly $3 million, leaving 3ABN in the red by $2,996,016 for the year. (EX 164, 84; JA 105).

3ABN CFO Larry Ewing ("Ewing") testified that he monthly charted donations received. (JA 81). Though a monthly analysis is critical to Plaintiffs' claims, the only monthly analysis produced was a comparison between 2003 and 2004. (JA 157). Plaintiffs never produced 3ABN's 2006 Form 990, or documents pertaining to former donors or to donation and sales totals for 2005, 2006, or 2007. (JA 196–197, 333; EX 375–387; DA 39–41).

Evidence Against Linda

Plaintiffs previously claimed as evidence: a feloniously recorded phone

conversation, video of Linda with Abrahamsen, a broadcast from Wisconsin, a pregnancy test receipt, vacations before and after the divorce, and phone card phone records. (EX 355, 357–59, 361–362, 460, 499, 507, 523). Though Plaintiffs promised to reveal their evidence in court, Plaintiffs refused to produce it, citing irrelevance and the marital privilege. (EX 357, 365; DA 45–46).

Private Inurement, Royalties, & Perjury

Plaintiffs asserted that Shelton's personal finances were irrelevant, and encouraged Gray Hunter Stenn ("GHS") and Remnant to resist Defendants' subpoenas. (EX 532; JA 129, 532; DA??-RA 67 p. 11).

Because of document fraud allegations against Plaintiffs (EX 178), Defendants had to challenge whatever documents or facts Plaintiffs produced or asserted. Defendants therefore subpoenaed documents from Remnant pertaining to Shelton's royalties ("Remnant documents"), bank statements from MidCountry Bank ("MidCountry") ("MidCountry's records")[4] for accounts owned by DLS, 3ABN, and Shelton, and work papers and tax returns from GHS.[5] (EX 72–73, 75). Plaintiffs fought this discovery. (JA 129).

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[4]MidCountry's records address whether Shelton's July 2006 financial affidavit's bank balance and income figures are accurate, and whether improper transfers occurred between 3ABN and Shelton accounts.

[5]Plaintiffs planned to use GHS auditor Alan Lovejoy ("Lovejoy") and the audited financial statements at trial. (EX 677, 263). In 3ABN's property tax case, Lovejoy presented figures in a way that hid Shelton's profiting from book sales, and 3ABN's counsel offered to bring the work papers to that court. (EX 269, 298–301).

Plaintiffs' Objectives

Plaintiffs filed suit to silence Defendants' reporting on *any* website with a domain name using the characters "3ABN" (JA 55), and to identify anonymous, third-party sources and commentators. (EX 310, 313; JA 138, 511).

Instead of seeking injunctive relief as promised (RA 122-2 p. 1), Plaintiffs bought Defendants' domain names from Joy's bankruptcy estate on February 12, 2008. (JA 237). To defeat Plaintiffs' end run, Save-3ABN.com and 15 other new domain names were purchased from December 25, 2007, to January 20, 2008. (JA 272–273). From February 25 onward, Defendants referenced and filed articles from these new websites. (EX 133, 136, 140, 318, 340, 354, 440–441, 468–469, 611–642; JA 152, 157, 160, 188). Plaintiffs wanted to silence these websites too. (JA 176; EX 747–748).

3ABN converted its Rule 2004 examination of Joy into a deposition for *3ABN v. Joy*, seeking information about the new websites, who reported Plaintiffs to the IRS, and the identity of anonymous sources within 3ABN. (JA 207–208; EX 649–650, 749–778).

Timeline of Discovery-Related Events

The lower court explicitly stated it wanted the case to move along. (JA 87–88, 499–501, 306, 318). But Plaintiffs had other ideas. (JA 87; EX680).

August 3, 2007: Initial disclosures served. Plaintiffs disclose nineteen witnesses, including fourteen 3ABN officers and directors, Linda, Defendants, and

Pickle's counsel. (EX 48–53). Plaintiffs refuse to produce Rule 26(a)(1) materials. (EX 56–63).

August 20: Plaintiffs serve written discovery. (JA 273).

September 20: Pickle responds. By this point, Defendants have disclosed 163 witnesses, and produced more than 5,500 emails, and about 7,000 total documents. (JA 348–350, 190, 181; DA 38).

November 10: After Plaintiffs seek to disqualify Pickle's counsel, Pickle enters his appearance *pro se*. (RA 29 p. 2; RA 31).

November 21: Automatic stay in Joy's bankruptcy lifted. (RA 122-2 p. 1).

November 29 to December 11: Defendants serve subpoenas on four third parties, and requests to produce on Plaintiffs (modeled somewhat after Plaintiffs' requests to produce). (JA 122, 514–515; EX 833–836). Three subpoenas are later reissued. (JA 129).

December 14: Pickle moves to compel Plaintiffs to produce Rule 26(a)(1) materials. (RA 35). *Court denies Plaintiffs' request to stay discovery* until Plaintiffs' not-yet-filed motion for confidentiality order is resolved. (JA 304, 306).

December 18, 2007: Plaintiffs move for confidentiality order, explicitly reserving issue of relevance and requesting oral arguments, but never request a hearing. (RA 40; RA 41 p. 3; JA 182).

January 3, 2008: Defendants prepare to expand case by adding parties. (EX 696–699).

January 9: Plaintiffs respond to Pickle's requests to produce, declaring *everything* requested irrelevant, confidential, or privileged. (JA 119–120; cf. DA 38–46). Parties confer for four hours twenty minutes on January 10, and confer again on January 22. (JA 116).

February 6: Plaintiffs use motion for confidentiality order to stall subpoena in D.Minn. (RA 63-27 p. 2).

March 10: Lower court orders Plaintiffs to produce non-confidential Rule 26(a)(1) materials, sternly warning against wrongly designating documents confidential or privileged. (JA 9–10).

March 28: D.Minn. enforces subpoena, ordering that, upon payment from Pickle, MidCountry produce its records under seal to D.Mass. for review for compliance with yet unissued confidentiality order. (EX 183–185).

March 28 & April 8: Plaintiffs serve 583 unindexed documents in three PDF files. All but about 25 pages are publicly available or already in Defendants' possession. None seem substantive. (JA 150–152, 157; SE 159).

April 17: D.Mass. issues confidentiality order: Materials designated "confidential" must be non-public trade secret or business information; unilateral redactions not permitted. (DA 31).

May 5: Defendants file motion to compel Plaintiffs' ally Remnant in W.D.Mich. after Remnant asserts royalties are irrelevant. (EX 237; RA 96-9 p. 5).

May 7: Plaintiffs announce they will file a motion to limit scope of

discovery, and that the discovery schedule "is still very workable." (JA 138–139). Lower court extends May 28 deadline for written disovery to June 11, and tells Plaintiffs they should produce documents responsive to requests to produce that Plaintiffs don't object to. (JA 145–146).

May 9: Plaintiffs assert they can provide a summary of document requests believed to be irrelevant by May 20. (RA 71-3).

May 14: Plaintiffs serve 207 pages of "confidential" Rule 26(a)(1) materials, including a 72-page, publicly available magazine (*Catch the Vision* (*"CTV"*)), seven editions of corporate bylaws (74 pages), and a 39-page employee handbook, which Defendants had already used for an exhibit in February. (JA 157; EX 172–174). Also served was the "confidential" *TCTR*, with a cover stating that 5 million are in print. (EX 187, 708; JA 391).

May 15: Due to looming discovery deadlines, Pickle moves to compel Plaintiffs to produce documents responsive to requests to produce, without Plaintiffs having identified which documents they think are irrelevant. (RA 61 p. 2).

May 27: Plaintiffs provide schedule for producing documents responsive to requests to produce. Dates range from June 13 to 27, with privilege log not produced until July 11. (EX 188–189).

June 4–5: Parties confer. Plaintiffs want motion to compel withdrawn and offer to draft stipulated extension of deadlines, including June 11 deadline for

written discovery. (JA 200, 123).

June 6: Plaintiffs concede promised draft will not extend June 11 deadline, and give notice they will further obstruct third-party subpoenas. (*Id.*).

June 10: Draft hasn't arrived. (JA 123). Defendants move for extension of deadlines. (RA 69).

June 12: After June 11 deadline already passed, Plaintiffs demand motion to extend deadlines be withdrawn, threatening sanctions. (EX 195–196).

June 13: Plaintiffs produce 199 unindexed pages of schedules and inventory lists. (EX 375; RA 73 p. 4).

June 16: Plaintiffs use not-yet-filed motion to limit scope of discovery to stall subpoena in S.D.Ill., eight days before GHS's planned production date. (EX 201–202).

June 20: W.D.Mich. compels Remnant to produce, finding documents sought to be clearly relevant. (EX 643–644).

June 20: Plaintiffs produce 1,606 unindexed "confidential" pages, including 287 pages regarding purchases of printing, common office supplies, and office furniture. (JA 190–191; EX 375–384; RA 73 p. 4).

June 25: Plaintiffs move to limit scope and methods of discovery,[6] seeking

[6]Plaintiffs' suggested time frame of 2001 to January 2007 (JA 126) hinders discovery of Pete Crotser's embezzlement (JA 533–534) and the 1998 house deal, and makes Save3ABN.com's activities almost exclusively about Tommy. (EX 318–319). Plaintiffs sought to prohibit discovery about Tommy, but admitted it was relevant. (JA 130–131, 525).

in camera review of subpoenaed documents, including MidCountry's records, before production to Defendants. (JA 125–127, 132–133).

June 27: Remnant moves to reconsider at Plaintiffs' behest, citing relevancy and Plaintiffs' motion to limit scope of discovery. (EX 388–389; JA 135).

June 27: Plaintiffs produce 1,785 unindexed "confidential" pages, many being unilaterally redacted. (EX 223, 384–387). Plaintiffs' June 13–27 productions include: 367 pages regarding fixed assets, 989 pages regarding inventory, and 342 pages regarding the terminated whistleblowers. 691 pages are duplicative (up to 5 copies). A significant number are illegible. By Plaintiffs' admission, 30 of 44 document requests haven't been responded to. (JA 191, 158). Plaintiffs designate "employment related information" confidential when Plaintiffs said they wouldn't, as well as public filings. (JA 172–173, 247).

July 7: Defendants move to compel GHS in S.D.Ill. (EX 258–261, 788).

July 10: Plaintiffs produce privilege log listing only 12 invoices, reports, and board meeting minutes. (RA 103-2).

July 28: W.D.Mich. denies Remnant's motion to reconsider. (EX 645–646).

August 8: Remnant appeals, citing relevancy and Plaintiffs' motion to limit scope of discovery. (RA103-3).

August 25–26: Defendants move for leave to subpoena non-privileged documents from U.S. attorney (to verify or refute Plaintiffs' claims of IRS vindication) and Fjarli Foundation (regarding misstatements on Shelton's July

2006 financial affidavit about Fjarli Foundation loan). (RA 95). Plaintiffs oppose on September 8, asserting irrelevance. (RA 97 pp. 1–2).

September 4: Plaintiffs' counsel represents he opposes motion to extend discovery deadlines. (EX 480).

September 8: Defendants move to extend discovery deadlines, identifying 84 types of documents Plaintiffs failed to produce. (RA 101; JA 191–199).

September 8: W.D.Mich. denies Remnants' appeal. (EX 647–648).

September 8: Defendants move for leave to subpoena documents from port director and Delta Airlines, to determine whether Linda rendezvoused with Abrahamsen. (RA 98). Plaintiffs oppose on September 22, asserting irrelevance. (DA 50).

September 11: D.Mass. denies Pickle's motion to compel without prejudice, ordering revised document requests served by September 26. Plaintiffs must respond by October 27. Plaintiffs' motion to limit scope and methods of discovery is denied except that *all* parties must seek leave before issuing subpoenas. Plaintiffs are chastised for not complying with Fed.R.Civ.P. 34(b)(2)(E)(i) and obstructing discovery on basis of relevance, including regarding whether Defendants have caused damages. (JA 204–206).

September 12: MidCountry's records arrive at D.Mass., and are signed for by district judge's docket clerk. (RA 206-2; RA214-12; RA214-13). Defendants are told they cannot be found; no notice is ever given otherwise. (RA 206 pp. 2–4).

September 22: Remnant produces documents giving Defendants *prima facie* evidence of abuse of prosecution and malicious prosecution against Plaintiffs and Plaintiffs' counsel.[7] (EX 700; JA 248). Case reaches critical juncture.

October 17: Plaintiffs verbally offer to Pickle to settle in order to avoid discovery expense, and deny they will file motion to dismiss. (JA 267).

October 22: Thompson signs affidavit stating that during week of October 12th, board voted to dismiss suit. (JA 238–239).

October 22: Plaintiffs represent to S.D.Ill. court they will produce on October 27. Plaintiffs stall subpoena on basis that issues of scope and relevance remain unresolved. (EX 684–685, 688–689).

October 23: Plaintiffs file motion to dismiss, and notify Defendants that Plaintiffs will not comply with October 27 deadline. (JA 218–219; EX 608).

October 23: Defendants file emergency motion for hearing regarding GHS subpoena since discovery deadlines are looming, informing court that Plaintiffs misrepresented that issues of scope and relevance remain unresolved. (JA 240–243).

October 30: 37 minutes before the scheduled 3pm status conference, Defendants finish filing a hurriedly prepared opposition to the motion to dismiss,

[7]Thompson and Plaintiffs' counsel asserted that Plaintiffs' counsel thoroughly reviewed Plaintiffs' finances. (EX 394–395, 545). On September 26, 2008, Defendants gave notice that the Remnant documents demonstrate that Plaintiffs' counsel knew or should have known that Plaintiffs' allegations were false. (EX 546).

with affidavit and 45 exhibits, totaling 255 pages, just in case the court takes up that motion. (JA 17, 244, 265).

The Confidentiality Order

The April 17, 2008, blanket Confidentiality Order:

- Governs all discovery documents, confidential or not. (DA 30).
- Permits post-case challenges to confidentiality designations. (DA 35).
- Requires only non-parties (such as experts) to sign Exhibit A. (DA 34–35).
- Requires only those who sign Exhibit A to return confidential documents, within 30 days after the conclusion of all appeals. (DA 37).

re: Spoliation of Evidence

Miller alleged that Shelton ordered the fraudulent alteration of Miller's billing records. (EX 178).

Kathy Bottomley alleged that Ewing ordered the destruction of evidence of state law charitable gift annuity violations. Another source alleged that Ewing destroyed financial records dated earlier than the year 2000. (EX 585, 135; JA 507–508).

Shelton and Plaintiffs' counsel asserted that Plaintiffs ordered the destruction of documents pertaining to the IRS criminal investigation. (EX 394–395, 489–490).

Plaintiffs destroyed *3ABN World* evidence that showed that *TCTR* and

Mending Broken People (*"MBP"*) were Shelton's marital property. Plaintiffs then spoiled the evidence of spoliation by recreating those issues after Defendants obtained copies from Michigan. (JA 439–443, 398–399; EX 791–797).

Thompson's Veracity & Credibility

Defendants raised questions as to Thompson's veracity (RA 80 p. 15; RA 104 p. 2; RA 113 pp. 2–3; JA 260, 335–336), and drew attention to his contradictory and false statements:

- Thompson had "hard evidence" of Linda's adultery, giving Shelton the biblical right to remarry, but "never had" such evidence. (EX 495, 498).
- Thompson had evidence that Linda rendezvoused with Abrahamsen in Florida, but had no proof that trip took place. (EX 359, 473).
- Shelton didn't initiate Shelton's divorce (but Shelton did). (EX 500, 415).
- The state of Illinois thoroughly reviewed 3ABN's finances (but Judge Rowe noted: 3ABN refused to produce its Form 990's). (EX 651–654).
- The lawsuit "has only one purpose," "to expose the truth," and "does nothing to hide truth," for "[w]e have nothing to hide." (EX 494–495). Yet Plaintiffs sought permanent impoundment, abusively designated documents as confidential, and refused to participate in discovery. (RA 2; EX 372; JA 530–531, 316–317).

Thompson admitted, "I am reporting only what I believe I was told." (EX 470).

Case's Turning Point

The district judge is normally a careful jurist: 4½ hours was insufficient to digest a five-page order. (JA 201, 16, 315).

The district judge didn't have "a good enough handle on the case" on December 14, 2007, indicated the case had "fall[en] through the cracks" on May 7, 2008, and didn't have "a handle really on where matters stand" on September 11 regarding disputes going back to January 2008. (JA 310, 137, 315, 320).

When the court took up the dismissal motion in the October 30, 2008, status conference, Defendants referred to their extensive opposition. The court responded, "When was that filed?" (DA 6).

Plaintiffs covertly sought to impose the Confidentiality Order's non-party return requirements upon parties. (JA 227). Plaintiffs' counsel's "only concern" was Defendants' malicious prosecution claims, including against counsel, as demonstrated by his comments about diversity jurisdiction. (DA 10, 12–13).

After the district judge, former colleague of one of Plaintiffs' counsel[8] (EX 839–841, 850), heard the situation, he granted the motion,[9] and ordered the return of confidential documents conditioned upon whatever the Confidentiality Order required (although he was unfamiliar with that order's terms), and the return of

[8]The district judge previously asked that counselor's advice twice on the rules, instead of his own law clerk, when another counselor had taken the lead. (JA 301, 309, 312).

[9]At that point, Plaintiffs' counsel had spoken 1,090 words, Joy 242 words, and Pickle 226 words. (DA 5–13).

MidCountry's records to "the party that produced" them. (DA 14–17). The sole dismissal condition was that Plaintiffs refile their claims in the same court, though the judge understood that Plaintiffs would refile their claims as counterclaims in state court. (DA 12–14, 17).

Right after dismissal, Plaintiffs' counsel for the first time "designated" as confidential subpoenaed documents regarding Tommy's pedophilia and the terminated whistleblowers, demanded the surrender of those documents, and threatened new litigation if Defendants revealed anything. The next day Plaintiffs' counsel threatened Joy for making a comment based on Joy's own sources. (EX 692–694, 170).

As the district judge invited, Defendants moved for costs, including reimbursement for MidCountry's records, which was denied two days before the court considered a motion Defendants' reply depended upon. (RA 130; RA 153; JA 24). Defendants moved to reconsider and amend findings pursuant to Fed.R.Civ.P. 52(b), 59(e), and 60(b)(1)–(3), and moved for sanctions against Attorney Gregory Simpson ("Simpson"), citing 16 misrepresentations. (RA 169; JA 450–463). These motions were denied. (DA 27–29). Defendants appealed. (JA 493).

Thereafter, Defendants discovered that MidCountry's records were surrendered to Plaintiffs instead of returned to MidCountry. (RA 212 pp. 3–4; JA 435 n.4). In seeking their return to the district court, Defendants cited the ties between the district judge and Plaintiffs' counsel, and how the case took a marked

turn once Defendants gave notice that Defendants had *prima facie* evidence against Plaintiffs' counsel. (RA 213 pp. 10–12). Thereafter, the district judge recused himself, stating that an objective observer might reasonably question his impartiality, and making public what had been a secret, that a complaint for judicial misconduct had been filed. (JA 538).

SUMMARY OF THE ARGUMENT

Under Fed.R.Civ.P. 41(a)(2), the court must ensure that defendants are protected, but in the underlying case, Plaintiffs, not Defendants, were protected, in a way that chills free speech and press.

The district court erred in not reading briefs, deciding motions while unfamiliar with relevant facets of the case, accepting hearsay testimony from a liar, not conducting a requested evidentiary hearing, and withholding evidence. The factors to consider under Rule 41(a)(2) were not properly applied. Orders were internally inconsistent and contained clearly erroneous findings.

Defendants' property was expropriated and misappropriated, without just compensation.

ARGUMENT

Standard of Review

Orders pertaining to voluntary dismissals, costs and fees, and sanctions are reviewed for abuse of discretion. *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 49, 51 (1st Cir. 1981); *Mariani v. Doctors Associates, Inc.*, 983 F.2d 5, 7

(1st Cir. 1993). An abuse of discretion may arise from a mistake of law, a clearly erroneous finding of fact, or a failure to exercise discretion. *Baella-Silva v. Hulsey*, 454 F.3d 5, 11 (1st Cir. 2006); *Alamance Indus., Inc., v. Filene's*, 291 F.2d 142, 146 (1st Cir. 1961).

The district judge's finding that his "impartiality might reasonably be questioned by an impartial observer" (JA 538), after Defendants drew attention to his apparent efforts to shield Plaintiffs' counsel from liability in the orders under review (RA 213 pp. 10–12), suggests that in this instance a high degree of scrutiny be applied when examining findings of fact for clear error.

In cases raising First Amendment issues, an appellate court must "make an independent examination of the whole record" to ensure that there is no "forbidden intrusion on the field of free expression." *Bose Corp. v. Consumers Union*, 466 U.S. 485, 499 (1984) (internal quotation marks omitted). For protective orders under Fed.R.Civ.P. 26(c), when there has been no finding of good cause, an independent determination of whether good cause exists is required. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 859 (7th Cir. 1994).

Discussion of the Issues

I. Plaintiffs' "Accomplishment": Manifest Injustice

Defendants intended to expand the case by adding 3ABN's directors as parties, but delayed. (EX 696–697). Defendants first needed enough evidence to defeat anti-SLAPP motions. The Remnant documents qualified since they showed

that Plaintiffs knew or should have known that Shelton had inured himself at 3ABN's expense through kickbacks and substantial royalties, violating 3ABN's own policies. (EX 173–177). (*See* SB 1–2).

Subsequently: Plaintiffs obtained a dismissal without prejudice. (DA 2). The clerk's notes omitted the fact that the return of documents is conditioned upon whatever the Confidentiality Order requires. (DA 1, 14, 16–17). MidCountry's records were surrendered to Plaintiffs instead of being "returned to the party that produced" them. (DA 15; JA 368). Defendants were denied reimbursement, hindering their ability to pursue their claims against Plaintiffs. (DA 22–25). Erroneous findings were inserted into the record. (*infra* 42–46). Post-dismissal, Plaintiffs demanded the surrender of *all* subpoenaed documents, and threatened contempt proceedings when Defendants reported what they obtained from other sources. (EX 692–694).

II. First Amendment Freedoms Threatened

To muzzle Defendants, Plaintiffs will conceivably accuse Defendants of disclosing in an article a "confidential" document Defendants never received. If Defendants no longer possess what Plaintiffs actually produced, Defendants cannot adequately defend. That very prospect has a chilling effect on free speech and press, as does the threat of contempt proceedings for reporting information obtained from other sources.

If Defendants no longer possess the documents Plaintiffs abusively

designated confidential, Defendants cannot adequately petition the government for redress for Plaintiffs' abuse of process. (EX 372, 375–383).

Under Fed.R.Civ.P. 26(c), protective orders require that good cause be shown. *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789–790 (1st Cir.1988). Litigants have a constitutionally protected right to disseminate discovery information absent a valid protective order. *Id.* at 780–781. Even with a valid order, the press must be allowed to disseminate the same information it obtains by other means. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 37 (1984).

The *Seattle Times* protective order, not the parties, identified in detail the information covered. Good cause was found in affidavits detailing attacks, threats of physical harm, and assaults. *Id.* at 26–27 fn.8, 37. In contrast, in the underlying case, the blanket Confidentiality Order was issued without a finding of good cause. (DA 30). The lower court stated, "lawsuits are presumptively public," and the Remnant and Westphal documents would have become public record at trial since they directly address Plaintiffs' claims. (JA 496, 48–50).

The burden of proof for continued protection for these documents, as well as for *CTV*, *TCTR*, and Plaintiffs' purchase orders for sticky notes and pens (JA 157; EX 187, 372), is upon Plaintiffs. Absent that showing, these documents shouldn't receive judicial protection. *In re Agent Orange Product Liability Litigation*, 821 F.2d 139, 145–148 (2d Cir. 1987).

Therefore, in this instance, there is no basis in law for nullifying the

Confidentiality Order's post-case challenge provision by imposing its non-party return requirements upon parties, or for removing the dismissal order's condition that the return of documents be pursuant to whatever the Confidentiality Order requires. (DA 35, 37, 14, 16–17). Since Plaintiffs never appealed these two orders, Plaintiffs lack standing to seek such modifications within Defendants' appeal.

III. Due Process Offended

A. Failure to Exercise Discretion

The district judge is typically a careful jurist. 4½ hours wasn't long enough to digest a five-page order before ruling on an issue. (JA 201–206, 315). But clearing the docket[10] and shielding Plaintiffs and their counsel from liability led him to depart from his normal practice.

In the October 30, 2008, status conference, Defendants repeatedly referred to their opposition, affidavit, and 45 exhibits, totaling 255 pages, which they finished filing 37 minutes before the status conference was scheduled to begin. (JA 17, 265; DA 6–7, 11, 15). The district judge initially represented that he was unaware of these filings. (DA 6). He was unfamiliar with the Confidentiality Order's terms, and didn't have a handle on a complex case involving adultery, copyright, perjury, private inurement, royalties, and trademarks. (DA 16–17; JA 315, 320, 43, 47–53).

[10]With a background in journalism and investigating characters like Shelton (JA 841–850), the district judge would have perceived the frivolousness of the underlying case, and might welcome getting rid of it. But while clearing the docket may be a convenience to the court, such considerations are secondary. *Alamance*, 291 F.2d at 145–146.

Nevertheless, the district judge didn't schedule a motion hearing, didn't read Defendants' brief, granted the motion midway through the status conference,[11] didn't give Defendants adequate opportunity to be heard, and cut short the conference. (DA 20). The court thus failed to exercise the discretion required by Rule 41(a)(2). *Alamance*, 291 F.2d at 146.

The court's order denying costs (DA 22–25): (a) failed to recognize that most of Defendants' miscellaneous expenses were for copies, as Defendants' affidavit *and* memorandum made clear (JA 279; RA 131 p. 2), (b) failed to reference revised figures in Defendants' reply and affidavit (JA 339, 354–355), and (c) was filed two days before a motion to seal that Defendants' reply depended upon was ruled on. (JA 24, 324, 344). Five times from December 2008, to July 2009, Defendants informed the court that the Confidentiality Order doesn't require parties to return documents. (JA 373–376, 407, 445–447, 462–463; RA 182 pp. 2–3, 10–11; RA 190 p. 11). The district judge ruled otherwise on this indisputable point. (DA 29). All this suggests that none of these submissions were read.

Since the lower court failed to exercise its discretion, the orders at issue must be reversed.

B. Thompson's Credibility; Evidentiary Hearing Required

3ABN's sole "evidence" for its need of dismissal is Thompson's affidavit,

[11]At that point, Plaintiffs' counsel had spoken 1,090 words, Joy 242 words, and Pickle 226 words. (DA 5–13).

which cites hearsay assertions by unidentified individuals that the IRS and EEOC found nothing wrong,[12] restoring both 3ABN's reputation and its donations from the public. (JA 237–239). Thompson is not the attorney or accountant with personal knowledge of these matters, making his testimony on these points inadmissible. (*Id.*). Fed.R.Evid. 802, 805.

Thompson lacks credibility and veracity. He claimed to have evidence that Linda committed adultery and went to Florida, and claimed that he didn't. (EX 495, 498, 359, 473). His testimony regarding a thorough review by the IRS mirrors his previous false statement about the state of Illinois. (JA 237; EX 651–654). Given the 1998 house deal, horse donations, kickbacks, evidence within the Remnant and Westphal documents, and a IRS whistleblower's claim still being open in May 2009, Thompson's assertions of IRS and EEOC-proven innocence are impossible. (EX 86–88, 280–285, 289, 800). (*See* SB 1–3).

Despite Thompson's assertion that the lawsuit's objectives are achieved, ¶¶ 1–3, 6–10 of Plaintiffs' prayer for relief clearly haven't been. (JA 55–56). ¶¶ 4–5 arguably haven't been either, since there are now 16 times as many Save3ABN websites as when the case was filed, and Plaintiffs wanted to shut these down too. (JA 272–273, 176; EX 747–748, 751–754, 773).

During economic turmoil, Thompson testified that donations were back up

[12]Since 3ABN apparently never made public the EEOC investigation, much less its conclusion, its conclusion could have no effect on public reputation. (RA 171 p. 6).

to pre-June/July 2006 levels. (JA 238, 81–83). Yet Jim Gilley ("Gilley") around October 8, 2008, asked for $5 million in donations (over 25% of 3ABN's reported 2006 expenses) by October 17 (EX 659, 84), the same day Plaintiffs asked to settle to avoid *expense*. (JA 267).

Any restoration of 3ABN's reputation may have been fraudulently obtained: 3ABN publicized Shelton being replaced by Gilley as president, which could easily boost donations, but 3ABN still reported Shelton as president in later state filings. (JA 275; EX 656–658, 179).

If there are "issues of fact that cannot be resolved on the papers submitted," an evidentiary hearing should be held. *McLaughlin v. Cheshire*, 676 F.2d 855, 857 (D.C.Cir. 1982).

The district court erred by granting the motion solely on Thompson's testimony, without the evidentiary hearing Defendants explicitly requested to determine (a) what monthly donation levels were, (b) whether insider donations rather than public reputation affected those levels in 2008, (c) whether the IRS found nothing wrong with Shelton's house deal, horse donations, kickbacks, and excessive royalties, and (d) whether 3ABN tainted the EEOC investigation by not producing the Westphal documents. (JA 264).

C. LR, D.Mass. 7.2

The Confidentiality Order mandates seven-days notice before using documents designated confidential (DA 33), but the dismissal motion was filed

only seven days before the status conference. (JA 17, 19). Therefore, the only way Defendants could present the Remnant and Westphal documents to the court was to request an evidentiary hearing, which they did. (JA 264).

Defendants again sought to present these (and other) "confidential" documents to the court in connection with their motions for costs, to reconsider and amend findings, and for sanctions (RA 153; RA 173; JA 450–451), and were opposed by Plaintiffs (JA 359–364, 413–420), even when much of this material couldn't possibly qualify for protection. (EX 372, 375–383, 187, 708).

LR, D.Mass. 7.2 bars the submission of sealed material without first obtaining leave. Unlike 1st Cir.Loc.R. 11(c)(2), LR, D.Mass. 7.2 does not safeguard due process by permitting provisionally filing under seal. Since Defendants couldn't explicitly describe the documents without also filing that description under seal (EX 544), the situation was impossible.

District courts shouldn't exercise any degree of control over the trial record's contents, even when requested by the parties, for such control is a "usurpation of power." *IBM v. Edelstein*, 526 F.2d 37, 45–46 (2nd Cir. 1975). Yet LR, D.Mass. 7.2 appears to empower such control when a confidentiality order requires more notice than time available, and when an adversarial party unfairly uses confidentiality designations to obstruct submission of substantive documents and arguments. LR, D.Mass. 7.2 should therefore be modified to permit provisionally filing under seal.

D. Evidence Withheld

Once Plaintiffs' request for an *in camera* review for relevancy before giving MidCountry's records to Defendants was denied (JA 132–133, 206), the court should have given these records to Defendants. Instead, the lower court told Defendants that MidCountry's records could not be found, and never gave notice otherwise. (RA 206 pp. 2–4). The lower court therefore withheld critical evidence of Shelton's perjury on his July 2006 financial affidavit and of his private inurement from Defendants, prejudicing their ability to fairly litigate from September 12, 2008, onward. (RA 206-2).

Since MidCountry's records document Shelton's substantial, unreported royalty income and manipulation of bank balances, showing the frivolousness of Shelton's claims, this evidence goes to the heart of the basis upon which Defendants' request for attorney's fees was denied. (DA 24–25; SE 110). (*See* SB 1–2).

IV. Fed.R.Civ.P. 41(a)(2)

A. Purpose of Rule

After defendants have responded to a complaint, voluntary dismissal is no longer a matter of right. The court must make three determinations: whether dismissal should be allowed at all, whether it should be with or without prejudice, and what curative terms and conditions should be imposed to protect defendants. 8 *Moore's Federal Practice* §41.40[1] (Matthew Bender 3d ed.). Defendants'

position, not plaintiffs' position, is what must be protected. *LeCompte v. Mr. Chip, Inc.*, 528 F.2d 601, 604 (5th Cir. 1976).

When determining whether defendants will suffer *legal prejudice* (prejudice to some legal interest, claim, or argument) by granting a voluntary dismissal, courts consider the following non-exclusive factors: the extent to which the suit has progressed, defendants' effort and expense in preparation for trial, plaintiffs' excessive delay and lack of diligence in prosecuting the action or bringing the motion, insufficient explanation for the need to dismiss, any undue vexatiousness on Plaintiff's part, the duplicative expense of relitigation, and whether the case has reached a critical juncture. *Doe v. Urohealth*, 216 F.3d 157, 160 (1st Cir. 2000); *Piedmont Resolution L.L.C. v. Johnston,* 178 F.R.D. 328, 331 (D.D.C. 1998); *Catanzano v. Wing*, 277 F.3d 99, 110 (2d Cir. 2001); 8 *Moore's* §41.40[6].

Rule 41(a)(2) dismissals cannot be used to thwart discovery deadlines or as thinly-veiled attempts to avoid discovery. *Greguski v. Long Island*, 163 F.R.D. 221, 224 (S.D.N.Y. 1995); *In re Exxon Valdez*, 102 F.3d 429, 432 (9th Cir. 1996).

B. Factors Applied to Plaintiffs

These factors clearly rule against dismissal.

1. Plaintiffs' Reasons for Dismissal

The lower court erred by dismissing Shelton's claims when Shelton, individually, had given no reasons whatsoever for dismissal. *Beavers v. Bretherick,* 227 Fed.Appx. 518, 522 (8th Cir. 2007). Thompson lacks veracity and credibility,

and his reasons weren't credible. (*supra* 29–31).

Plaintiffs' counsel asserted as a reason that Plaintiffs' couldn't obtain a "substantial award of damages," but that is irrelevant since Plaintiffs admit that wasn't why they sued. (JA 223; EX 534).

2. Plaintiffs' Bad Faith and Vexatiousness

Plaintiffs "never had any intention of providing discovery," but sought "the advantage of filing [their claims] without having to support them"; this constitutes "undue vexatiousness." *S.E.C. v. Oakford Corp.*, 181 F.R.D. 269, 271 (S.D.N.Y. 1998). (JA 303). Shelton never produced a thing. (JA 273). 3ABN secretly predetermined that it would never produce its evidence of Linda's adultery. (EX 535).

Plaintiffs should have filed their untimely June 25, 2008, scope of discovery motion no later than 30 days after Pickle served requests to produce on November 29, 2007. (JA 122, 125). *Burlington N. &. Santa Fe Ry. Co. v. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005). Plaintiffs then used this untimely motion to delay. (EX 388–389, 531–533; RA 103-3). And Plaintiffs' June 16 motion to quash in S.D.Ill. (EX 531–533) was itself 60 days untimely, since the subpoena's compliance date was April 17. *U.S. ex. rel. Pogue v. Diabetes Treatment Ctrs. of Am., Inc.*, 238 F.Supp.2d 270, 278 (D.D.C. 2002).

Plaintiffs' lone example of a "donor" negatively influenced by Defendants was a trustor concerned about Defendants' "documentation." (EX 42). Therefore,

Plaintiffs sued in order to infringe upon Defendants' First Amendment right to report on and document Plaintiffs' ethical departures. (JA 236–237). Plaintiffs' ill-motive is further evidence of vexatiousness. *Jewelers Vigilance Comm., Inc. v. Vitale Inc.*, 1997 U.S. Dist. LEXIS 14386, at *7–8 (S.D.N.Y. 1997).

"A finding of good faith on the part of plaintiffs is relevant in evaluating whether defendant has or will suffer substantial prejudice." *Read Corp. v. Bibco Equip. Co.*, 145 F.R.D. 288, 291 (D.N.H.1993). Plaintiffs knew before filing suit that their claims were frivolous since they knew that their programming isn't copyrighted (EX 547–557), that Shelton privately inured himself through house deals, kickbacks, and excessive royalties (EX 86–88) (*See* SB 1–2), and that Shelton perjuriously omitted 2006 royalty income from his financial affidavit. (EX 287–288). (*See* SB 1–2). Plaintiffs never sought a preliminary injunction, knowing that case law was against them. (EX 13–14). Plaintiffs sought to hide the baselessness of their claims by omitting key pages from Defendants' articles. (EX 1–4, 8–38). Plaintiffs denied their long-held position that Linda's alleged Florida rendezvous with Abrahamsen was evidence of adultery. (DA 50; RA 113 pp. 4–6; EX 359, 456, 499; JA 186). Plaintiffs told the court they had top secret "proprietary and trade secret" Rule 26(a)(1) materials: the widely distributed *CTV* and *TCTR*! (JA 167, 157; EX 187). Plaintiffs declared irrelevant discovery pertaining to an alleged IRS vindication, and then used that unsubstantiated vindication as justification for dismissal. (RA 97 pp. 1–2; JA 237–238).

Parties must confer in good faith to narrow the issues before filing motions. LR, D.Mass. 7.1(a)(2). Instead, Plaintiffs filed for dismissal without conferring with Defendants, six days after denying that Plaintiffs would file such a motion, when the 3ABN Board had already voted to dismiss. (EX 537–543, 666; JA 238–239, 267–268). Plaintiffs' bad faith prejudiced Defendants since Defendants had to address so many issues in their hastily prepared opposition. (JA 249).

Plaintiffs moved for dismissal seven days before a scheduled status conference, hoping Defendants wouldn't have enough time to adequately respond, and leaving too little time to comply with the Confidentiality Order's seven-day notice requirement before filing the Remnant and Westphal documents. (JA 17, 19; DA 33). Plaintiffs never gave explicit notice that they were attempting to alter the Confidentiality Order's terms regarding post-case challenges and return of documents, hampering Defendants' and the court's recognition of that fact.

3. Lack of Diligence Litigating Case

Plaintiffs' only offensive maneuvers were serving written discovery on *August 20, 2007*, failed attempts to get mirror images of Defendants' hard drives, two subpoenas seeking identities of anonymous third-parties, and a deposition of Linda that never occurred. (JA 273; RA 33; EX 53, 308–317).

Plaintiffs abandoned or never pursued their claims pertaining to the pedophilia allegations, Shelton's divorce, and copyright and trademark infringement. (EX 103; DA 45–46; JA 43, 49–53, 271). A preliminary injunction

was never sought. Injunctive relief was never sought as promised. (RA 122-2 p. 1). The promised motion to compel disclosure of Defendants' sources was never filed; the promised demand for supplementation of written discovery was never served. (JA 138, 101).

4. Lack of Diligence in Bringing Motion

Plaintiffs professedly intended to pursue only their financial allegations. (JA 164). But Plaintiffs knew from July 2007 onward that even these allegations were doomed, as Defendants published about Shelton's horse donations, house deal, perjury, and Remnant royalties. (EX 611–642; RA 96-11 pp. 45–65; JA 257). Not until Remnant produced incriminating documents on September 22, 2008, and Defendants gave notice that Defendants now had a basis for counterclaims of misuse of process and malicious prosecution, only then did Plaintiffs finally file their motion to dismiss. (EX 700, 546).

5. Plaintiffs' Motion a Ploy to Evade Discovery

Plaintiffs gave avoidance of discovery as a reason to end the case. (JA 267). Upon filing their dismissal motion, Plaintiffs announced that they would disregard the court-ordered production date of October 27, 2008, even though Plaintiffs had the previous day led a court and Defendants to believe otherwise. (EX 608, 684–685, 688–689).

6. Defendants' Effort and Expense in the Case

Within the First Circuit, an 11-page docket sheet with eighty-five entries

demonstrated sufficient effort and expense that a Rule 41(a)(2) dismissal without prejudice was denied. *Boyd v. Rhode Island Dep't of Corrections*, 206 F.R.D. 36, 37–38 (D.R.I. 2001). In comparison, *3ABN v. Joy* at the time of dismissal had a 20-page docket sheet with 128 entries. (JA 1–20).

Plaintiffs' obstructionism forced Defendants to file four motions to compel, and two motions seeking leave to serve four subpoenas. (JA 6, 10–11, 15–18). Through November 13, 2008, Defendants filed about 384 exhibits, counting subparts. The extensive litigation in the related cases in Illinois, Michigan, and Minnesota[1] involved filing hundreds of pages and over 170 exhibits. (RA 63-28 through RA 63-33; RA 81-2 p. 121 through RA 81-9; RA 96-9 through RA 96-11).

Defendants aren't made of money, and don't have millions of dollars at their disposal. (JA 233). Defendants cannot maintain time-consuming, expensive, and extended legal battles with Plaintiffs, fighting to obtain any and every document requested, only to have Plaintiffs dismiss without prejudice.

7. Duplicative Expense

Since Plaintiffs accomplished none of their objectives, moved to dismiss in order to evade liability and remove incriminating evidence from Defendants, and immediately threatened more litigation (JA 55–56, 218; DA 8, 10–13; EX 692–694), and since Defendants have yet to pursue their claims, litigation is far from over. Yet without diversity jurisdiction (DA 12–13) and the transfer of discovery and favorable rulings, there will be considerable duplicative expense.

8. Late in the Case; Critical Juncture

Given Plaintiffs' obstruction of discovery, the case's discovery phase constituted a *major* portion of the case. Once Remnant produced its documents on September 22, 2008, giving Defendants a solid basis for counterclaims that could survive an anti-SLAPP motion, the case had reached a critical juncture. (EX 700; JA 258).

C. Dismissal Conditions

Curative conditions that would protect Defendants from duplicative expense, exhaustion of limited resources, spoliation of evidence, and deprivation of legal rights include:

- Dismissing with prejudice.
- Allowing use of discovery in future actions between the parties. *Lopez v. Ross Stores, Inc.*, 2006 U.S. Dist. LEXIS 83069, at *9 (S.D.Tex. 2006); *Bready v. Geist*, 85 F.R.D. 36, 38 (E.D.Pa. 1979).
- Requiring Plaintiffs' consent to favorable rulings regarding case impoundment, form of electronic discovery, confidentiality, and scope of discovery. *LeBlang Motors, Ltd. v. Subaru of Am. Inc*., 148 F.3d 680, 686 (7th Cir. 1998); *Lopez*, *supra*, at *3–4, 9.

As a matter of law, the district court erred in granting a dismissal without prejudice in order to deprive Defendants of their malicious prosecution claims (DA 8, 10–13), since that deprivation "constitutes legal prejudice." *In re Sizzler*

Restaurants Intern. Inc., 262 B.R. 811, 821–822 (Bankr.C.D.Cal. 2000); *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).

Whether or not Plaintiffs might be sued for malicious prosecution isn't "a factor which ought seriously to influence our decision here ... because it is not entirely relevant under the standards for deciding a motion for voluntary dismissal." *Selas*, 57 F.R.D. at 5 n.2; *In re Sizzler*, 262 B.R. at 823.

Dismissal with prejudice preserves Defendants' legal rights, and avoids irremediable injustice. *Selas*, 57 F.R.D. at 7.

The sole dismissal condition imposed, that Plaintiffs refile their claims in the same court, was a nullity because the court understood that Plaintiffs would refile their claims in state court anyway if Defendants lacked diversity jurisdiction when suing Plaintiffs' counsel. (DA 12–14, 17 ("[W]e'll have to ... see how that plays out and in what court.")).

"The court may not impose conditions on the non-moving party to protect the plaintiff from the consequences of the dismissal." 8 *Moore's* §41.40[10][b]. There is no authority to do so. *Cross Westchester Dev. Corp. v. Chiulli*, 887 F.2d 431, 432 (2d Cir. 1989). Therefore, the lower court could not condition dismissal upon the return of Defendants' discovery, including MidCountry's records, when the Confidentiality Order called for no such return. (DA 14–15, 30–35).

Three individuals have accused Plaintiffs of destroying or altering

documents. (EX 135, 178, 585). Plaintiffs admit ordering such destruction. (EX 394–395, 489–490). *3ABN World* evidence was destroyed, and evidence of that spoliation was spoliated. (JA 439–443; EX 791–797). The protection of evidence is therefore of utmost importance when crafting dismissal conditions to protect Defendants.

D. Costs, Expenses, and Fees

Plaintiffs objected to paying even 1¢ of Defendants' costs. (JA 282–299). Plaintiffs should not have it both ways. Plaintiffs should either dismiss their complaint with prejudice, or compensate Defendants for their reasonable costs, expenses, and fees. *Kappa*, *supra*, at *6.

But imposing costs is not entirely curative: While avoiding duplicative expense, it cannot cure the deprivation of Defendants' malicious prosecution claims (with their potential for punitive damages), or the prejudice of opposing an anti-SLAPP motion without MidCountry's records.

In denying Defendants' motion for costs (and the collateral motion to file under seal), the lower court made clearly erroneous findings which warrant these orders' reversals if a reversal of the dismissal order doesn't moot these issues.

1. Sole Condition Not Curative

The lower court asserted that *"any* potential legal prejudice" was already addressed by requiring Plaintiffs to refile their claims in the same court. (DA 24, italics added). But this does nothing to cure the prejudicial deprivation of

Defendants' malicious prosecution claims. (DA 8). The court understood Plaintiffs would refile their claims as counterclaims in state court anyway (DA 12–13, 17), resulting in the potential loss of favorable rulings and considerable duplicative expense.

2. Error re: Expenses

The court erroneously found that none of Pickle's miscellaneous expenses ($4,614.09) and mileage ($993.62) were attributable to costs for copies. (DA 22–24). $3,534.59 alone ($3,682.50 – $147.91) of "miscellaneous expenses" is clearly identified as the cost of obtaining MidCountry's records. Seven other entries, totaling $104.80, are marked "copying," "copies," or "photocopies." Another $5.95 is identified as the cost of obtaining copies of articles. (JA 279). Part of the mileage expense was clearly identified as attributable to obtaining digital copies of 3ABN's 1,757-page tax case record, which was used in filings in the underlying case. (JA 352–353; EX 294–301, 548–557).

3. Error re: "Nothing in the Record"

The lower court stated:

> 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 ....

(DA 24–25). Yet Defendants' opposition to Plaintiffs' motion to dismiss, with its many citations to the record and exhibits, does more than merely suggest such, and

Plaintiffs admit that such briefs contain Defendants' "usual litany of complaints" filed in "several" federal districts. (JA 248–259, 425).

Even if Defendants never filed that opposition, similar briefs, or supporting affidavits and exhibits, the lower court's finding would still be clearly erroneous: Shelton never produced a single document in discovery, let alone documents pertaining to royalties. (JA 273). 3ABN refused to produce documents pertaining to (a) monthly donation levels for 2005, 2006, and 2007, (b) donors who stopped giving due to Defendants' reporting, and (c) Linda's adultery, all basic elements of 3ABN's case and requested by Defendants. (*Id.*; EX 375–387; JA 49–50, 54–55; DA 38–46). Absent the production of these basic documents, the *only* plausible finding is that Plaintiffs never intended to litigate their case, filed suit to harass, embarrass, and abuse, and purposely increased costs by obstructing necessary discovery in four judicial districts.

The record contains findings that Plaintiffs (a) produced documents without indexes, violating Fed.R.Civ.P. 34(b)(2)(E)(i), (b) wrongly declared relevant documents irrelevant (including documents regarding "whether the plaintiffs have actually been damaged by the alleged statements," i.e. documents regarding former donors), (c) should permit inspection of the part not objected to (Fed.R.Civ.P. 34(b)(2)(C)), and (d) filed suit because "obviously, they're trying to back you down for some reason," and as "a nice public way of refuting" Defendants' reporting about

Shelton's cover up of Tommy's pedophilia.[13] (JA 204–205, 145; EX 675, 678).

As a matter of law, the lower court erred by setting aside these findings without their being clearly erroneous. Fed.R.Civ.P. 52(a)(6).

4. Relevance of Remnant Documents

Similarly, the court erred as a matter of law in finding that the Remnant documents were not relevant (DA 24), without also finding that the previous finding that these documents were clearly relevant, a finding that survived appeal (EX 643–648, 802–810), was clearly erroneous.

As a matter of law, the court's finding of irrelevance is impossible, since whether or not the Remnant documents disclose payments to Shelton, either way, they incriminate or vindicate Shelton in regards to the inurement, royalty, and perjury allegations in Plaintiffs' complaint. (JA 48, 50).

Moreover, the April 13 and 15, 2008, orders contradict each other: The court found on April 13 that evidence of abuse of process and malicious prosecution are relevant to a motion for costs under Rule 41(a)(2), but two days later found that the *prima facie* evidence of such within the Remnant documents is irrelevant. (DA 24–25; JA 24) Because of this inconsistency, the court's findings cannot stand. *Todd v. Corporate Life Ins. Co*., 945 F.2d 204, 208 (7th Cir. 1990).

Clearly, Defendants attempted to file the Remnant documents prior to

[13]Regarding one of Plaintiffs' claims: "That's not going to get to a jury." "They cannot be successful in their case ...." (EX 673–674).

dismissal, but could not: Remnant produced the documents on September 22, 2008. (EX 700). Plaintiffs filed their October 23 dismissal motion just seven days before the October 30 status conference. (DA 17, 19). Defendants immediately gave Remnant the seven-day notice the Confidentiality Order requires. (EX 781). For the very first time, Remnant informed Defendants by mail received on October 27 that Remnant was not the designator of confidentiality. (EX 701).

5. Restriction of Fed.R.Civ.P. 41(a)(2)

The lower court found that Rule 41(a)(2) is restricted by 28 U.S.C. §1920, but cited no applicable authority. (DA 23). Yet attorney fees, an expense not listed under §1920, may be imposed under Rule 41(a)(2). *Puerto Rico*, 668 F.2d at 51. (JA 322–323).

The lower court also restricted Rule 41(a)(2) by the American Rule, citing, and adopting the language of, *Blackburn v. City of Columbus,* 60 F.R.D. 197, 198 (S.D. Ohio 1973). (DA 24–25). *Blackburn* relied upon *Smoot v. Fox*, 353 F.2d 830, 832–833 (6th Cir. 1965). But *Smoot* concerned a voluntary dismissal *with prejudice*, and explicitly allowed for attorney fees for dismissals *without prejudice*, without requiring a finding of bad faith. *Id.*

Attorney fees are not awarded absent statutory authority or other factors. *Blackburn*, 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," and thus constitutes statutory authority apart from the American Rule for awarding

attorney's fees. *GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 n.16 (D.C. Cir. 1981); *Yoffe v. Keller Industries, Inc.*, 580 F.2d 126, 129 n.9 (5th Cir. 1978).

> 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). ... 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.

Dismissal is "typically" conditioned upon payment of defendant's expenses, "usually" including reasonable attorneys' fees, 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).

Therefore, the lower court erred as a matter of law in restricting Rule 41(a)(2) by §1920 and the American Rule. Further, expenses incurred by *pro se* defendants would, if represented, be a part of attorney's fees. If 42 U.S.C. §1988 allows for imposing out-of-pocket expenses as part of attorney's fees,[14] Rule 41(a)(2) should as well, if necessary to protect Defendants. Otherwise, if expenses can never be imposed, the lower court shouldn't have explicitly invited Defendants to request reasonable attorney's fees, costs, and *expenses*. (DA 16–18).

Defendants also demonstrated to the lower court that, in this instance, costs, expenses, and fees could be imposed under 28 U.S.C. §1927 and the court's

[14] *Palmigiano v. Garrahy*, 707 F.2d 636, 637 (1st Cir.1983).

inherent powers, as well as under Rule 41(a)(2). (JA 337–339).

V. Expropriation and Misappropriation

Attorneys must make available to former clients upon request client files, including "all investigatory or discovery documents for which the client has paid the lawyer's out-of-pocket costs." Mass.R.Prof.C. 1.16(e)(3).

Therefore, by virtue of payment of the cost of obtaining discovery documents, clients formerly represented (even if now *pro se*) acquire an ownership interest in those documents. Otherwise, the attorney still owns them. Therefore, a *pro se* litigant, as both attorney and client, must certainly acquire ownership interest in discovery documents upon payment of costs.

Upon Defendants' payment of $3,682.50, MidCountry (without restrictions) provided copies of its records pertaining to accounts owned by DLS, 3ABN, and Shelton. (EX 137–138; RA 206-5). The Confidentiality Order didn't prohibit this discovery. (DA 30–35).

DLS and 3ABN never objected to MidCountry's production of its records. (EX 183). A court found Shelton to lack standing to object on their behalf. (JA 357–358; RA 185 pp. 4–5). Plaintiffs admitted that the records are "of MidCountry," not of Plaintiffs, and were "supplied to Defendants." (JA 2218). *United States v. Miller*, 425 U.S. 435, 440–443 (1976).

Defendants never got to see these records because of Plaintiffs' obstructionism. (EX 183–185). The district court professed to not know where they

were, never gave notice otherwise, ordered them returned to "the party that produced" them despite the Confidentiality Order not requiring, surrendered them to Plaintiffs instead, and denied reimbursement to Defendants, without even reading Defendants' briefs. (DA 15, 22–24, 30–35, 6; RA 206 pp. 2–4; JA 160, 405).

And yet, once Plaintiffs' request that the court conduct an *in camera* review before giving these records to Defendants was denied, the court should have given them to Defendants. (JA 132, 133, 206). Ordering them returned to MidCountry without a basis in law or equity, and denying Defendants reimbursement, constituted expropriation. Surrendering them instead to Plaintiffs, without any advance notice whatsoever, constituted misappropriation.

The taking of Defendants' property prevents the use of MidCountry's records in court to establish the extent of Shelton's private inurement and perjury. If this benefits the public by enabling 3ABN's broadcasts to continue without harm, the Fifth Amendment was violated by denying Defendants just compensation. If the taking is instead for private use, the Fifth Amendment was violated by taking Defendants' property without "due process of law."

VI. October 26, 2009, Order on Motions to Reconsider, to Amend Findings, to File Under Seal, and for Sanctions

A. Error re: Fed.R.Civ.P. 52(b)

Defendants moved to amend clearly erroneous findings regarding the

Remnant documents' relevancy, Defendants' total copying costs, the restriction of Rule 41(a)(2) by 28 U.S.C. §1920, whether anything in the record suggests abuse of process or malicious prosecution, and whether "any potential legal prejudice" was already addressed. (JA 402–407). Without explanation, the lower court found that Fed.R.Civ.P. 52(b) was "clearly inapplicable" to such a motion. (DA 28 n.1).

The district court erred as a matter of law, since "[t]he purpose of [Rule 52(b)] motions to amend is to correct manifest errors of law or fact." *Fontenot v. Mesa Petroleum Co.*, 791 F.2d 1207, 1219 (5th Cir. 1986). As the record existed on April 13, 2008, all of these findings were manifest errors. (EX 643–644; DA 17; JA 370–371, 379–380, 322–341).

B. Motion for Sanctions

Attorneys must make reasonable inquiry before making or denying factual or legal contentions, and may not file or later advocate papers that make or deny factual contentions which do not have evidentiary support, unless specifically so identified. Legal contentions must be warranted by existing law or by a nonfrivolous argument for modifying or reversing existing law. Fed.R.Civ.P. 11(b).

Rule 11 sanctions, even an award of attorney fees, are based upon an objective standard of reasonableness, and, unlike sanctions pursuant to the court's inherent powers, do not require a finding of bad faith. Violations "might be caused by inexperience, incompetence, willfulness, or deliberate choice." *Cruz v. Savage*, 896 F.2d 626, 631, 634 (1st Cir. 1990).

In a racial discrimination case, an attorney inadvertently added a single word to a quotation from an affidavit in a brief, turning a statement that on its face had nothing to do with race into one that did. He was sanctioned for "not verifying the accuracy of the alleged quotation," "not promptly withdrawing it when the error was pointed out," and "put[ting] before the Court a false piece of evidence." *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 263 (5th Cir. 2007).

The lower court found that "all of the [sixteen] disputed assertions fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions." (DA 29). Thus, the court found the disputed assertions problematic, only not problematic enough. The question therefore turns on how problematic the assertions really were.

Defendants' motions for reconsideration asserted that Plaintiffs fraudulently misrepresented the Remnant documents' relevancy, the substantiveness of Plaintiffs' productions, the scope of Plaintiffs' allegations, the timing of Defendants' discovery efforts, and the reason Defendants' subpoenas issued from other courts.[15] (JA 399–402). Defendants argued, *inter alia*, that the Remnant

[15]The lower court noted that in *Puerto Rico*, dismissal conditions were not imposed where both sides alleged discovery abuse. (DA 23). This suggests why Simpson persistently misrepresents Defendants' discovery efforts.

But *Puerto Rico* is inapposite since it noted that the defendants had not alleged that they would be precluded from asserting any claims, and much of their discovery was relevant to a pending suit. 668 F.2d at 50–51. Here, no discovery is currently transferable, and Defendants are stripped of their malicious prosecution claims.

documents are relevant and should be filed, and that Plaintiffs increased Defendants' costs by improperly obstructing discovery. (JA 394–395, 408–410, 412).

In response, Simpson asserted that Shelton's kickbacks from Remnant for booklets published by PPPA (JA 489–492; EX 406) were "perfectly proper royalty payments," re-advocated the earlier misrepresentations by declaring them "demonstrably accurate," and falsely asserted that Defendants had not explained the bearing of documents referred to in a new motion to file under seal. (JA 413, 415–416, 429). These fallacious assertions, with each of the incorporated, re-advocated misrepresentations, were deemed problematic by the lower court.

Since these misrepresentations went to the heart of the issues of the motions for costs, to file under seal, for reconsideration, and to amend findings, they went beyond being merely problematic and constituted a fraud upon the court.

1. Remnant Documents

The Remnant documents contain conclusive evidence of kickbacks, excessive royalties at 3ABN's expense, manipulation of bank accounts, perjury on Shelton's financial affidavit, and an issue of interest to the IRS. (*See* SB 1–2). Simpson has the Remnant documents, and thus knows this is true. (EX 799). He clearly intended to deceive the court and thwart justice by declaring the documents irrelevant and mischaracterizing the kickbacks as royalties.

The lower court could not determine to what degree Simpson's prevarication

concerning the Remnant documents was problematic without reviewing the Remnant documents as Defendants explicitly requested. (JA 451).

2. Defendants' Discovery Efforts

Simpson knew or should have known that (a) Defendants' original subpoenas of GHS, Remnant, and MidCountry issued from D.Mass. before Plaintiffs' December 18, 2007, motion for a protective order, (b) Defendants reissued these subpoenas from the proper districts at Plaintiffs' counsel's behest, and (c) Pickle's requests to produce pre-dated Plaintiffs producing their very first document. (JA 128–129, 305). Nevertheless, Simpson deceived the court by asserting that Defendants expanded their discovery efforts only after not finding "help among the Plaintiffs' *relevant* documents,"[16] and issued subpoenas from other districts to avoid contending with Plaintiffs' motions for protective orders. (JA 284–286). Consequently, the lower court erroneously found that nothing in the record suggested that Plaintiffs tried to increase Defendants' costs by purposely obstructing necessary discovery, and refused to amend that finding. (DA 24–25, 28 n.2).

3. Documents' Bearing

Defendants had explained the bearing of the additional documents needing

[16]Here, Simpson specifically asserts that Pickle's November and December 2007 requests to produce constituted such an expansion ***after*** 3ABN's incomplete June 2008 production of corporate records and tax filings! (EX 372, 375, 384–387).

to be filed under seal (RA 171 pp. 5–7; JA 399, 401, 406), and then explained it thrice more (JA 448, 452; RA 179 pp. 6–10), but the lower court adopted Simpson's fallacious misrepresentation as its finding. (DA 29).

C. Order Internally Inconsistent

Defendants moved to reconsider on the basis of Simpson's fraudulent misrepresentations. (JA 399–402, 408–409). The court declined to do so. Yet since the court simultaneously found Simpson's misrepresentations problematic, it should have reconsidered its previous orders. (DA 28–29).

The order declined to reconsider solely on these very general grounds: "Defendants make no argument, and present no evidence, that was not either raised previously or should have been raised previously." (DA 28).

Two earlier submissions Defendants' memorandum cited, RA 149 and 161, which the lower court gave evidence of not having previously considered (JA 13), are of interest. These submissions explained how the Remnant documents constitute *prima facie* evidence of abuse of process and malicious prosecution. (JA 324, 370–371, 383–385). By asserting that Defendants had already raised such arguments, the October 26, 2009, order acknowledges that something in the record *does* suggest abuse of process and malicious prosecution. The court's earlier finding to the contrary (DA 24–25), therefore, is clearly erroneous, and yet the court declined to amend.

The October 26 order suggests that if the documents pertaining to the new

motion to file under seal had been offered in connection with the original motion for costs, they might have been accepted. (DA 29). Yet the court inconsistently declined to reconsider its rejection of the Remnant documents, which had been offered in connection with that motion for costs. (RA 153).

Because of these internal inconsistencies, the October 26 order cannot stand. *Todd*, 945 F.2d at 208.

D. Newly Discovered Evidence

"Defendants make no argument, and present no evidence, that was not either raised previously or should have been raised previously." (DA 28). Yet, as Defendants plainly pointed out (JA 395–399, 435–437), (a) Plaintiffs' admission in Plaintiffs' appellees' brief didn't exist before March 23, 2009, (b) Defendants didn't previously have the missing *3ABN World* issues because Plaintiffs repeatedly refused to produce them, and (c) Shelton's recordings mischaracterized Dryden's Action Items as a letter, preventing Defendants from understanding that Shelton was referring to the Action Items.

The lower court's finding that evidence created on March 23, 2009 (EX 726), should have been presented before briefing for the motions for costs and to file under seal was completed on December 29, 2008 (JA 22–23) is clearly erroneous, giving further evidence that Defendants' submissions weren't read, and Defendants' arguments and evidence weren't considered. Therefore, the rejection of the third line of proffered evidence, arguably more discretionary under other

circumstances, should not be shown deference.

1. Plaintiffs' March 23, 2009, Admission

Defendants' appellants' brief cited the voluminous record to show that Plaintiffs filed a frivolous suit in bad faith, vexatiously multiplied proceedings, and engaged in abuse of process. (RA 171-3 pp. 8–38, 50–52, 55–58, 64). Plaintiffs' March 23 appellees' brief tacitly admitted that there was nothing in the record to rebut Defendants' many citations. (EX 726). Therefore, the lower court's April 13, 2009, finding that there was nothing in the record that suggests abuse of process or malicious prosecution (DA 24–25) must be clearly erroneous.

2. *3ABN World* Issues

3ABN refused to produce copies of its widely distributed *3ABN World* magazine. (DA 40). When Simpson asserted that issues from 2005 onward were available on 3ABN's website, Pickle specifically requested the three missing 2004 and 2005 issues on June 25, 2008, stating, "Please produce these documents." (EX 222, 369). Simpson would not.

Pickle requested copies from the public on September 23, 2007, scoured the internet, and searched the Minnesota library system, all in vain. (EX 832; JA 443). Not till January 20, 2009, were copies obtained from a university in Michigan.

The September and November 2004 *3ABN World* issues prove that Plaintiffs conspired to destroy, and refused to produce, evidence that *MBP* and *TCTR* are Shelton's marital property, since they existed before Shelton's divorce. (JA 398–

399). Thus, Shelton perjuriously omitted those books and royalties from his July 2006 financial affidavit, a matter put at issue in Plaintiffs' frivolous complaint. (JA 48, 50). Plaintiffs conspired to obstruct discovery of these missing issues, thus increasing Defendants' costs. (EX 287–289; JA 48–50).

3. Shelton's Recordings

Plaintiffs testified that Plaintiffs' donation levels declined after June/July 2006. (JA 81–83). Defendants' widely distributed December 2006 report of Shelton's cover up of Tommy's pedophilia sickened 3ABN supporters. (EX 95–98, 336).

But did Thompson give Dryden's 2003 Action Items to Shelton? When Shelton asserted that the pedophilia allegations were 30 years old, did Shelton know the Action Items asked Tommy to apologize to the CCoG for "deceit and inappropriate behavior" occurring between 1995 and 2000? (EX 208–210).

Shelton's recordings provide the answer: Shelton cites a "letter" by Dryden referring to a bill and the statutes of limitations, points covered in the Action Items. (EX 209–210). Therefore, Plaintiffs knew Defendants' reports of Shelton's cover up were accurate, and Plaintiffs' claims regarding a donation decline in 2006 were retaliatory and malicious.

Evidence has been considered newly discovered even when already in a litigant's possession when timing, sheer volume of documents, and incomprehensibility prevented its being proffered before. *Perez v. Volvo Car Corp.*,

247 F.3d 303, 318–319 (1st Cir. 2001). Defendants received Shelton's recordings after June 2, 2008 (EX 789), and were puzzled as to why Shelton referred to two different letters when Dryden had sent but one. (EX 789). Plaintiffs' blitzkreig in three federal districts the summer of 2008, the mass of unindexed, non-substantive documents Plaintiffs produced that June, preparing motions seeking leave to file subpoenas due to Plaintiffs' obstructionism, and reading through the voluminous record in preparation for Defendants' first appeal, prevented earlier recognition.

E. The New Motion to File Under Seal

The lower court denied Defendants' motion to file under seal because: (a) The materials, if subject to the Confidentiality Order, should have already been returned to Plaintiffs. (b) The documents' relevance was unclear. (c) Defendants had not shown that the information was newly discovered and could not reasonably have been submitted with the original motion. (DA 29).

1. Confidentiality Order

Only non-parties must sign Exhibit A, and thus, only non-parties must return confidential documents (within 30 days after all appeals). (DA 34–35, 37). There was therefore no legal or factual basis for denying Defendants' motion on the grounds that the documents should have already been returned.

2. Documents' Relevance "Unclear"

Three times Defendants clearly explained the documents' relevance, and put Simpson's assertion to the contrary at issue in Defendants' motion for sanctions.

(RA 171 pp. 5–7; JA 448, 452). That the lower court adopted Simpson's assertion as its finding while simultaneously finding that same assertion problematic makes the order internally inconsistent. Thus, the court's findings cannot stand. *Todd*, 945 F.2d at 208.

3. Showing re: Being Newly Discovered or Not Reasonably Submitted Earlier

a. Purchase Orders for Printing

This factor is inapplicable. There is no legal basis for requiring evidence that clarifies newly discovered evidence to also be newly discovered, or for requiring Defendants to make this showing.

Defendants made fairly clear: these otherwise worthless purchase orders for printing, the earliest ones 3ABN produced, merely limit the latest authorship date for articles within the newly discovered *3ABN World* issues. (DA 50–51; JA 399). (*See* SB 3). LR, D.Mass. 26.6(a) prohibited their being filed any earlier.

After Shelton completed his original *TCTR* manuscript, Shelley Quinn rewrote it. (EX 740–741). Shelton divorced on June 25, 2004. (EX 415). According to these purchase orders, the September 2004 *3ABN World* article referencing *TCTR* was written by about July 20. (*See* SB 3). Thus, the *TCTR* manuscript must be Shelton's marital property. (EX 287–288; JA 48, 50).

b. DVD of Plaintiffs' Confidential Discovery

Defendants' detailed, unrebutted analyses of these "confidential" documents,

in affidavits, memoranda, and oral argument asserted abusive confidentiality designations, no indexing, and non-substantiveness. (JA 156–157, 190–191, 519–520, 253; RA 80 p. 3). On September 11, 2008, the lower court adopted these analyses in part by finding that Plaintiffs violated Fed.R.Civ.P. 34(b)(2)(E)(i) by not providing indexes. (JA 205).

Defendants cited these abuses in connection with Defendants' motion for costs. (JA 322, 335, 350). Clearly, these abuses drastically increased Defendants' costs and showed that Plaintiffs filed suit without intending to pursue their claims or participate in discovery. But since these analyses were unrebutted, and partially adopted by the court, why would the documents themselves need to be filed?

But the April 13, 2009, order that set aside the September 11 finding without a finding of clear error, was not the only reason why Defendants proffered the CD/DVD containing Plaintiffs' "confidential" productions. Defendants made clear that they were thereby preparing to assert their legal rights under ¶7 of the Confidentiality Order to challenge Plaintiffs' "confidentiality" designations.

c. Westphal Documents

Caught by surprise by Plaintiffs' motion to dismiss with only seven days till the October 30, 2008, status conference, and hampered by Plaintiffs' confidentiality designations, Defendants requested an evidentiary hearing in order to present the Westphal documents to the court. That request was not considered.

Plaintiffs used confidentiality designations to shield highly relevant

information from the lower court's review, and it should not have assisted Plaintiffs in that effort. *Jepson v. Makita Elec. Works Ltd.*, 30 F.3d 854, 860 (7th Cir. 1994).

F. Plaintiffs' Fraud, Misrepresentation, Misconduct

In the First Circuit, misconduct under Fed.R.Civ.P. 60(b)(3) includes "[f]ailure to disclose or produce materials requested in discovery," whether "accidental," "evil, innocent or careless." Neither a "nefarious intent or purpose," nor a showing that the result would be different, is required. *Anderson v. Cryovac, Inc.*, 862 F.2d 910, 923, 924 n.10 (1st Cir. 1988).

The standard regarding Plaintiffs' fraud is "colorable claim," not "smoking gun." *Pearson v. First NH Mortgage Corp.*, 200 F.3d 30, 35 (1st Cir. 1999).

Plaintiffs repeatedly opposed the Remnant documents being filed by intentionally misrepresenting their contents. (JA 360, 416). Therefore, it must be presumed that this misconduct substantially interfered with Defendants' ability to fairly litigate, and that relief is justified; Plaintiffs never rebutted this presumption as required. *Anderson*, 862 F.2d at 924–926.

Plaintiffs' intentional failure to produce missing *3ABN World* issues, documents pertaining to Linda's alleged adultery, Shelton's royalties, former donors, and monthly donation levels results in a similar rebuttable presumption that relief was justified.

CONCLUSION

For the facts and arguments outlined above, Joy and Pickle hereby 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, do not revoke ¶ 7 of the Confidentiality Order, and do not impose the Confidentiality Order's non-party return requirements upon parties. (c) Permit the filing of exhibits that Plaintiffs designated confidential. (d) Impose sanctions against Plaintiffs' counsel.

Respectfully submitted,

Dated: December 13, 2010

s/ Gailon Arthur Joy, *pro se*
Gailon Arthur Joy, *pro se*
P.O. Box 37
Sterling, MA 01564
Tel: (508) 499-6292

and

s/ Robert Pickle, *pro se*
Robert Pickle, *pro se*
1354 County Highway 21
Halstad, MN 56548
Tel: (218) 456-2568
Fax: (206) 203-3751

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief and the supplemental sealed brief contain a total of 13,982 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: December 13, 2010

s/ Bob Pickle
Bob Pickle

CERTIFICATE OF SERVICE

I, Bob Pickle, hereby certify that on December 13, 2010, I served a copy of the accompanying appendix and appendix exhibits on the following represented parties by way of First Class U.S. Mail, postage paid, and a copy of this brief on the same via the ECF system:

M. Gregory Simpson
Attorney for Danny Lee Shelton, individually,
and Three Angels Broadcasting Network, Inc.
Meagher & Geer
33 South Sixth Street, Suite 4400
Minneapolis, MN 55402

I also hereby certify that I served a copy of this brief and addendum via the , with five paper copies of the accompanying appendix and appendix exhibits, on the Clerk of the Court of Appeals by way of First Class U.S. Mail, postage paid.

Dated: December 13, 2010

/s/ Bob Pickle
Bob Pickle

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

DEFENDANTS' ADDENDUM — PAGES DA 001–DA 066

GAILON ARTHUR JOY, *PRO SE*
P.O. Box 37
Sterling, MA 01564
(508) 499-6292

ROBERT PICKLE, *PRO SE*
1354 County Highway 21
Halstad, MN 56548
(218) 456-2568

DEFENDANTS' ADDENDUM
TABLE OF CONTENTS

Subject: Activity in Case 4:07-cv-40098-FDS Three Angels Broadcasting v Joy, et al., Order on Motion to Dismiss
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District of Massachusetts

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Case Name: Three Angels Broadcasting v Joy, et al.,
Case Number: 4:07-cv-40098
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Docket Text:
Electronic Clerk's Notes for proceedings held before Judge F. Dennis Saylor, IV: Status Conference held on 10/30/2008. Case called, Counsel and dft's pro-se appear for status conference, Court hears arguments of counsel re: motion to dismiss, Court rules granting [120] Motion to Dismiss without prejudice; The Court orders dismissal with conditions stated on the record, Any renewed claims brought by plaintiff shall be brought in this division in the District of MA. as ordered on the record, Court orders all confidential documents returned, All subpoenas are ordered moot, Records in possession of Mag. Judge will be returned, Court orders any motion for costs to be filed by 11/21/08. Order of dismissal to issue, (Court Reporter: M. Kusa-Ryll.)(Attorneys present: Simpson,Pucci/Dft's Joy and Pickle - Pro se) (Castles, Martin)

4:07-cv-40098 Notice has been electronically mailed to:

John P. Pucci pucci@***, christine@***, richards@***

J. Lizette Richards richards@***

Gerald Duffy gerryduffy@***

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting, et al.,
Plaintiffs,

V.

Gailon Arthur Joy and Robert Pickle,
Defendants,

CIVIL ACTION

NO. 07-40098-FDS

ORDER OF DISMISSAL

Saylor, D. J.

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

By the Court,

11/3/08
Date

/s/ Martin Castles
Deputy Clerk

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Three Angels Broadcasting Network, Inc., and Danny Lee Shelton, Plaintiffs,

vs. Case No. 07cv40098-FDS

Gailon Arthur Joy, and Robert Pickle, Defendants.

BEFORE: The Honorable F. Dennis Saylor, IV

Status conference/Motion for Voluntary Dismissal

United States District Court
Courtroom No. 2
595 Main Street
Worcester, Massachusetts
October 30, 2008

Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter
United States District Court
595 Main Street, Room 514A
Worcester, MA 01608-2093
508-929-3399
Mechanical Steno - Transcript by Computer

APPEARANCES:

(via telephone)
Siegel, Brill, Greupner, Duffy & Foster, P.A.
M. Gregory Simpson, Esquire
100 Washington Avenue South, Suite 1300
Minneapolis, Minnesota 55401
for the Plaintiffs, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton

Fierst, Pucci & Kane, LLP
John P. Pucci, Esquire
64 Gothic Street, Suite 4
Northampton, Massachusetts 01060
for the Plaintiffs, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton

(via telephone)
Gailon Arthur Joy
P.O. Box 1425
Sterling, Massachusetts 01564
Pro Se

(via telephone)
Robert Pickle
1354 County Highway 21
Halstad, Minnesota 56548
Pro Se

P R O C E E D I N G S

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

Counsel and defendants, please identify yourself for the record.

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

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

THE COURT: Good afternoon.

MR. JOY: Gailon Arthur Joy, pro se.

THE COURT: Good afternoon.

MR. PICKLE: And Bob Pickle, pro se.

THE COURT: All right. Good afternoon.

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

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

Mr. Pickle and Mr. Joy?

MR. JOY: Yes, sir.

THE COURT: Who -- who's this?

MR. JOY: I'm sorry. This is Mr. Joy, sir.

THE COURT: Yes.

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

THE COURT: When was that filed?

MR. JOY: It was --

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

MR. JOY: I'm sorry.

THE COURT: Yes. Okay.

MR. JOY: In summary, the difficulty here is that this is really just another maneuver on the part of the plaintiffs to very simply avoid their duty of discovery, and they're doing it at a point in the case where, frankly, we should have been close to a completion, which the case law clearly indicates is an inappropriate situation and prejudices the defendants' scenario, particularly reserve the right to relitigate at a future point.

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

THE COURT: All right. Anything else?

MR. SIMPSON: This is Mr. Simpson --

THE COURT: Well, before I --

MR. SIMPSON: Sure.

THE COURT: Anything else from the defendants?

MR. JOY: Yes.

THE COURT: Okay.

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

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

MR. SIMPSON: Well, let me just begin by saying that the -- that I think that is the issue whether it should be with or without prejudice. If this is -- to my reading of the case law, it's a factor of the test, so it's within the discretion of the court to determine whether it should be with or without prejudice.

The case looks a lot older than it really is, because it was filed in May of '07, and you had us submit interrogatories and some documents exchanged and mandatory

discovery exchange; and then Mr. Joy filed for bankruptcy, and there was a stay in effect until almost December; and then there was a four-month period where we were working on getting that confidentiality order out. When that was finally signed, and, in fact, it was already April, and then there has been a period of document discovery since then, and depositions were scheduled, and they were canceled, because there was -- because the document exchange had not been completed.

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

So, if the lawsuit is resolved with prejudice, that could give them one of the elements necessary to continue this -- this dispute, and the dispute would not end.

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

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

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

the, if not all, of the original statements that they've made.

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

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

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

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

MR. SIMPSON: Well, I -- I can assure you that that's not the concern. The only concern is that these gentlemen have indicated throughout and in the most recent filing that they intend to sue us for malicious prosecution, and they said that they were going to file counterclaims in this lawsuit, and they said then they were going to -- now, they said they're going to commence a separate lawsuit, but if we don't have at least a prospect of raising affirmative claims against them, I think

that would keep them in check. Maybe it would keep them in check. They would have to think twice about filing a lawsuit. I can tell you that there is no forum shopping going on, and I think Rule 41 also has some -- something to say about that.

The costs -- if we bring a second lawsuit after dismissing the first one, costs would ordinarily be imposed. We would have to reimburse them for all of that that occurred in the first lawsuit. So, there's -- so, there's mechanisms for dealing with that, and I think we would have quite a bit of explaining to do to a subsequent court if we were -- if we were to pull -- pull a fast one, and I can just tell you that that's not -- that's not the intent.

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

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

THE COURT: Yes.

MR. PICKLE: In our memorandum, we've outlined eight different factors, I believe, that are supposed to be taken into consideration regarding legal prejudice or that different circuits have taken into consideration. One of those is adequacy of the plaintiffs' explanation for the need to dismiss; and one of the explanations they gave is that they've achieved one of the goals of their -- their suit. That is just one -- one aspect that we bring out in the memorandum. And they say that through the bankruptcy, they bought the domain

names, save3abn.com and save3abn.org. What they don't tell the Court is that there are at least 16 times as many save3abn websites now than when the plaintiffs filed suit, and these other websites were in operation prior to their purchase of save3abn.com.

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

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

THE COURT: Yes.

MR. SIMPSON: -- I wouldn't oppose the court imposing a restriction that if we were to bring an affirmative claim arising out of the same events that it would have to be brought in the same court. That would be -- that would seem perfectly fine and appropriate as a remedy as a -- to make sure we don't do that. I think that if -- if the plaintiffs -- I mean the defendants here, Mr. Pickle and Mr. Joy, were to bring a separate lawsuit for malicious prosecution, it probably would have to be brought in state court, because they wouldn't meet -- well, I'm just thinking they wouldn't have diversity or

jurisdiction. Maybe they would be able to get jurisdiction in the federal court. So, it's not -- it's not -- if we were -- if the plaintiffs were to want to raise their defamation claims by way of a counterclaim, as a defensive matter, we couldn't guarantee that it would be in the same court. It would be in your court, but I think if we -- I think the court could impose a restriction on dismissal that if we were to refile the same claims or any claims arising out of the same operative set of facts, it would have to be brought in the same court. I think that would be appropriate.

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

The motion for voluntary dismissal is granted. I order that this lawsuit be dismissed without prejudice. I make no finding of any kind as to the merits or lack of merits of any of the claims or factual defenses set forth in the pleadings, and I'm dismissing the claim principally based on the representation by the plaintiff that there is no longer any purpose for the litigation, because plaintiffs do not believe that they can accomplish -- or achieve any meaningful relief

based on the facts and circumstances as they now exist, including, but not limited to, the bankruptcy of one of the defendants.

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

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

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

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

MR. PICKLE: Your Honor, could I -- could I --

THE COURT: Let me -- let me just finish. And any records that were delivered under seal and that are in the custody of the magistrate judge shall be returned to the party that produced those documents.

Yes, sir. Is this Mr. Pickle?

MR. PICKLE: Yes, it is.

THE COURT: Yes.

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

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

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

MR. PUCCI: Right.

THE COURT: In this case.

MR. PICKLE: That is correct, your Honor.

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

MR. PICKLE: It is --

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

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

THE COURT: Well, it's -- it is transferable, unless it's subject to the confidentiality order. If it's subject to the confidentiality order, you have to return it, or do whatever the order says you're supposed to do with it; and, you know, you have gained presumably a certain amount of information. You're not required to erase it from your brain, and you can use it consistent with the terms of the order

as -- as may be permitted by that order, but that's --

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

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

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

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

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

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

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

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

MR. JOY: Thank you.

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

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

MR. SIMPSON: Thank you, your Honor.

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

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

MR. SIMPSON: Nothing further from the plaintiffs.

THE COURT: Okay.

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

THE COURT: Not unless someone -- if they're sealed, they're not going to be unsealed, unless someone moves to unseal them.

MR. JOY: Thank you, your Honor.

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

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

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

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

THE COURT: Very -- very briefly, yes.

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

I read the rule to Mr. Pickle, Rule 41, including the terms and conditions, and we discussed whether there was any possible -- possible basis on which they would agree to the dismissal of the lawsuit. He said that he would speak with Mr.

Joy over the weekend, get back to me on Monday, if there was an interest; and he didn't get back to me and continued to move forward with the lawsuit.

THE COURT: All right. All right.

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

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

Thank you.

MR. SIMPSON: Thank you, Judge.

MR. JOY: Thank you.

MR. SIMPSON: Bye-bye.

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

C E R T I F I C A T E

I, Marianne Kusa-Ryll, RDR, CRR, Official Court Reporter, do hereby certify that the foregoing transcript, consisting of 18 pages, is a true and accurate transcription of my stenographic notes in Case No. 07cv40098-FDS, Three Angels Broadcasting Network, Inc., and Danny Lee Shelton versus Gailon Arthur Joy and Robert Pickle, before F. Dennis Saylor, IV, on October 30, 2008, to the best of my skill, knowledge, and ability.

/s/ Marianne Kusa-Ryll
Marianne Kusa-Ryll, RDR, CRR
Official Court Reporter

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING NETWORK, INC.,	)	
Plaintiff,	)	**Civil Action No. 07-40098-FDS**
v.	)	
GAILON ARTHUR JOY and ROBERT PICKLE,	)	
Defendants.	)	

ORDER ON DEFENDANT'S BILL OF COSTS

SAYLOR, J.

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

On November 13, 2008, defendants, proceeding *pro se*, filed a motion for costs. They seek to recover from plaintiff some or all of the costs incurred during this lawsuit in order to alleviate substantial prejudice resulting from the voluntary dismissal. Defendants seek reimbursement for the following costs: (1) mileage attributable to two fact-finding trips by defendant Pickle, in the amount of $993.62; (2) various miscellaneous expenditures by defendant Pickle over the course of the lawsuit, in the amount of $4,614.09; (3) costs for copies made on defendant Pickle's equipment for filing, in the amount of $206.70; (4) cost of time invested in research and motion preparation by defendant Pickle, in the amount of $30,114.75; (5) invoices from an expert retained by the defendants, in the amount of $20,342.32; and (6) invoices from an

attorney in the amount of $54,266.94.

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

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

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

> (1) Fees of the clerk and marshal;
>
> (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case;
>
> (3) Fees and disbursements for printing and witnesses;
>
> (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; [and]
>
> (5) Docket fees . . . .

28 U.S.C. § 1920.

Four items on defendants' list of requested costs are neither attorneys' fees nor costs

delineated in § 1920: (1) mileage attributable to two fact-finding trips by defendant Pickle; (2) various miscellaneous expenditures by defendant Pickle over the course of this lawsuit; (3) cost of time invested in research and motion preparation by defendant Pickle; or (4) invoices from an expert retained by the defendants.[1] Accordingly, the defendants are not entitled to recover those costs. What remains are (1) costs for copies made on defendant Pickle's equipment for filings and (2) attorney's fees.

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

The decision whether to impose attorneys' fees also lies within the discretion of the judge. *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973); *Less v. Berkshire Hous. Servs.*, 2000 U.S. Dist. LEXIS 13700, at *15 (D. Mass. Aug. 18, 2000). Attorneys' fees are awarded less frequently than other litigation costs. Courts have declined to award attorney fees unless there is evidence that the suit was brought "to harass, embarrass, or abuse either the named defendants or the civil process," or that a plaintiff "deliberately sought to increase the defendants' costs by unduly protracting the litigation." *See Less* at *16, *citing Blackburn*, 60 F.R.D. at 198. There is nothing in the record to suggest that the plaintiffs filed this suit simply to

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

harass, embarrass, or abuse the defendants or that they sought to increase their costs, and the Court sees no other reason to award attorneys' fees under the circumstances.

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

So Ordered.

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

Dated: April 13, 2009

Subject: Activity in Case 4:07-cv-40098-FDS Three Angels Broadcasting v Joy, et al., Order on Motion for Leave to File
From: ECFnotice@mad.uscourts.gov
Date: Wed, 15 Apr 2009 11:34:47 -0400
To: CourtCopy@mad.uscourts.gov

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United States District Court

District of Massachusetts

Notice of Electronic Filing

The following transaction was entered on 4/15/2009 at 11:34 AM EDT and filed on 4/15/2009
Case Name: Three Angels Broadcasting v Joy, et al.,
Case Number: 4:07-cv-40098
Filer:
WARNING: CASE CLOSED on 11/03/2008
Document Number: No document attached

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

4:07-cv-40098 Notice has been electronically mailed to:

John P. Pucci pucci@fierstpucci.com, richards@fierstpucci.com, sp@fierstpucci.com

J. Lizette Richards richards@fierstpucci.com

Gerald Duffy gerryduffy@sbgdf.com

William Christopher Penwell chrispenwell@sbgdf.com

Jerrie M. Hayes jerriehayes@sbgdf.com

Kristin L. Kingsbury kristinkingsbury@sbgdf.com

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

THREE ANGELS BROADCASTING NETWORK, INC., and DANNY LEE SHELTON, **Plaintiffs,** **v.** **GAILON ARTHUR JOY and ROBERT PICKLE,** **Defendants.**	**Civil Action No. 07-40098-FDS**

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

SAYLOR, J.

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

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

On April 27, 2009, defendants filed a Motion to Reconsider and to Amend Findings. That motion sought reconsideration of the Court's Orders of April 13 and 15, 2009, and sought amendment or alteration of the judgment under Fed. R. Civ. P. 59(e) and relief from judgment

under Fed. R. Civ. P. 60(b).[1] The same day, defendants filed a further Motion for Leave to File Under Seal seeking to seal certain documents filed in support of the Motion to Reconsider. Plaintiffs opposed both motions in pleadings filed on May 11, 2009. Defendants then filed, on June 24, 2009, a Motion for Sanctions under Fed. R. Civ. P. 11(c)(2), and the Court's inherent powers, alleging various misstatements in plaintiffs' opposition filings.

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

A. <u>Motion for Reconsideration and to Amend or Alter the Judgment</u>

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

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

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

B. <u>Motion for Leave to File Under Seal</u>

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

C. <u>Motion for Sanctions</u>

Defendants also seek sanctions against plaintiffs under Fed. R. Civ. P. 11 and pursuant to the Court's inherent powers to redress litigation abuses. In substance, defendants contend that plaintiffs' memoranda opposing the foregoing motions were "riddled with misstatements of fact that have no evidentiary support" and, in some instances, are "demonstrably intentional." The Court has carefully reviewed defendants' submissions. It appears to the Court that all of the disputed assertions fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions. Defendants' motion for sanctions (Docket #183) is therefore DENIED.

So Ordered.

<u>/s/ F. Dennis Saylor</u>
F. Dennis Saylor IV
United States District Judge

Dated: October 26, 2009

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

v.

GAILON ARTHUR JOY
ROBERT PICKLE,
Defendants

CIVIL ACTION NO. 07-40098-FDS

CONFIDENTIALITY AND PROTECTIVE ORDER

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

This Order governs all documents and information produced, or to be produced by any party or third party in connection with this litigation, including documents and things produced or to be produced, any answers to interrogatories, responses to requests for admissions, and deposition and other testimony disclosed through discovery in this case (the "Subject Discovery Materials"). The Subject Discovery Materials will be used for no other purpose than this

litigation. "Confidential Information" as used herein means any type or classification of information in any of the Subject Discovery Materials which is designated as **"CONFIDENTIAL"** by one of the parties, or a third party (the "designating party"), in accordance with this Order.

Confidential Designation

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

Any party wishing to designate a document as Confidential Information shall first discuss with the requesting party whether the production of the requested information in redacted form would be satisfactory, or if some other accommodation regarding the document(s) can be reached. If after consultation, the parties are unable to come to agreement regarding the production in redacted, or other form, they shall confer per Local Rule 37.1. Thereafter, the requesting party may move to compel the production of the document(s) at issue and the

responding party shall file the documents at issue with the court under seal per the provisions of Local Rule 7.2. as part of their opposition to the motion to compel.

Depositions

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

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

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

b. During any time that the line of questioning involving Confidential Information is being followed, any and all representatives of the receiving party other than counsel, parties, and outside experts subject to the terms of this Agreement as evidenced by the signing of a document in the form of **Exhibit A** attached hereto and served on opposing

counsel prior to disclosure of such Confidential Information may be excluded from the deposition.

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

Use of Confidential Information

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

Use of Information Designated "Confidential"

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

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

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

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

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

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

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

i. the Confidential Information to be disclosed; and

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

The producing party or their outside trial counsel has ten (10) days after receipt of the written notice within which to object in writing to the disclosure and, in the event objection is made, no disclosure will be made without Court Order. If no objection is made or if an Order of Court permits the disclosure, counsel for the receiving party must, prior to the disclosure, inform the individual to whom the Confidential Information is to be disclosed as to the terms of this

Agreement, and have the individual acknowledge this in writing by signing a document in the form of **Exhibit A** attached hereto, the executed document to be served on the producing party within ten (10) days of the signing, acknowledging that he/she is fully conversant with the terms of this Agreement and agrees to comply with it and be bound by it.

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

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

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

/s/Timothy S. Hillman
TIMOTHY S. HILLMAN
MAGISTRATE JUDGE

April 17, 2008

EXHIBIT A

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

*, Plaintiff v. *, Defendant	CIVIL ACTION NO.

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

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

I hereby confirm that:

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

b. I will use any Confidential Information imparted to me solely for the purpose of the above litigation, and I will make no commercial use or any other litigation or non-litigation use of any part of such Confidential Information and shall not assist or permit any other person to do so.

c. Upon the earlier of: (i) demand of counsel of record for the party who supplied the Confidential Information to me or (ii) within 30 days after the final termination of instant litigation, including appeal, I will return all Confidential Information and all copies thereof, including all notes, abstracts, summaries and memoranda relating thereto which contain any of the substance thereof, to the person or party from whom I received the Confidential Information.

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

Dated: _____

_____
Signature

Address:

[Excerpt for Addendum: "Shelton, individually," on Plaintiffs' civil cover sheet.]

JS 44 (Rev. 11/04)

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS	DEFENDANTS
Three Angels Broadcasting Network, Inc. an Illinois non-profit corp. & Danny Lee Shelton, individually	Gailon Arthur Joy and Robert Pickle
(b) County of Residence of First Listed Plaintiff Franklin, IL	County of Residence of First Listed Defendant Worcester, MA

* * * * *

[Excerpts for Addendum: from Joy's memorandum accompanying his proposed order on form of electronic discovery.]

* * * * *

transfer from hard disk to CD or DVD. Defendants have completed self discovery by providing a complete transfer of all hard copy documents, electronic documents and e-mails to the plaintiffs. Plaintiffs have not provided any electronic autodiscovery to defendants pursuant to 26(a).

* * * * *

[Excerpts for Addendum: from Pickle's requests to produce served on 3ABN.]

* * * * *

DEFINITIONS

As used herein, the following words and phrases shall have the following definitions, whether or not a request specifically says, "as defined in Definitions":

* * * * *

* * * * *

7. ***Or*** and ***and*** are used in the inclusive sense (i.e. "and/or"). Thus, if a request seeks all documents relating to "A, B, or C" or "A, B, and C," You are to produce all documents relating to A, B, and C individually, as well as in any combination thereof.

* * * * *

16. ***Plaintiff-related Issues*** means any or all of the following issues, topics, questions, or decisions that are applicable to the particular request making use of this term, whether or not a specific issue, topic, or question is also referred to in that request.

* * * * *

* * * * *

u. All payments, whether direct or indirect, whether bartered or not, related to purchases of or royalties for any products, including but not limited to books, pamphlets, CD's, and videos, made to or from Plaintiff Shelton, DLS Publishing, or D & L Publishing, and all payments, whether direct or indirect, related to purchases of or royalties for any materials authored or otherwise created, in whole or in part, by any 3ABN director, officer, employee, key employee, or independent contractor, or any relative thereof, made to or from Pacific Press, Remnant Publications, or any other publisher, press, manufacturer, individual, or entity, when a benefit, monetary or otherwise and not reported as salary on a W-2 or 1099 issued by 3ABN, is received by that individual, and the identification, history, or location of all assets or inventory of D & L Publishing, DLS Publishing, or any other entity controlled by Plaintiff Shelton other than 3ABN.

* * * * *

[Excerpts for Addendum: Selections from 3ABN's responses to Pickle's requests to produce. The first one applies to Definition 16(u):]

* * * * *

GENERAL OBJECTION NO. 8.

Plaintiff objects to the "Definitions" set forth in the Document Requests as vague, overly broad, and assuming facts not in evidence. Specifically, definitions 4, 5, 10, 11, 12, 13, 14, and 16 are objected to on these grounds and answering any requests containing or incorporating these defined terms would impose an undue or impossible burden on Plaintiff to frame responsive answers.

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REQUEST NO. 8: All issues of *3ABN World* (or its predecessor newsletter) and *Catch the Vision* from all years of 3ABN's existence, and issues of other periodical-type publications or catalogs from January 1, 1998, to the present, in machine readable format (PDF preferred) when extant, or in readable printed or scanned format otherwise.

RESPONSE: Plaintiff objects to this request as overly broad, unduly burdensome, and vague. Plaintiff also objects to this Request on the grounds that it seeks information that is neither temporarily nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Notwithstanding and without waiving these objections, any relevant documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendants Pickle's inspection at a date and time to be mutually agreed upon by the parties.

REQUEST NO. 9: For 3ABN as defined under Definitions, from 1998 onward, and for all years such statements were filed with any government entity or official, all financial statements, audited or not, with attached notes, supplementary information, and auditor's report, as applicable, all engagement, management, and management representation letters pertaining to auditor(s), all unredacted Form 990's (or other applicable tax returns, including but not limited to those for Three Angels Enterprises, LLC, and Crossbridge Music, Inc.), with all supporting schedules, statements, or forms, all documents and records which break down the figures for contributions on these documents into annual or monthly (a) amounts received in exchange for the sale of books, cassettes, videos, CD's, clothing, or other items, (b) amounts arising from charitable gift annuities or revocable trusts, (c) amounts arising from tithe Plaintiff Shelton or any other person (with sufficient detail to identify the amount of tithe coming from Plaintiff Shelton), and (d) amounts arising from contributions of other sorts, all documents that provide a basis for breaking down 3ABN income and expenses by related organization, including without limitation the 3ABN Sound Center, 3ABN Music, 3ABN Books, and 3ABN organizations in foreign countries, and all documents containing all detail associated with revenue and expenses on the Form 990's, financial statements, or related documents, that are categorized as "Auto," "Bad debt," "Inventory write-down," "Contract labor," "Contributions receivable," "Cost of goods sold" or "given away" or any variation thereof, "Credit card fees," "Interest" expense, "Love gifts," "Miscellaneous," "Music production," "noncash" contributions, "Other changes in net assets" (line 20 of Form 990), "Other" expenses, "Other revenue," "School subsidy," or "Special projects," whether or not the categories containing expenses of these types are labeled exactly this way.

RESPONSE: Plaintiff objects to this request as overly broad, unduly burdensome, assuming facts not in evidence, vague, and argumentative. Plaintiff also objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant,

admissible evidence related to the instant dispute. Plaintiff also objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Notwithstanding and without waiving these objections, any relevant documents responsive to this request will be made available, subject to a confidentiality agreement or a protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

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REQUEST NO. 11: From January 1, 1999 onward, all records or other documents pertaining to contributions to 3ABN from any 3ABN director, officer, or member, whether personally or via DBA's, corporations, trusts, wills annuities, foundations, tax exempt organizations, or any other means, including without limitation records or other documents giving such detail as the amount of each contribution, to whom it was given, and the purpose of the contribution.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is not relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Plaintiff further objects to this Request on the grounds that it seeks information protected from disclosure by the attorney-client privilege, the accountant-client privilege or the accompanying work-product doctrine. Plaintiff further objects to this Request on the grounds that it is overly broad, unduly burdensome, and vague. Plaintiff further objects to this Request on the grounds that it seeks documents not in Plaintiff's possession, custody or control. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

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REQUEST NO. 15: All email, correspondence, recordations, records or recordings of telephone conversations, or other documents that support or do not support the claim that how Seventh-day Adventist church leaders view 3ABN has been negatively impacted by the Defendants or Save3ABN.com, or the claim that church leaders have refused to hear the side of the Plaintiffs, including without limitation documents giving such detail as the name, address, and telephone number of each such church leader, and the date of any such contact.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information protected from disclosure by the attorney-client privilege or the accompanying work-product

doctrine. Plaintiff further objects to this Request on the grounds that it is overly broad and unduly burdensome. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Plaintiff further objects to this Request on the grounds that, having assumed facts not in evidence, it is vague. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

REQUEST NO. 16: From January 1, 2000, onward, all email, correspondence, recordations, records or recordings of telephone conversations, or other documents pertaining to donors who have reduced or stopped giving, including without limitation documents giving such detail as the names, addresses, and telephone numbers of all such donors, the sums they stopped giving, the reason(s) they stopped giving, and the documented sums given each year for the previous seven years along with the intended purpose each gift was for.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information protected from disclosure by the attorney-client privilege or the accompanying work-product doctrine. Plaintiff further objects to this Request on the grounds that it is overly broad and unduly burdensome. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

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REQUEST NO. 22: All invoices or other documents concerning purchases of books or other items sold, manufactured, authored, produced, patented, inventoried, or copyrighted by any officer, director, employee, key employee, or independent contractor of 3ABN, or relative thereof, or relative of Plaintiff Shelton, whether purchased from that/those individual(s), D & L Publishing, DLS Publishing, Remnant Publications, Pacific Press, Media Opportunities IPTV, or any other individual or entity, and all editions and translations of *Ten Commandments Twice Removed*, including but not limited to that of the first printing.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that it seeks information protected from disclosure by the attorney-client privilege, accountant-client privilege, or the accompanying

work-product doctrine(s). Plaintiff further objects to this Request on the grounds that it is overly broad, unduly burdensome, and vague. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

REQUEST NO. 23: All records or other documents pertaining to 3ABN eBay.com sales, and to sales to any 3ABN director, officer, independent contractor, employee, or key employee, or any relative thereof, of any donated or purchased items or assets, identifying the donors of (if a donated item or asset) and recipients or buyers of such items or assets, or containing a description of reasonable particularity of such items or assets, or the appraised or recorded value or original price paid or final sales price (whichever of these are applicable to a particular case) of such items or assets, items or assets including but not limited to the piano that sold in 1998 for $2,000, and any antiques purchased by Shelley Quinn, and all documents pertaining to the calculation of the final sales price for the house sold to Plaintiff Shelton in 1998 as well as proof of payment for that house.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that it seeks information protected from disclosure by the attorney-client privilege, accountant-client privilege, or the accompanying work-product doctrine(s). Plaintiff further objects to this Request on the grounds that it is overly broad, unduly burdensome, and vague. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

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REQUEST NO. 34: All photographs (digital or film), slides, videotapes, films, moving pictures, DVD's, CD's, CD-ROM., MP3's, cassettes, or other types of audio or video representations in Your possession pertaining to the 3ABN Story, to the instant dispute, to Plaintiff-related Issues, to the Defendants, to Save3ABN.com, to any internet forum or other website containing concerns or criticism about one or both Plaintiffs, or to allegations made against Linda Shelton since January 1, 2004, whether prior or after her dismissal, including but not limited to any photographs of a watch or watches, certain camp meeting broadcasts of May 2004, 3ABN Today LIVE broadcasts of August 10 and December 31, 2006, and February 15, 2007 (to ensure that

Defendants' copies and Plaintiffs' copies are identical), any and all recordings of phone conversations of Linda Shelton or Arild Abrahamsen, any and all audio- or video-recorded evidence against Linda Shelton, including but not limited to the audio recording referred to by Hal Steenson, Plaintiff Shelton, and Harold Lance, and the video recording referred to by Kenneth Denslow on October 23, 2006, all documents referring to such audio and video recordings or the individuals who saw or heard them, all broadcasts in which Linda Shelton referred to a newfound friend or sent anyone secret messages, all broadcasts in which any allegations pertaining to

Plaintiff-related Issues were referred to explicitly or through innuendo, and any broadcasts or recordings that will be used for the Plaintiffs case.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Plaintiff further objects to this Request on the grounds that it is overly broad, unduly burdensome and vague. Due to the vagueness, overbreadth, and factually assumptive content of the request, Plaintiff is unable to formulate a reasonable response.

REQUEST NO. 35: Unredacted copies of all emails or other documents attached to the Affidavit of Mollie Steenson of May 9, 2007, all documents of any type that support the allegations of that Affidavit or of other court filings in the instant dispute, including but not limited to documents supporting the allegations that disparaging commentary first erupted on the internet in June 2006 as alleged by that Affidavit's ¶ 4 (or around July 2006 as alleged by ¶ 3 of the Affidavit of Larry Ewing of May 9,2007), that donations began to decline in June 2006 as alleged in that Affidavit's ¶ 4 (or in July 2006 as alleged by ¶ 8 of the Affidavit of Larry Ewing), that donors have stopped donating to 3ABN specifically because of rumors pasted on Save3ABN.com, as alleged in that Affidavit's ¶ 5, that Save3ABN.com was the source of any information in the letter published by *Adventist Today*, referred to in that Affidavit's ¶¶ 6-8, other than the child molestation and sexual misconduct allegations against Tommy Shelton, that the individual referred to in that Affidavit's ¶ 8 was indeed a supporter of 3ABN, that demonstrates Save3ABN.com's role in persuading the South Pacific Division of Seventh-day Adventists to enact the moratorium referred to in that Affidavit's ¶ 9, that either Defendant had any knowledge of or involvement in the distribution of the postcards referred to in that Affidavit's ¶ 10, that 3ABN supporters have been confused as to the affiliation of Save3ABN.com as alleged in that Affidavit's ¶ 11, and that Save3ABN.com contains documents that have been edited and commented upon in ways that lead the reader to inaccurate and defamatory conclusions, or that lead the reader to conclude that the original author maintained something by those documents that he or she in effect did not, claims made in ¶ 12 of that Affidavit, and all other emails that support or do not support the positions taken in any 3ABN or Plaintiff Shelton's court filings, whatever has not already been produced in response to Requests Nos. 1 through 34.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information

protected from disclosure by the attorney-client privilege or the accompanying work-product doctrine. Plaintiff further objects to this Request on the grounds that it seeks proprietary trade secret or highly confidential business information. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

* * * * *

[Excerpts for Addendum: Pickle's requests to produce served on Shelton were the same as those served on 3ABN (to be responded to if Shelton had documents that 3ABN didn't have or didn't produce), but with 8 added requests at the end. From Shelton's responses:]

Case 4:07-cv-40098-FDS Document 63-25 Filed 05/15/2008 Page 19 of 22

* * * * *

REQUEST NO. 39: All proofs of payment for the house You purchased from 3ABN in 1998, all proofs of receipt or payment of the loans or mortgages You acquired from Merlin Fjarli or the Fjarli Foundation, and that You gave to Jim Gilley, and all proofs of payment to 3ABN for any services or merchandise 3ABN has, whether directly or indirectly, paid on Your behalf or given to You.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that it seeks highly confidential, personal financial information. Plaintiff further objects to this Request on the grounds that it is unduly burdensome, harassing and embarrassing. Notwithstanding and without waiving these objections, any relevant non-privileged documents responsive to this Request will be made available, subject to a confidentiality agreement or protective order of the court, for Defendant Pickle's inspection at a date and time to be mutually agreed upon by the parties.

* * * * *

Case 4:07-cv-40098-FDS Document 63-25 Filed 05/15/2008 Page 20 of 22

* * * * *

REQUEST NO 40: All documents containing or pertaining to evidence of Linda Shelton's adultery, whether "spiritual" or physical, including without limitation audio or video recordings, phone records of any sort (whether printed or handwritten or otherwise), correspondence, letters, and email.

RESPONSE: Plaintiff objects to this Request on the grounds that it seeks information that is neither temporally nor substantively relevant to the instant dispute and is not reasonably calculated to lead to the discovery of relevant, admissible evidence related to the instant dispute. Plaintiff further objects to this Request on the grounds that the information requested is protected from disclosure by the marital privilege, the attorney-client privilege or the accompanying work-

product doctrine, Plaintiff further objects to this Request on the grounds that it is unduly burdensome, harassing and embarrassing. Notwithstanding and without waiving these objections, Plaintiff has no relevant, non-privileged documents responsive to this request.

* * * * *

[Excerpts for Addendum: from 3ABN's 1998 Form 990: §4958 excess benefit transaction, Shelton's compensation, acknowledging house sold at loss.]

* * * * *

89a *501(c)(3) organizations.*—Enter: Amount of tax imposed on the organization during the year under section 4911 ▶ _____ ; section 4912 ▶ _____ ; section 4955 ▶ _____

b *501(c)(3) and 501(c)(4) organizations.*—Did the organization engage in any section 4958 excess benefit transaction during the year? If "Yes," attach a statement explaining each transaction . . . . . 89b X

* * * * *

Please Sign Here

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than officer) is based on all information of which preparer has any knowledge.

Signature of officer — Date — Danny Shelton, President — Type or print name and title.

* * * * *

Item	Book Value	Gross Sale	Gain (loss)
Downlink	47,619.57	$250,000.00	$202,380.43
House	52,781.05	6,129.00	(46,652.05)
Piano	0.00	2,000.00	2,000.00

* * * * *

* * * * *

Danny Shelton	President	49,862.66

* * * * *

Linda Shelton	Vice-President	44,334.10

* * * * *

[Excerpts for Addendum: Note 14 (Related Party Transactions) showing 3ABN purchases of Shelton's books from 3ABN's financial statements for 2001 to 2006.]

* * * * *

The Organization purchases a portion of their inventory from an entity that is owned by two Board members. Purchases from this entity totaled $75,000.00 for the year ending December 31, 2001.

* * * * *

* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2002:

	Purchases From	Contributions From	Contributions To
D & L Publishing	$130,612.50	$ -	$ -

* * * * *

* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2003:

	Purchases From	Contributions From	Contributions To
D & L Publishing	$ 73,112.50	$ -	$ -

* * * * *

* * * * *

parties. Following is a summary of related party transactions for the year ending December 31, 2004:

	Due From	Sales To	Due To	Purchases From	Contributions To	Contributions From
Employee accounts	$ 11,135.56	$ -	$ -	$ -	$ -	$ -
DLS Publishing, Inc.	-	-	9,724.38	44,724.38	-	-
D & L Publishing	-	-	-	35,000.00	-	-

* * * * *

* * * * *

The Organization periodically purchases books which are authored by a member of management. The books are purchased from the publisher for giveaway or for a suggested donation. For the year ending December 31, 2005, purchases of these books totaled $82,712.43. Royalties are paid by the publisher to the author.

* * * * *

* * * * *

The Organization periodically purchases books which are authored by a member of management. The books are purchased from the publisher for giveaway or for a suggested donation. For the year ending December 31, 2006, purchases of these books totaled $2,982,793.71. Royalties are paid by the publisher to the author.

* * * * *

[Excerpts for Addendum: Part of detail from 3ABN's financial statements for 2003 and 2004, showing change of accounting for sales of Shelton's books.]

* * * * *

	Unrestricted	Temporarily Restricted	Total
Revenues and Other Support			
Contributions	$ 7,432,304.34	$ 1,846,535.01	$ 9,278,839.35
Charitable gift annuities (Note 11)	1,623,816.34	-	1,623,816.34
Airtime and production fees	882,653.67	-	882,653.67
Sales of satellite equipment	991,604.39	-	991,604.39
Other sales	399,341.21	-	399,341.21
Rental income	20,762.56	-	20,762.56

* * * * *

* * * * *

Cost of goods sold and given away - Satellite equipment	887,536.04
Cost of goods sold and given away - Other	154,165.62

* * * * *

	Unrestricted	Temporarily Restricted	Total
Revenues and Other Support			
Contributions	$ 9,455,115.40	$ 2,633,222.89	$12,088,338.29
Charitable gift annuities (Note 11)	1,493,559.53	-	1,493,559.53
Airtime and production fees	1,106,556.00	-	1,106,556.00
Sales of satellite equipment	713,725.32	-	713,725.32
Rental income	33,173.44	-	33,173.44

* * * * *

* * * * *

Cost of goods sold and given away - Satellite equipment	584,019.94
Cost of goods given away - Other	330,242.46

* * * * *

[Excerpt for Addendum: Remnant's total royalty payments from Remnant's Form 990's for 2000 through 2006**]**

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[2000 Form 990:] ROYALTY 6,542.

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[2001 Form 990:] ROYALTY 17,652.

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[2002 Form 990:] d Royalty | 43d | 12,438

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[2003 Form 990:] e Royalty | 43e | 16,226

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[2004 Form 990:] d Royalty | 43d | 26,178

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* * * * *

[2005 Form 990:] d Royalty expense | 43d | 116,556

* * * * *

* * * * *

[2006 Form 990:**]** d Royalty expense | 43d | 508.767|

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[Excerpt for Addendum: from Plaintiffs' opposition to Defendants' motion seeking leave to serve subpoenas upon a port director and upon Delta Airlines.**]**

* * * * *

None of this information is relevant to Plaintiffs' claims. It is therefore also irrelevant to Defendants' defenses. The alleged trip to Florida was never considered by Plaintiffs to constitute a factual basis supporting any claims set forth in Plaintiffs' complaint. In the end, Plaintiffs do not care whether Linda actually went to Florida or not. Defendants will prove nothing with the information they seek – whether Linda Shelton traveled to Dr. Abrahamsen's condo or not, and whether Dr. Abrahamsen was present at that time or not.

* * * * *

[Excerpt for Addendum: from Pickle's affidavit for reply for Defendants' motion to file under seal.**]**

* * * * *

18. I will seek leave from the Court to file under seal **Exhibits Q–R.** These two documents are purchase orders for printing from Smith & Butterfield which Plaintiffs designated

confidential. They will speak to the issue of how long before the publication date of an issue of *3ABN World* might that issue come back from the printer. Interestingly, while Plaintiffs did produce a lot of invoices and purchase orders for the printing of *3ABN World*, they did not produce any for the printing of the 2004 issues, as if those issues never existed.

* * * * *

* * * * *

20. Attached hereto as **Exhibit T** are relevant pages from *AA* in which Quinn states she rewrote Shelton's completed manuscript after making a visit to 3ABN.

21. As a publisher, I do not see any way that Shelton could have started and completed his manuscript, and Quinn could have rewritten it between Shelton's June 25, 2004, Guam divorce and when the September 2004 issue of *3ABN World* went to press.

* * * * *

25. I will seek leave of the court to file under seal **Exhibits X–Y,** which speak to the question of whether Plaintiffs believed the allegations against Leonard Westphal to be true.

* * * * *

* * * * *

31. I will seek leave to file under seal as **Exhibit BB** a CD or DVD containing documents produced by Plaintiffs which Plaintiffs designated confidential. On that DVD will be four folders labeled in part **Folders 1–4.** Folder 1 will contain the 207 pages of Rule 26(a)(1) materials which I scanned into PDF's. Folders 2 and 3 will contain the PDF's produced by Plaintiffs on June 20 and 27, 2008, allegedly responsive to my requests to produce. Folder 4 will contain some additional minutes missing from an earlier production.

32. Plaintiffs' discovery in Folder 10 on Exhibit H, and in Folders 1–3 on Exhibit BB was provided without any index whatsoever. The original names for all the files were simply Bates numbers. I spent considerable time adding to these filenames some descriptive text that would give some sort of idea what was in each file. In some cases I split larger files into separate documents. Some documents are illegible, a lot are duplicative, and anything substantive seems to have been produced by accident. Redactions were done by Plaintiffs without first obtaining our consent, and thus were not done pursuant to ¶ 1 of the confidentiality order.

UNITED STATES CONSTITUTION

BILL OF RIGHTS

Amendment I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

* * * * *

Amendment V

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

TITLE 17 — COPYRIGHTS

CHAPTER 3 — DURATION OF COPYRIGHT

§ 301. Preemption with respect to other laws

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State.

* * * * *

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title until February 15, 2067. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2067. Notwithstanding the provisions of section 303, no sound recording fixed before February 15, 1972, shall be subject to copyright under this title before, on, or after February 15, 2067.

TITLE 26 — INTERNAL REVENUE CODE

Subtitle F — Procedure and Administration

CHAPTER 61 — INFORMATION AND RETURNS

Subchapter B — Miscellaneous Provisions

§ 6104. Publicity of information required from certain exempt organizations and certain trusts

* * * * *

(d) Public inspection of certain annual returns, reports, applications for exemption, and notices of status

(1) In general

In the case of an organization described in subsection (c) or (d) of section 501 and exempt from taxation under section 501 (a) or an organization exempt from taxation under section 527 (a)—

(A) a copy of—

(i) the annual return filed under section 6033 (relating to returns by exempt organizations) by such organization,

(ii) any annual return filed under section 6011 which relates to any tax imposed by section 511 (relating to imposition of tax on unrelated business income of charitable, etc., organizations) by such organization, but only if such organization is described in section 501 (c)(3),

(iii) if the organization filed an application for recognition of exemption under section 501 or notice of status under section 527 (i), the exempt status application materials or any notice materials of such organization, and

(iv) the reports filed under section 527 (j) (relating to required disclosure of expenditures and contributions) by such organization,

shall be made available by such organization for inspection during regular business hours by any individual at the principal office of such organization and, if such organization regularly maintains 1 or more regional or district offices having 3 or more employees, at each such regional or district office, and

(B) upon request of an individual made at such principal office or such a regional or district office, a copy of such annual return, reports, and exempt status application materials or such notice materials shall be provided to such individual without charge other than a reasonable fee for any reproduction and mailing costs.

The request described in subparagraph (B) must be made in person or in writing. If such request is made in person, such copy shall be provided immediately and, if made in writing, shall be provided within 30 days.

TITLE 28 — JUDICIARY AND JUDICIAL PROCEDURE

Part V — Procedure

CHAPTER 123 — FEES AND COSTS

§ 1920. Taxation of costs

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

following:

(1) Fees of the clerk and marshal;

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

(3) Fees and disbursements for printing and witnesses;

(4) Fees for exemplification and the costs of making copies of any materials where the copies are necessarily obtained for use in the case;

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

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

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

* * * * *

§ 1927. Counsel's liability for excessive costs

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

CHAPTER 131 — RULES OF COURTS

§ 2072. Rules of procedure and evidence; power to prescribe

(a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.

(b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

* * * * *

1998

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c) of the Internal Revenue Code (except black lung benefit trust or private foundation) or section 4947(a)(1) nonexempt charitable trust
Note: *Form 990-EZ is for use by organizations with gross receipts of less than $100,000* ***and*** *total assets of less than $250,000 at the end of the year.*
Section references are to the Internal Revenue Code unless otherwise noted.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws.

The organization is not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. The rules governing the confidentiality of the Form 990, and Form 990-EZ, are covered in Code section 6104.

The time needed to complete and file this form and related schedules will vary depending on individual circumstances. The estimated average times are:

Form	Recordkeeping	Learning about the law or the form	Preparing the form	Copying, assembling, and sending the form to the IRS
990	96 hr., 23 min.	16 hr., 48 min.	21 hr., 55 min.	48 min.
990-EZ	28 hr., 28 min.	9 hr., 12 min.	11 hr., 1 min.	16 min.
Schedule A (Form 990)	50 hr., 13 min.	9 hr., 26 min.	10 hr., 40 min.	–0–

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can write to the Tax Forms Committee, Western Area Distribution Center, Rancho Cordova, CA 95743-0001. **DO NOT** send the form to this address. Instead, see **When and Where To File.**

Contents

Changes To Note

- Proposed regulations, published in 1998-34 I.R.B. 9, provide guidance pending the issuance of final regulations under section 4958. See General Instruction P, Taxes on Excess Benefit Transactions.
- In the heading of both the Form 990 and Form 990-EZ, Item E, **Telephone number,** replaces a required entry in prior years for a state registration number. Organizations must enter a telephone number in Item E that members of the public and government regulators may use during normal business hours to obtain information about the organization's finances and activities. If the organization does not have a telephone number, enter the telephone number of an organization official who can provide such information.
- For purposes of section 501(c)(12), the term "gross income" means gross receipts without reduction for any cost of goods sold. The instructions for Line 87 were amended.
- When completing Column (A) of Part VII, Analysis of Income-Producing Activities, use the new six-digit Codes for Unrelated Business Activity given in the 1998 Instructions for Form 990-T.
- Notice 98-25, 1998-18, I.R.B. 11, provides guidance to a section 4947(a)(1) nonexempt charitable trust for electing continued treatment as a U.S. trust even though the trust would be considered a foreign trust under the tests of section 7701(a)(30)(E).

Purpose of Form

- Form 990 and Form 990-EZ are used by tax-exempt organizations and nonexempt charitable trusts to provide the IRS with the information required by section 6033.
- An organization's completed Form 990, or Form 990-EZ (except for the schedule of contributors) is available for public inspection as required by section 6104.
- Some members of the public rely on Form 990, or Form 990-EZ, as the primary or sole source of information about a particular organization. How the public perceives an organization in such cases may be determined by the information presented on its return. Therefore, please make sure the return is complete and accurate and fully describes the organization's programs and accomplishments.
- Use the Form 990, and Form 990-EZ, to send a required election to the IRS, such as the election to capitalize costs under section 266.

provisions. However, Congress, in the legislative history of TBOR2, indicated that organizations would comply voluntarily with the public inspection provisions prior to the issuance of such regulations.

N. Disclosures Regarding Certain Information and Services Furnished

A section 501(c) organization that offers to sell or solicits money for specific information or a routine service for any individual that could be obtained by such individual from a Federal government agency free or for a nominal charge must disclose that fact conspicuously when making such offer or solicitation. Any organization that intentionally disregards this requirement will be subject to a penalty for each day on which the offers or solicitations are made. The penalty imposed for a particular day is the greater of $1,000 or 50% of the total cost of the offers and solicitations made on that day that lacked the required disclosure (section 6711).

O. Disclosures Regarding Certain Transactions and Relationships

In their annual returns on Schedule A (Form 990), section 501(c)(3) organizations must disclose information regarding their direct or indirect transfers to, and other direct or indirect relationships with, other section 501(c) organizations (except other section 501(c)(3) organizations) or section 527 political organizations (section 6033(b)(9)). This provision helps prevent the diversion or expenditure of a section 501(c)(3) organization's funds for purposes not intended by section 501(c)(3). All section 501(c)(3) organizations must maintain records regarding all such transfers, transactions, and relationships. See also General Instruction K regarding penalties.

P. Taxes on Excess Benefit Transactions

Section 4958 was added to the Code by the Taxpayer Bill of Rights 2 (TBOR2) on July 30, 1996.

The section 4958 excise taxes generally apply to excess benefit transactions occurring on or after September 14, 1995.

An excess benefit transaction subject to tax under section 4958 is any transaction in which an economic benefit provided by an applicable tax-exempt organization to, or for the use of, any disqualified person exceeds the value of consideration received by the organization in exchange for the benefit.

An excess benefit transaction also includes certain revenue-sharing transactions.

An applicable tax-exempt organization is any organization described in section 501(c)(3) (except private foundations) or section 501(c)(4) at the time of the excess benefit transaction or at any time during the 5-year period ending on the date of the transaction.

There are three taxes under section 4958. Disqualified persons are liable for the first two taxes. Certain organization managers are liable for the third tax.

Proposed regulations, published in 1998-34 I.R.B. 9, proposed new and amended regulations under section 4958.

The information in these proposed regulations is required for an applicable tax-exempt organization to avail itself of a rebuttable presumption that payments under a compensation arrangement between the organization and a disqualified person are reasonable, or a transfer of property, right to use property, or any other benefit or privilege between the organization and a disqualified person is at fair market value.

This information will be used by the organization's governing body, or committee thereof, to document the basis for its determination that compensation was reasonable or any other benefit was at fair market value.

Taxpayers may rely on these proposed regulations for guidance pending the issuance of final regulations. If, and to the extent, future guidance is more restrictive than the guidance in these proposed regulations, the future guidance will be applied without retroactive effect.

Taxes on excess benefit transactions. The proposed regulations describe the three taxes imposed under section 4958 on excess benefit transactions between an applicable tax-exempt organization and a disqualified person.

Two of the taxes are paid by certain disqualified persons who benefit economically from a transaction, and the other tax is paid by certain organization managers who participate in the transaction knowingly, willfully, and without reasonable cause.

Tax on disqualified persons. A disqualified person who receives an excess benefit from a transaction is liable for a tax equal to 25% of the excess benefit. If the excess benefit is not corrected within the taxable period, that disqualified person is then liable for a tax of 200% of the excess benefit.

"Taxable period" is defined as the period beginning on the date the transaction occurs and ending on the earlier of the date of mailing a notice of deficiency for the 25% tax or the date on which the 25% tax is assessed.

"Correction" is defined as undoing the excess benefit to the extent possible, and taking any additional measures necessary to place the organization in a financial position not worse than that in which it would be if the disqualified person had been dealing under the highest fiduciary standards.

If the excess benefit transaction consists of the payment of compensation for services under a contract that has not been completed, termination of the employment or independent contractor relationship between the organization and the disqualified person is not required in order to correct. However, the terms of any ongoing compensation arrangement may need to be modified to avoid future excess benefit transactions.

If the excess benefit is corrected within the correction period, then under the rules of section 4961, the 200% tax under section 4958(b) is not assessed. If the excess benefit is corrected within the correction period, and it is established to the satisfaction of the Secretary that the excess benefit transaction was due to reasonable cause and not to willful neglect, then, under the rules of section 4962, the 25% tax under section 4958(a)(1) will be abated.

Tax on organization managers. Each organization manager who participated in the excess benefit transaction, knowing that it was such a transaction, unless such participation was not willful and was due to reasonable cause, is liable for a tax equal to 10% of the excess benefit, not to exceed an aggregate amount of $10,000 with respect to any one excess benefit transaction.

An organization manager is, with respect to any applicable tax-exempt organization, any officer, director, or trustee of such organization, or any individual having powers or responsibilities similar to those of officers, directors, or trustees of the organization.

An individual who is not an officer, director, or trustee, yet serves on a committee of the governing body of an applicable tax-exempt organization that is invoking the rebuttable presumption of reasonableness based on the committee's action, however, is an organization manager for purposes of the 10% tax.

The definitions provided in the proposed regulations for the terms, "participation," "knowing," "willful," and "due to reasonable cause," with respect to organization managers for section 4958 purposes parallel the definitions of those terms used with respect to foundation managers in the section 4941 regulations.

Joint and several liability. With respect to any specific excess benefit transaction, if more than one person is liable for any of the taxes imposed by section 4958, all persons with respect to whom a particular tax is imposed are jointly and severally liable for that tax. For instance, if more than one disqualified person benefits from the same transaction, all the benefiting disqualified persons are jointly and severally liable for the respective section 4958(a)(1) or (b) taxes on that transaction.

Where an organization manager also receives an excess benefit from an excess benefit transaction, the manager may be liable for both taxes imposed by section 4958(a).

Except as otherwise provided in the proposed regulations, a transaction occurs on the date on which a disqualified person receives an economic benefit from the applicable tax-exempt organization for Federal income tax purposes. In the case of payment of deferred compensation, the transaction occurs on the date the deferred compensation is earned and vested.

The proposed regulations provide that the taxes imposed on excess benefit transactions apply to transactions occurring on or after September 14, 1995. However, these taxes do not apply to a transaction pursuant to a written contract that was binding on September 13, 1995, and at all times thereafter before the transaction occurred.

A written binding contract that is terminable or subject to cancellation by the applicable tax-exempt organization without the disqualified person's consent is treated as a new contract as of the date that any such termination or cancellation, if made, would be effective.

If a binding written contract is materially modified (including situations in which the contract is amended to extend its term or to increase the amount of compensation payable to the disqualified person), it is treated as a new contract entered into as of the date of the material modification.

Applicable tax-exempt organization. The proposed regulations generally define an applicable tax-exempt organization as any organization that, without regard to any excess benefit, is or would have been described in sections 501(c)(3) or (4) and exempt from tax under section 501(a) at any time during a 5-year period ending on the date of an excess benefit transaction (the lookback period).

To be described in section 501(c)(3) for purposes of section 4958, an organization must meet the requirements of section 508 (subject to any applicable exceptions provided by that section).

A private foundation as defined in section 509(a) is not an applicable tax-exempt organization for section 4958 purposes. An organization that has applied for and received recognition of exemption as an organization described in section 501(c)(4) is an applicable tax-exempt organization for section 4958 purposes.

A foreign organization that receives substantially all of its support from sources outside of the United States is not an

applicable tax-exempt organization for section 4958 purposes.

Disqualified person. The proposed regulations define a disqualified person as a person who, with respect to any transaction with an applicable tax-exempt organization, at any time during a 5-year period beginning after September 13, 1995, and ending on the date of such transaction, was in a position to exercise substantial influence over the affairs of the organization.

Certain persons are statutorily defined to be disqualified persons under section 4958(f), including certain family members of disqualified persons (spouse, brothers or sisters (by whole or half blood), spouses of brothers or sisters (by whole or half blood), ancestors, children, grandchildren, great grandchildren, and spouses of children, grandchildren, and great grandchildren), and 35%-controlled entities (a corporation in which a disqualified person owns more than 35% of the combined voting power; a partnership in which a disqualified person owns more than 35% of the profits interest; or a trust or estate in which a disqualified person owns more than 35% of the beneficial interest).

The proposed regulations specifically identify certain persons that have substantial influence over the affairs of an applicable tax-exempt organization.

These specified persons include:

1. Any individual who serves as a voting member on the governing body of the organization;

2. Any individual or individuals who have the power or responsibilities of the president, chief executive officer or chief operating officer of an organization;

3. Any individual or individuals who have the power or responsibilities of treasurer or chief financial officer of an organization; and

4. Any person who has a material financial interest in certain provider-sponsored organizations in which a hospital that is an applicable tax-exempt organization participates.

The proposed regulations establish two categories of persons that do not have substantial influence over the affairs of an applicable tax-exempt organization:

1. Other applicable tax-exempt organizations described in section 501(c)(3), and

2. Any employee who:

a. Receives economic benefits, directly or indirectly from the organization, of less than the amount of compensation referenced for a highly compensated employee in section 414(q)(1)(B)(i) (for the taxable year in which the benefits are provided),

b. Is not a statutorily defined disqualified person,

c. Is not specifically identified by the regulations as having substantial influence, and

d. Is not a substantial contributor to the organization within the meaning of section 507(d)(2).

The proposed regulations provide that except as specified in the categories set forth in section 4958(f) or in the proposed regulation, as outlined above, the determination of whether a person has substantial influence over the affairs of an organization is based on all relevant facts and circumstances.

A person who has managerial control over a discrete segment of an organization may nonetheless be in a position to exercise substantial influence over the affairs of the entire organization.

Facts and circumstances tending to show that a person has substantial influence over the affairs of an organization include, but are not limited to, the following:

1. The person founded the organization;

2. The person is a substantial contributor (within the meaning of section 507(d)(2)) to the organization

3. The person's compensation is based on revenues derived from activities of the organization that the person controls;

4. The person has authority to control or determine a significant portion of the organization's capital expenditures, operating budget, or compensation for employees;

5. The person has managerial authority or serves as a key advisor to a person with managerial authority; or

6. The person owns a controlling interest in a corporation, partnership, or trust that is a disqualified person.

Facts and circumstances tending to show that a person does not have substantial influence over the affairs of an organization include, but are not limited to, the following:

1. The person has taken a *bona fide* vow of poverty as an employee, agent, or on behalf of a religious organization;

2. The person is an independent contractor, such as an attorney, accountant, or investment manager or advisor, acting in that capacity, unless the person is acting in that capacity with respect to a transaction from which the person might economically benefit either directly or indirectly (aside from fees received for the professional services rendered); and

3. Any preferential treatment a person receives based on the size of that person's donation is also offered to any other donor making a comparable contribution as part of a solicitation intended to attract a substantial number of contributions.

In the case of multiple organizations affiliated by common control or governing documents, the determination of whether a person does or does not have substantial influence will be made separately for each applicable tax-exempt organization.

Excess benefit transaction. The proposed regulations state that an excess benefit transaction is any transaction in which an economic benefit is provided by an applicable tax-exempt organization directly or indirectly to, or for the use of, any disqualified person if the value of the economic benefit provided exceeds the value of the consideration (including the performance of services) received for providing such benefit.

An excess benefit transaction also includes certain revenue-sharing transactions (described later). A benefit can be provided indirectly if it is provided through one or more entities controlled by or affiliated with the applicable tax-exempt organization.

Certain economic benefits provided by an applicable tax-exempt organization to a disqualified person are disregarded for purposes of section 4958. These include:

1. Paying reasonable expenses for members of the governing body of an applicable tax-exempt organization to attend meetings of the governing body of the organization, not including expenses for luxury travel or spousal travel;

2. An economic benefit provided to a disqualified person that the disqualified person receives solely as a member of, or volunteer for, the organization, if the benefit is provided to members of the public in exchange for a membership fee of $75 or less per year; and

3. An economic benefit provided to a disqualified person that the disqualified person receives solely as a member of a charitable class the applicable tax-exempt organization intends to benefit.

The proposed regulations provide that if the amount of the economic benefit provided by the applicable tax-exempt organization exceeds the fair market value of the consideration, the excess is the excess benefit on which tax is imposed by section 4958.

The fair market value of property is the price at which property or the right to use property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell, or transfer property or the right to use property, and both having reasonable knowledge of relevant facts.

Compensation. Compensation for the performance of services is reasonable only if it is an amount that would ordinarily be paid for like services by like enterprises under like circumstances.

Generally, the circumstances to be taken into consideration are those existing at the date when the contract for services was made. However, where reasonableness of compensation cannot be determined based on circumstances existing at the date when the contract for services was made, then that determination is made based on all facts and circumstances, up to and including circumstances as of the date of payment.

In no event shall circumstances existing at the date when the contract is questioned be considered in making a determination of the reasonableness of compensation.

Compensation for purposes of section 4958 includes all items of compensation provided by an applicable tax-exempt organization in exchange for the performance of services by a disqualified person.

These items of compensation include, but are not limited to, all forms of cash and noncash compensation, including salary, fees, bonuses, and severance payments paid, and all forms of deferred compensation that is earned and vested, whether or not funded, and whether or not paid under a deferred compensation plan that is a qualified plan under section 401(a).

Compensation also includes:

1. The amount of premiums paid for liability or any other insurance coverage, as well as any payment or reimbursement by the organization of charges, expenses, fees, or taxes not covered ultimately by the insurance coverage;

2. All other benefits, whether or not included in income for tax purposes, including payments to welfare benefit plans on behalf of the disqualified persons, such as plans providing medical, dental, life insurance, severance pay, and disability benefits, and both taxable and nontaxable fringe benefits (other than working condition fringe benefits described in section 132(d) and *de minimis* fringe benefits described in section 132(e)), including expense allowances or reimbursements or foregone interest on loans that the recipient must report as income on his separate income tax return; and any economic benefit provided by the applicable tax-exempt organization directly or indirectly through another entity, owned, controlled by or affiliated with the applicable tax-exempt organization, whether such other entity is taxable or tax-exempt.

An applicable tax-exempt organization will be treated as having intended to provide an economic benefit as compensation for services only if it provides clear and convincing evidence of having that intent when the benefit was paid.

An applicable tax-exempt organization can provide clear and convincing evidence of such intent by reporting the economic benefit as compensation on original or amended Federal tax information returns with respect to the payment (e.g., Form W-2 or 1099) or with respect to the organization (e.g., Form 990), filed before the commencement of an IRS examination in which the reporting of the benefit is questioned.

Transaction in which amount of economic benefit determined in whole or in part by the revenues of one or more activities of the organization. The proposed regulations apply a facts and circumstances test to assess whether a transaction in which the amount of an economic benefit provided by an applicable tax-exempt organization to or for the use of a disqualified person is determined in whole or in part by the revenues of one or more activities of the applicable tax-exempt organization (revenue-sharing transaction) results in inurement, and therefore constitutes an excess benefit transaction.

A revenue-sharing transaction may constitute an excess benefit transaction regardless of whether the economic benefit provided to the disqualified person exceeds the fair market value of the consideration provided in return if, at any point, it permits a disqualified person to receive additional compensation without providing proportional benefits that contribute to the organization's accomplishment of its exempt purpose.

If the economic benefit is provided as compensation for services, relevant facts and circumstances include, but are not limited to, the relationship between the size of the benefit provided and the quality and quantity of the services provided, as well as the ability of the party receiving the compensation to control the activities generating the revenues on which the compensation is based.

The type of revenue-sharing transaction described in the proposed regulations constitutes an excess benefit transaction if it occurs on or after the date of publication of final regulations. The excess benefit in such a transaction consists of the entire economic benefit provided.

Any revenue-sharing transaction occurring after September 13, 1995, may still constitute an excess benefit transaction if the economic benefit provided to the disqualified person exceeds the fair market value of the consideration provided in return.

Before the date of publication of final regulations, however, the excess benefit shall consist only of that portion of the economic benefit that exceeds the fair market value of the consideration provided in return.

Rebuttable presumption that transaction is not an excess benefit transaction. The proposed regulations provide that a compensation arrangement between an applicable tax-exempt organization and a disqualified person is presumed to be reasonable, and a transfer of property, a right to use property, or any other benefit or privilege between an applicable tax-exempt organization and a disqualified person is presumed to be at fair market value, if three requirements are satisfied.

The three requirements are as follows:

- **First requirement—**The compensation arrangement or terms of transfer are approved by the organization's governing body or a committee of the governing body composed entirely of individuals who do not have a conflict of interest with respect to the arrangement or transaction;
- **Second requirement—**The governing body, or committee thereof, obtained and relied upon appropriate data as to comparability prior to making its determination; and
- **Third requirement—**The governing body or committee adequately documented the basis for its determination concurrently with making that determination.

The presumption established by satisfying these three requirements may be rebutted by additional information showing that the compensation was not reasonable or that the transfer was not at fair market value.

First requirement. With respect to the first requirement, the proposed regulations provide that the governing body is the board of directors, board of trustees, or equivalent controlling body of the applicable tax-exempt organization.

However, any members of such a committee who are not members of the governing body are deemed to be organization managers for purposes of the tax imposed by section 4958(a)(2) if the organization is invoking the rebuttable presumption based on the actions of the committee.

The proposed regulations provide that a member of the governing body, or committee thereof, does not have a conflict of interest with respect to a compensation arrangement or transaction if the member:

1. Is not the disqualified person, and

2. Is not related to any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

3. Is not in an employment relationship subject to the direction or control of any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

4. Is not receiving compensation or other payments subject to approval by any disqualified person participating in or economically benefiting from the compensation arrangement or transaction;

5. Has no material financial interest affected by the compensation arrangement or transaction; and

6. Does not approve a transaction providing economic benefits to any disqualified person participating in the compensation arrangement or transaction, who in turn has approved or will approve a transaction providing economic benefits to the member.

An arrangement or transaction has not been approved by a committee of a governing body if, under the governing documents of the organization or state law, the committee's decision must be ratified by the full governing body in order to become effective.

Second requirement. With respect to the second requirement for the rebuttable presumption of reasonableness, the proposed regulations provide that a governing body or committee has appropriate data on comparability if, given the knowledge and expertise of its members, it has information sufficient to determine whether a compensation arrangement will result in the payment of reasonable compensation or a transaction will be for fair market value.

Relevant information includes, but is not limited to:

1. Compensation levels paid by similarly situated organizations, both taxable and tax-exempt, for functionally comparable positions;

2. The availability of similar services in the geographic area of the applicable tax-exempt organization; independent compensation surveys compiled by independent firms;

3. Actual written offers from similar institutions competing for the services of the disqualified person; and

4. Independent appraisals of the value of property that the applicable tax-exempt organization intends to purchase from, or sell or provide to the disqualified person.

A special rule is provided for organizations with annual gross receipts of less than $1 million. Under this rule, when the governing body reviews compensation arrangements, it will be considered to have appropriate data as to comparability if it has data on compensation paid by five comparable organizations in the same or similar communities for similar services. No inference is intended with respect to whether circumstances falling outside this safe harbor will meet the requirements with respect to the collection of appropriate data.

Third requirement. For purposes of the third requirement of the rebuttable presumption of reasonableness under the proposed regulations, to be documented adequately, the written or electronic records of the governing body or committee must note:

1. The terms of the transaction that was approved and the date it was approved;

2. The members of the governing body or committee who were present during debate on the transaction or arrangement that was approved and those who voted on it;

3. The comparability data obtained and relied upon by the committee and how the data was obtained; and

4. The actions taken with respect to consideration of the transaction by anyone who is otherwise a member of the governing body or committee but who had a conflict of interest with respect to the transaction or arrangement.

If the governing body or committee determines that reasonable compensation for a specific arrangement or fair market value in a specific transaction is higher or lower than the range of comparable data obtained, the governing body or committee must record the basis for its determination.

If reasonableness of the compensation cannot be determined based on circumstances existing at the date when a contract for services was made, then the rebuttable presumption cannot arise until circumstances exist so that reasonableness of compensation can be determined, and the three requirements for the presumption subsequently are satisfied.

The fact that a transaction between an applicable tax-exempt organization and a disqualified person is not subject to the presumption described in this section shall not create any inference that the transaction is an excess benefit transaction.

The rebuttable presumption applies to all payments made or transactions completed in accordance with a contract provided that the three requirements of the rebuttable presumption were met at the time the contract was agreed upon.

Special rules. The proposed regulations provide that the excise taxes imposed by section 4958 do not affect the substantive statutory standards for tax exemption under sections 501(c)(3) or (4). Organizations are described in those sections only if no part of their net earnings inure to the benefit of any private shareholder or individual.

The proposed regulations provide that the procedures of section 7611 will be used in initiating and conducting any inquiry or examination into whether an excess benefit transaction has occurred between a church and a disqualified person.

For purposes of this rule, the reasonable belief required to initiate a church tax inquiry is satisfied if there is a reasonable belief that a section 4958 tax is due from a disqualified person with respect to a transaction involving a church.

Line 87—Section 501(c)(12) organizations

One of the requirements that an organization must meet to qualify under section 501(c)(12) is that at least 85% of its gross income consists of amounts collected from members for the sole purpose of meeting losses and expenses. For purposes of section 501(c)(12), the term "gross income" means gross receipts without reduction for any cost of goods sold.

For a mutual or cooperative electric or telephone company, "gross income" does not include amounts received or accrued as "qualified pole rentals."

For a mutual or cooperative telephone company, "gross income" also does not include amounts received or accrued either from another telephone company for completing long distance calls to or from or between the telephone company's members, or from the sale of display listings in a directory furnished to the telephone company's members.

Line 89a—Section 501(c)(3) organizations: Disclosure of excise taxes imposed under section 4911, 4912, or 4955

Section 501(c)(3) organizations must disclose any excise tax imposed during the year under section 4911 (excess lobbying expenditures), 4912 (disqualifying lobbying expenditures), or, unless abated, 4955 (political expenditures). See sections 4962 and 6033(b).

Line 89b—Section 501(c)(3) and 501(c)(4) organizations: Disclosure of section 4958 excess benefit transactions and excise taxes

Sections 6033(b) and 6033(f) require section 501(c)(3) and section 501(c)(4) organizations to report the amount of taxes imposed under section 4958 (excess benefit transactions) involving the organization, unless abated, as well as any other information the Secretary may require concerning those transactions. See General Instruction P for a discussion of excess benefit transactions.

Attach a statement describing any excess benefit transaction, the disqualified person or persons involved, and whether or not the excess benefit transaction was corrected.

Line 89c—Taxes imposed on organization managers or disqualified persons

For line 89c, enter the amount of taxes imposed on organization managers or disqualified persons under sections 4912, 4955, and 4958, unless abated.

Line 89d—Taxes reimbursed by the organization

For line 89d, enter the amount of tax in line 89c that was reimbursed by the organization. Any reimbursement of the excise tax liability of a disqualified person or organization manager will be treated as an excess benefit unless **(1)** the organization treats the reimbursement as compensation during the year the reimbursement is made, and **(2)** the total compensation to that person, including the reimbursement, is reasonable.

Line 90a—List of states

List each state with which the organization is filing a copy of this return in full or partial satisfaction of state filing requirements.

Line 90b—Number of employees

Enter the number of employees on your payroll during the pay period including March 12, 1998, as shown on your **Form 941,** Employer's Quarterly Federal Tax Return, or **Form 943,** Employer's Annual Tax Return for Agricultural Employees, (January-March calendar quarter return only). Do not include household employees, persons who received no pay during the pay period, pensioners, or members of the Armed Forces.

Line 92—Section 4947(a)(1) nonexempt charitable trusts

Section 4947(a)(1) nonexempt charitable trusts that file Form 990 instead of Form 1041 must complete this line. The trust should include exempt-interest dividends received from a mutual fund or other regulated investment company as well as tax-exempt interest received directly.

Part VII—Analysis of Income-Producing Activities

An organization is exempt from income taxes only if its primary purpose is to engage in the type of activity for which it claims exemption.

An exempt organization is subject to a tax on unrelated business taxable income if such income is from a trade or business that is regularly carried on by the organization and is not substantially related to the organization's performance of its exempt purpose or function. Generally, a tax-exempt organization with gross income of $1,000 or more for the year from an unrelated trade or business must file Form 990-T and pay any tax due.

In Part VII, show whether revenue, also reportable on lines 2 through 11 of Part I, was received from activities related to the organization's purpose or activities unrelated to its exempt purpose. Enter gross amounts unless indicated otherwise. Show also any revenue excludable from the definition of unrelated business taxable income.

The sum of amounts entered in columns (B), (D), and (E) for lines 93 through 103 of Part VII should match amounts entered for correlating lines 2 through 11 of Part I. Use the following table to verify the relationship of Part VII with Part I. Note that contributions that are reportable on lines 1a through 1d of Part I are **not** reportable in Part VII.

Amounts in Part VII on Line	Correspond to Amounts in Part I on Line
93(a) through (g)	2
94	3
95	4
96	5
97 and 98	6c
99	7
100	8d
101	9c
102	10c
103(a) through (e)	11
105 (plus line 1d, Part I)	12

Completing Part VII

Column (A)

In column (A), identify any unrelated business taxable income reportable in column (B) by selecting a business code from the Codes for Unrelated Business Activity in the 1998 Instructions for Form 990-T.

Note: *The codes for unrelated business activity have been revised. Use the codes shown in the 1998 Instructions for Form 990-T.*

Column (B)

In column (B), enter any revenue received from activities unrelated to the exempt purpose of the organization. See the Instructions for Form 990-T and Pub. 598 for a discussion of what is unrelated business taxable income. If you enter an amount in column (B), then you must enter a business code in column (A).

Column (C)

In column (C), enter an exclusion code from the Exclusion Codes list on the last page of the Specific Instructions for Form 990 to identify any revenue excludable from unrelated business taxable income. If more than one exclusion code applies to a particular revenue item, use the lowest numbered exclusion code that applies. If nontaxable revenues from several sources are reportable on the same line in column (D), use the exclusion code that applies to the largest revenue source. If the list of exclusion codes does not include an item of revenue that is excludable from unrelated business taxable income, enter that item in column (E) and see the instruction for column (E).

Column (D)

For column (D), identify any revenue received that is excludable from unrelated business taxable income. If you enter an amount in column (D), you must enter an exclusion code in column (C).

Column (E)

For column (E), report any revenue from activities related to the organization's exempt purpose; (i.e., income received from activities that form the basis of the organization's exemption from taxation). Also report here any revenue that is excludable from gross income other than by Code section 512, 513, or 514, such as interest on state and local bonds that is excluded from tax by section 103. Explain in Part VIII how any amount reported in column (E) related to the accomplishment of the organization's exempt purposes.

Lines 93(a) through (f)—Program service revenue

List the organization's revenue-producing program service activities on these lines. Program service activities are primarily those that form the basis of an organization's exemption from tax. Enter, in the appropriate columns, gross revenue from each program service activity and the business and exclusion codes that identify this revenue. See the explanation of program service revenue in the instructions for Part I, line 2.

Line 93(g)—Fees and contracts from government agencies

In the appropriate columns, enter gross revenue earned from fees and contract payments by government agencies for a service, facility, or product that benefited the government agency primarily, either economically or physically. Do not include government grants that enabled your organization to benefit the public directly and primarily. See Part I, line 1c instructions for the distinction between government grants that represent contributions and payments from government agencies for a service, product, or facility that primarily benefited the government agencies.

Report on line 2 of Part I (program service revenue) the sum of the entries in columns (B), (D), and (E) for lines 93(a) through (g).

Lines 94 through 96—Dues, assessments, interest, and dividends

In the appropriate columns, report the revenue received for these line items. General instructions for lines 94 through 96 are given in the instructions for Part I, lines 3 through 5.

Lines 97 and 98—Rental income (loss)

Report net rental income from investment property on these lines. Also report here rental income from unaffiliated exempt organizations.

Department of the Treasury
Internal Revenue Service

2003 Instructions for Schedules A & B (Form 1040)

Instructions for Schedule A, Itemized Deductions

Use Schedule A (Form 1040) to figure your itemized deductions. In most cases, your Federal income tax will be less if you take the **larger** of your itemized deductions or your standard deduction.

If you itemize, you may deduct a part of your medical and dental expenses and unreimbursed employee business expenses, and amounts you paid for certain taxes, interest, contributions, and miscellaneous expenses. You may also deduct certain casualty and theft losses.

CAUTION **Do not** include on Schedule A items deducted elsewhere, such as on Form 1040 or Schedule C, C-EZ, E, or F.

Medical and Dental Expenses

You may deduct only the part of your medical and dental expenses that exceeds 7.5% of the amount on Form 1040, line 35.

Pub. 502 discusses the types of expenses that you may and may not deduct. It also explains when you may deduct capital expenses and special care expenses for disabled persons.

CAUTION If you received a distribution from an MSA in 2003, see **Pub. 969** to figure your deduction.

Examples of Medical and Dental Payments You May Deduct

To the extent you were **not reimbursed,** you may deduct what you paid for:

- Insurance premiums for medical and dental care, including premiums for qualified long-term care contracts as defined in Pub. 502. But see **Limit on Long-Term Care Premiums You May Deduct** on this page. Reduce the insurance premiums by any self-employed health insurance deduction you claimed on Form 1040, line 29.

Note. If, during 2003, you were an eligible trade adjustment assistance (TAA) recipient, alternative TAA recipient, or Pension Benefit Guaranty Corporation pension recipient, you must reduce your insurance premiums by any amounts used to figure the health coverage tax credit. See the instructions for line 1 on page A-2.

CAUTION You **cannot** deduct insurance premiums paid with pretax dollars because the premiums are not included in box 1 of your Form(s) W-2.

- Prescription medicines or insulin.
- Acupuncturists, chiropractors, dentists, eye doctors, medical doctors, occupational therapists, osteopathic doctors, physical therapists, podiatrists, psychiatrists, psychoanalysts (medical care only), and psychologists.
- Medical examinations, X-ray and laboratory services, insulin treatment, and whirlpool baths your doctor ordered.
- Nursing help (including your share of the employment taxes paid). If you paid someone to do both nursing and housework, you may deduct only the cost of the nursing help.
- Hospital care (including meals and lodging), clinic costs, and lab fees.
- Qualified long-term care services (see Pub. 502).
- The supplemental part of Medicare insurance (Medicare B).
- A program to stop smoking and for prescription medicines to alleviate nicotine withdrawal.
- A weight-loss program as treatment for a specific disease (including obesity) diagnosed by a doctor.
- Medical treatment at a center for drug or alcohol addiction.
- Medical aids such as eyeglasses, contact lenses, hearing aids, braces, crutches, wheelchairs, and guide dogs, including the cost of maintaining them.
- Surgery to improve defective vision, such as laser eye surgery or radial keratotomy.
- Lodging expenses (but not meals) while away from home to receive medical care in a hospital or a medical care facility related to a hospital, provided there was no significant element of personal pleasure, recreation, or vacation in the travel. **Do not** deduct more than $50 a night for each eligible person.
- Ambulance service and other travel costs to get medical care. If you used your own car, you may claim what you spent for gas and oil to go to and from the place you received the care; or you may claim **12 cents a mile.** Add parking and tolls to the amount you claim under either method.

Note. Certain medical expenses paid out of a deceased taxpayer's estate may be claimed on the deceased taxpayer's final return. See Pub. 502 for details.

Limit on Long-Term Care Premiums You May Deduct. The amount you may deduct for qualified long-term care contracts (as defined in Pub. 502) depends on the age, at the end of 2003, of the person for whom the premiums were paid. See the following chart for details.

IF the person was, at the end of 2003, age . . .	THEN the most you may deduct is . . .
40 or under	$ 250
41–50	$ 470
51–60	$ 940
61–70	$ 2,510
71 or older	$ 3,130

Cat. No. 24328L

Line 15

Gifts by Cash or Check

Enter the total contributions you made in cash or by check (including out-of-pocket expenses).

Line 16

Other Than by Cash or Check

Enter your contributions of property. If you gave used items, such as clothing or furniture, deduct their fair market value at the time you gave them. Fair market value is what a willing buyer would pay a willing seller when neither has to buy or sell and both are aware of the conditions of the sale. For more details on determining the value of donated property, see **Pub. 561.**

If the amount of your deduction is more than $500, you must complete and attach **Form 8283.** For this purpose, the "amount of your deduction" means your deduction **before** applying any income limits that could result in a carryover of contributions. If your total deduction is over $5,000, you may also have to get appraisals of the values of the donated property. See Form 8283 and its instructions for details.

Recordkeeping. If you gave property, you should keep a receipt or written statement from the organization you gave the property to, or a reliable written record, that shows the organization's name and address, the date and location of the gift, and a description of the property. For each gift of property, you should also keep reliable written records that include:

- How you figured the property's value at the time you gave it. If the value was determined by an appraisal, keep a signed copy of the appraisal.
- The cost or other basis of the property if you must reduce it by any ordinary income or capital gain that would have resulted if the property had been sold at its fair market value.
- How you figured your deduction if you chose to reduce your deduction for gifts of capital gain property.
- Any conditions attached to the gift.

Note. If your total deduction for gifts of property is over $500, you gave less than your entire interest in the property, or you made a "qualified conservation contribution," your records should contain additional information. See Pub. 526 for details.

Line 17

Carryover From Prior Year

Enter any carryover of contributions that you could not deduct in an earlier year because they exceeded your adjusted gross income limit. See Pub. 526 for details.

Casualty and Theft Losses

Line 19

Complete and attach **Form 4684** to figure the amount of your loss to enter on line 19.

You may be able to deduct part or all of each loss caused by theft, vandalism, fire, storm, or similar causes, and car, boat, and other accidents. You may also be able to deduct money you had in a financial institution but lost because of the insolvency or bankruptcy of the institution.

You may deduct nonbusiness casualty or theft losses only to the extent that—

- The amount of **each** separate casualty or theft loss is more than $100 and
- The total amount of **all** losses during the year is more than 10% of the amount on Form 1040, line 35.

Special rules apply if you had both gains and losses from nonbusiness casualties or thefts. See Form 4684 and its instructions for details.

Use line 22 of Schedule A to deduct the costs of proving that you had a property loss. Examples of these costs are appraisal fees and photographs used to establish the amount of your loss.

For information on Federal disaster area losses, see **Pub. 547.**

Job Expenses and Most Other Miscellaneous Deductions

You may deduct only the part of these expenses that exceeds 2% of the amount on Form 1040, line 35.

Pub. 529 discusses the types of expenses that may and may not be deducted.

Examples of Expenses You May Not Deduct

- Political contributions.
- Personal legal expenses.
- Lost or misplaced cash or property.
- Expenses for meals during regular or extra work hours.
- The cost of entertaining friends.
- Commuting expenses. See Pub. 529 for the definition of commuting.
- Travel expenses for employment away from home if that period of employment exceeds 1 year. See Pub. 529 for an exception for certain Federal employees.
- Travel as a form of education.
- Expenses of attending a seminar, convention, or similar meeting unless it is related to your employment.
- Club dues. See Pub. 529 for exceptions.
- Expenses of adopting a child. But you may be able to take a credit for adoption expenses. See **Form 8839** for details.
- Fines and penalties.
- Expenses of producing tax-exempt income.

Line 20

Unreimbursed Employee Expenses

Enter the total ordinary and necessary job expenses you paid for which you were not reimbursed. (Amounts your employer included in box 1 of your Form W-2 are not considered reimbursements.)

An ordinary expense is one that is common and accepted in your field of trade, business, or profession. A necessary expense is one that is helpful and appropriate for your business. An expense does not have to be required to be considered necessary.

But you **must** fill in and attach **Form 2106** if **either 1** or **2** next applies.

1. You claim any travel, transportation, meal, or entertainment expenses for your job.

2. Your employer paid you for any of your job expenses reportable on line 20.

TIP If you used your own vehicle and item **2** does not apply, you may be able to file **Form 2106-EZ** instead.

If you do not have to file Form 2106 or 2106-EZ, list the type and amount of each expense on the dotted lines next to line 20. If you need more space, attach a statement showing the type and amount of each expense. Enter one total on line 20.

CAUTION Do not include on line 20 any educator expenses you deducted on Form 1040, line 23.

Examples of other expenses to include on line 20 are:

- Safety equipment, small tools, and supplies needed for your job.
- Uniforms required by your employer that are not suitable for ordinary wear.
- Protective clothing required in your work, such as hard hats, safety shoes, and glasses.
- Physical examinations required by your employer.
- Dues to professional organizations and chambers of commerce.
- Subscriptions to professional journals.
- Fees to employment agencies and other costs to look for a new job in your present occupation, even if you do not get a new job.
- Certain business use of part of your home. For details, including limits that apply, use TeleTax topic 509 (see page 11 of

Instructions for Form 8283

(Revised October 1998)

Noncash Charitable Contributions

Department of the Treasury
Internal Revenue Service

Section references are to the Internal Revenue Code unless otherwise noted.

General Instructions

Purpose of Form

Use Form 8283 to report information about noncash charitable contributions.

Do not use Form 8283 to report out-of-pocket expenses for volunteer work or amounts you gave by check or credit card. Treat these items as cash contributions. Also, **do not** use Form 8283 to figure your charitable contribution deduction. For details on how to figure the amount of the deduction, see your tax return instructions.

Additional Information

You may want to see **Pub. 526,** Charitable Contributions (for individuals), and **Pub. 561,** Determining the Value of Donated Property. If you contributed depreciable property, see **Pub. 544,** Sales and Other Dispositions of Assets.

Who Must File

You must file Form 8283 if the amount of your deduction for all noncash gifts is more than $500. For this purpose, "amount of your deduction" means your deduction **before** applying any income limits that could result in a carryover. The carryover rules are explained in Pub. 526. Make any required reductions to fair market value (FMV) before you determine if you must file Form 8283. See **Fair Market Value (FMV)** on page 2.

Form 8283 is filed by individuals, partnerships, and corporations.

Note: *C corporations, other than personal service corporations and closely held corporations, must file Form 8283 only if the amount claimed as a deduction is over $5,000.*

Partnerships and S corporations. A partnership or S corporation that claims a deduction for noncash gifts over $500 must file Form 8283 with Form 1065, 1065-B, or 1120S. If the total deduction of any item or group of similar items exceeds $5,000, the partnership or S corporation must complete Section B of Form 8283 even if the amount allocated to each partner or shareholder does not exceed $5,000.

The partnership or S corporation must give a completed copy of Form 8283 to each partner or shareholder receiving an allocation of the contribution deduction shown in Section B of the partnership's or S corporation's Form 8283.

Partners and shareholders. The partnership or S corporation will provide information about your share of the contribution on your Schedule K-1 (Form 1065 or 1120S).

In some cases, the partnership or S corporation must give you a copy of its Form 8283. If you received a copy of Form 8283 from the partnership or S corporation, attach a copy to your tax return. Deduct the amount shown on your Schedule K-1, not the amount shown on the Form 8283.

If the partnership or S corporation is not required to give you a copy of its Form 8283, combine the amount of noncash contributions shown on your Schedule K-1 with your other noncash contributions to see if you must file Form 8283. If you need to file Form 8283, you do not have to complete all the information requested in Section A for your share of the partnership's or S corporation's contributions. Complete only column (g) of line 1 with your share of the contribution and enter "From Schedule K-1 (Form 1065 or 1120S)" across columns (c)–(f).

When To File

File Form 8283 with your tax return for the year you contribute the property and first claim a deduction.

Which Sections To Complete

If you must file Form 8283, you may need to complete Section A, Section B, or both, depending on the type of property donated and the amount claimed as a deduction.

Section A. Include in Section A only items (or groups of similar items as defined on this page) for which you claimed a deduction of $5,000 or less per item (or group of similar items). Also, include the following publicly traded securities even if the deduction is more than $5,000.

- Securities listed on an exchange in which quotations are published daily,
- Securities regularly traded in national or regional over-the-counter markets for which published quotations are available, or
- Securities that are shares of a mutual fund for which quotations are published on a daily basis in a newspaper of general circulation throughout the United States.

Section B. Include in Section B only items (or groups of similar items) for which you claimed a deduction of more than $5,000 (omit publicly traded securities reportable in Section A). With certain exceptions, items reported in Section B will require information based on a written appraisal by a qualified appraiser.

Similar Items of Property

Similar items of property are items of the same generic category or type, such as stamp collections, coin collections, lithographs, paintings, books, nonpublicly traded stock, land, or buildings.

Example. You claimed a deduction of $400 for clothing, $7,000 for publicly traded securities (quotations published daily), and $6,000 for a collection of 15 books ($400 each). Report the clothing and securities in Section A and the books (a group of similar items) in Section B.

Special Rule for Certain C Corporations

A special rule applies for deductions taken by certain C corporations under section 170(e)(3) or (4) for contributions of inventory or scientific equipment.

To determine if you must file Form 8283 or which section to complete, use the difference between the amount you claimed as a deduction and the amount you would have claimed as cost of goods sold (COGS) had you sold the property instead. This rule is **only** for purposes of Form 8283. It does not change the amount or method of figuring your contribution deduction.

If you do not have to file Form 8283 because of this rule, you must attach a statement to your tax return (similar to the one in the example below). Also, attach a statement if you must complete Section A, instead of Section B, because of this rule.

Example. You donated clothing from your inventory for the care of the needy. The clothing cost you $5,000 and your claimed charitable deduction is $8,000. Complete Section A instead of Section B because the difference between the amount you claimed as a charitable deduction and the amount that would have been your COGS deduction is $3,000 ($8,000 – $5,000). Attach a statement to Form 8283 similar to the following:

Form 8283—Inventory

Contribution deduction	$8,000
COGS (if sold, not donated)	– 5,000
For Form 8283 filing purposes	=$3,000

Fair Market Value (FMV)

Although the **amount** of your deduction determines if you have to file Form 8283, you also need to have information about the **value** of your contribution to complete the form.

FMV is the price a willing, knowledgeable buyer would pay a willing, knowledgeable seller when neither has to buy or sell.

You may not always be able to deduct the FMV of your contribution. Depending on the type of property donated, you may have to reduce the FMV to get to the deductible amount, as explained next.

Reductions to FMV. The amount of the reduction (if any) depends on whether the property is ordinary income property or capital gain property. Attach a statement to your tax return showing how you figured the reduction.

Ordinary income property is property that would result in ordinary income or short-term capital gain if it were sold at its FMV on the date it was contributed. Examples of ordinary income property are inventory, works of art created by the donor, and capital assets held for 1 year or less. The deduction for a gift of ordinary income property is limited to the FMV minus the amount that would be ordinary income or short-term capital gain if the property were sold.

Capital gain property is property that would result in long-term capital gain if it were sold at its FMV on the date it was contributed. It includes certain real property and depreciable property used in your trade or business, and generally held for more than 1 year. You usually may deduct gifts of capital gain property at their FMV. However, you must reduce the FMV by the amount of any appreciation if any of the following apply.

- The capital gain property is contributed to certain private nonoperating foundations. This rule does not apply to qualified appreciated stock.
- You choose the 50% limit instead of the special 30% limit.
- The contributed property is tangible personal property that is put to an **unrelated use** (as defined in Pub. 526) by the charity.

Qualified conservation contribution. If your donation qualifies as a "qualified conservation contribution" under section 170(h), attach a statement showing the FMV of the underlying property before and after the gift and the conservation purpose furthered by the gift. See Pub. 561 for more details.

Specific Instructions

Identifying number. Individuals must enter their social security number or individual taxpayer identification number. All other filers should enter their employer identification number.

Section A

Part I, Information on Donated Property

Line 1

Column (b). Describe the property in sufficient detail. The greater the value, the more detail you need. For example, a car should be described in more detail than pots and pans.

For securities, include the following:

- Name of the issuer,
- Kind of security,
- Whether a share of a mutual fund, and
- Whether regularly traded on a stock exchange or in an over-the-counter market.

Note: *If the amount you claimed as a deduction for the item is $500 or less, you do not have to complete columns (d), (e), and (f).*

Column (d). Enter the approximate date you acquired the property. If it was created, produced, or manufactured by or for you, enter the date it was substantially completed.

Column (e). State how you acquired the property (i.e., by purchase, gift, inheritance, or exchange).

Column (f). Do not complete this column for publicly traded securities or property held 12 months or more. Keep records on cost or other basis.

Note: *If you have reasonable cause for not providing the information in columns (d) and (f), attach an explanation.*

Column (g). Enter the FMV of the property on the date you donated it. If you were required to reduce the FMV of your deduction or you gave a qualified conservation contribution, you must attach a statement. See **Fair Market Value (FMV)** on this page for the type of statement to attach.

Column (h). Enter the method(s) you used to determine the FMV. The FMV of used household goods and clothing is usually much lower than when new. A good measure of value might be the price that buyers of these used items actually pay in consignment or thrift shops.

Examples of entries to make include "Appraisal," "Thrift shop value" (for clothing or household goods), "Catalog" (for stamp or coin collections), or "Comparable sales" (for real estate and other kinds of assets). See Pub. 561.

Part II, Other Information

If Part II applies to more than one property, attach a separate statement. Give the required information for

each property separately. Identify which property listed in Part I the information relates to.

Lines 2a Through 2e

Complete lines 2a–2e only if you contributed less than the entire interest in the donated property during the tax year. On line 2b, enter the amount claimed as a deduction for this tax year and in any prior tax years for gifts of a partial interest in the same property.

Lines 3a Through 3c

Complete lines 3a–3c only if you attached restrictions to the right to the income, use, or disposition of the donated property. An example of a "restricted use" is furniture that you gave only to be used in the reading room of an organization's library. Attach a statement explaining **(1)** the terms of any agreement or understanding regarding the restriction, and **(2)** whether the property is designated for a particular use.

Section B

Part I, Information on Donated Property

You must have a written appraisal from a qualified appraiser that supports the information in Part I. However, see the **Exceptions** below.

Use Part I to summarize your appraisal(s). Generally, you do not need to attach the appraisals but you should keep them for your records. But see **Art valued at $20,000 or more** below.

Exceptions. You do not need a written appraisal if the property is:

- Nonpublicly traded stock of $10,000 or less,
- Certain securities considered to have market quotations readily available (see Regulations section 1.170A-13(c)(7)(xi)(B)),
- A donation by a C corporation (other than a closely held corporation or personal service corporation), or
- Inventory and other property donated by a closely held corporation or a personal service corporation that are "qualified contributions" for the care of the ill, the needy, or infants, within the meaning of section 170(e)(3)(A).

Although a written appraisal is not required for the types of property listed above, you must provide certain information in Part I of Section B (see Regulations section 1.170A-13(c)(4)(iv)) and have the donee organization complete Part IV.

Art valued at $20,000 or more. If your total deduction for art is $20,000 or more, you must attach a complete copy of the signed appraisal. For individual objects valued at $20,000 or more, a photograph must be provided upon request. The photograph must be of sufficient quality and size (preferably an 8 x 10 inch color photograph or a color transparency no smaller than 4 x 5 inches) to fully show the object.

Appraisal Requirements

The appraisal must be made not earlier than 60 days before the date you contribute the property. You must receive the appraisal before the due date (including extensions) of the return on which you first claim a deduction for the property. For a deduction first claimed on an amended return, the appraisal must be received before the date the amended return was filed.

A separate qualified appraisal and a separate Form 8283 are required for each item of property except for an item that is part of a group of similar items. Only one appraisal is required for a group of similar items contributed in the same tax year, if it includes all the required information for each item. The appraiser may group similar items with a collective value appraised at $100 or less.

If you gave similar items to more than one donee for which you claimed a total deduction of more than $5,000, you must attach a separate form for each donee.

Example. You claimed a deduction of $2,000 for books given to College A, $2,500 for books given to College B, and $900 for books given to a public library. You must attach a separate Form 8283 for each donee.

See Regulations section 1.170A-13(c)(3)(i)–(ii) for the definition of a "qualified appraisal" and information to be included in the appraisal.

Line 5

Note: *You **must** complete at least column (a) of line 5 (and column (b) if applicable) before submitting Form 8283 to the donee. You may then complete the remaining columns.*

Column (a). Provide enough detail so a person unfamiliar with the property could identify it in the appraisal.

Column (c). Include the FMV from the appraisal. If you were not required to get an appraisal, include the FMV you determine to be correct.

Columns (d)–(f). If you have reasonable cause for not providing the information in columns (d), (e), or (f), attach an explanation so your deduction will not automatically be disallowed.

Column (g). A bargain sale is a transfer of property that is in part a sale or exchange and in part a contribution. Enter the amount received for bargain sales.

Column (h). Complete column (h) only if you were not required to get an appraisal, as explained earlier.

Column (i). Complete column (i) only if you donated securities for which market quotations are considered to be readily available because the issue satisfies the five requirements described in Regulations section 1.170A-13(c)(7)(xi)(B).

Part II, Taxpayer (Donor) Statement

Complete Part II for each item included in Part I that has an appraised value of $500 or less. Because you do not have to show the value of these items in Part I of the donee's copy of Form 8283, clearly identify them for the donee in Part II. Then, the donee does not have to file **Form 8282,** Donee Information Return, for items valued at $500 or less. See the **Note** on page 4 for more details about filing Form 8282.

The amount of information you give in Part II depends on the description of the donated property you enter in Part I. If you show a single item as "Property A" in Part I and that item is appraised at $500 or less, then the entry "Property A" in Part II is enough. However, if "Property A" consists of several items and the total appraised value is over $500, list in Part II any item(s) you gave that is valued at $500 or less.

All shares of nonpublicly traded stock or items in a set are considered one item. For example, a book collection by the same author, components of a stereo system, or six place settings of a pattern of silverware are one item

for the $500 test.

Example. You donated books valued at $6,000. The appraisal states that one of the items, a collection of books by author "X," is worth $400. On the Form 8283 that you are required to give the donee, you decide not to show the appraised value of all of the books. But you also do not want the donee to have to file Form 8282 if the collection of books is sold. If your description of Property A on line 5 includes all the books, then specify in Part II the "collection of books by X included in Property A." But if your Property A description is "collection of books by X," the only required entry in Part II is "Property A."

In the above example, you may have chosen instead to give a completed copy of Form 8283 to the donee. The donee would then be aware of the value. If you include all the books as Property A on line 5, and enter $6,000 in column (c), you may still want to describe the specific collection in Part II so the donee can sell it without filing Form 8282.

Part III, Declaration of Appraiser

If you had to get an appraisal, the appraiser **must** complete Part III to be considered qualified. See Regulations section 1.170A-13(c)(5) for a definition of a qualified appraiser.

Persons who cannot be qualified appraisers are listed in the Declaration of Appraiser. Usually, a party to the transaction will not qualify to sign the declaration. But a person who sold, exchanged, or gave the property to you may sign the declaration if the property was donated within 2 months of the date you acquired it and the property's appraised value did not exceed its acquisition price.

An appraiser may not be considered qualified if you had knowledge of facts that would cause a reasonable person to expect the appraiser to falsely overstate the value of the property. An example of this is an agreement between you and the appraiser about the property value when you know that the appraised amount exceeds the actual FMV.

Usually, appraisal fees cannot be based on a percentage of the appraised value unless the fees were paid to certain not-for-profit associations. See Regulations section 1.170A-13(c)(6)(ii).

Part IV, Donee Acknowledgment

The donee organization that received the property described in Part I of Section B must complete Part IV. Before submitting page 2 of Form 8283 to the donee for acknowledgment, complete at least your name, identifying number, and description of the donated property (line 5, column (a)). If tangible property is donated, also describe its physical condition (line 5, column (b)) at the time of the gift. Complete Part II, if applicable, before submitting the form to the donee. See the instructions for Part II.

The person acknowledging the gift must be an official authorized to sign the tax returns of the organization, or a person specifically designated to sign Form 8283. After completing Part IV, the organization must return Form 8283 to you, the donor. You must give a copy of Section B of this form to the donee organization. You may then complete any remaining information required in Part I. Also, Part III may be completed at this time by the qualified appraiser.

In some cases, it may be impossible to get the donee's signature on the Appraisal Summary. The deduction will not be disallowed for that reason if you attach a detailed explanation why it was impossible.

Note: *If the donee (or a successor donee) organization disposes of the property within 2 years after the date the original donee received it, the organization must file* ***Form 8282,*** *Donee Information Return, with the IRS and send a copy to the donor. An exception applies to items having a value of $500 or less if the donor identified the items and signed the statement in Part II (Section B) of Form 8283. See the instructions for Part II.*

Failure To File Form 8283, Section B

If you fail to attach Form 8283 to your return for donated property that is required to be reported in Section B, your deduction will be disallowed unless your failure was due to a good-faith omission. If the IRS asks you to submit the form, you have 90 days to send a completed Section B of Form 8283 before your deduction is disallowed.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is: **Recordkeeping,** 20 min.; **Learning about the law or the form,** 29 min.; **Preparing the form,** 37 min.; **Copying, assembling, and sending the form to the IRS,** 35 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. See the instructions for the tax return with which this form is filed.

2006

Department of the Treasury
Internal Revenue Service

Instructions for Form 990 and Form 990-EZ

Return of Organization Exempt From Income Tax and Short Form Return of Organization Exempt From Income Tax

Under Section 501(c), 527, or 4947(a)(1) of the Internal Revenue Code (except black lung benefit trust or private foundation)

Caution: Form 990-EZ is for use by organizations other than sponsoring organizations and controlling organizations defined in section 512(b)(13), with gross receipts of less than $100,000 and total assets of less than $250,000 at the end of the year.

Section references are to the Internal Revenue Code unless otherwise noted.

Contents **Page**

Contents **Page**

What's New

The following items reflect changes made by the Pension Protection Act of 2006.

- Item K has been revised to reflect the requirement that a section 509(a)(3) supporting organization must generally file Form 990 (or Form 990-EZ, if applicable), even if its gross receipts are normally $25,000 or less.
- Sponsoring organizations and controlling organizations as defined in section 512(b)(13) cannot file Form 990-EZ. These organizations must file their return on Form 990.
- The definitions for disqualified persons and excess benefit transactions have been revised. See *General Instruction P*.
- New lines 1a and 22a were added to Form 990 to show the total contributions to, and grants made from, donor advised funds for the year. The change reflects section 6033(k) requirements for sponsoring organizations (defined in section 4966(d)(1)). Prior year's lines 1a–1d were renumbered 1b–1e.
- New lines 25a, 25b, and 25c replace the prior year's line 25 on Form 990. New lines 25a and 25b reflect compensation of current and former officers, directors, trustees, and key employees and line 25c reflects compensation and distributions to certain disqualified and other persons. Also, the descriptions for lines 26 through 28 were clarified to reflect the changes to line 25.
- New line 50b was added to Form 990 to reflect the amount of receivables from certain disqualified and other persons.
- New lines 54a and 54b were added to Form 990 to separate investments in publicly traded securities from investments in other securities. See the instructions for lines 54a and 54b for more information.
- New line 88b and new Part XI were added to reflect section 6033(h) which requires controlling organizations, within the meaning of section 512(b)(13), filing Form 990 after August 17, 2006, to report the information requested.
- New line 89f was added to Form 990 to ask if the organization acquired a direct or indirect interest in an applicable insurance contract after August 17, 2006.
- New line 89g was added to Form 990 to ask if supporting organizations and sponsoring organizations maintaining donor advised funds had any excess business holdings at any time during the tax year.
- Section 501(c)(3) organizations that file Form 990-T after August 17, 2006, to report unrelated business income must make that Form 990-T available for public inspection under section 6104(d)(1)(A)(ii).

The following item reflects changes made by Act section 516 of the Taxpayer Increase Prevention and Reconciliation Act of 2005.

- Form 990, line 89e and Form 990-EZ, line 40e have been added to ask if the organization was a party to any prohibited tax shelter transactions. See new *General Instruction W* for more information.

The following changes were also made to the instructions.

- For 2006, an exempt organization must file its return electronically if it files at least 250 returns during the calendar year and has total assets of $10 million or more at the end of the tax year. See *General Instruction H* for more information.
- The discussion for determining whether a non-life insurance company qualifies as a tax-exempt organization under section 501(c)(15) was revised to reflect the meaning of gross receipts for purposes of section 501(c)(15)(A). See *General Instruction A* for more information.

payments to welfare benefit plans on behalf of the officers, directors, etc. Such plans provide benefits such as medical, dental, life insurance, severance pay, disability, etc. Reasonable estimates may be used if precise cost figures are not readily available.

Unless the amounts were reported in column (C), report, as deferred compensation in column (D), salaries and other compensation earned during the reporting period, but not yet paid by the date the organization files its return.

Column (E)

Enter both taxable and nontaxable fringe benefits (other than *de minimis* fringe benefits described in section 132(e)). Include expense allowances or reimbursements that the recipients must report as income on their separate income tax returns. Examples include amounts for which the recipient did not account to the organization or allowances that were more than the payee spent on serving the organization. Include payments made under indemnification arrangements, the value of the personal use of housing, automobiles, or other assets owned or leased by the organization (or provided for the organization's use without charge), as well as any other taxable and nontaxable fringe benefits. See Pub. 525 for more information.

Line 75b. Business Relationships

For a definition of *family and business relationships*, see line 51 of these instructions.

Line 75c. Compensation from Related Organizations

Answer "Yes," to this question if any of the organization's listed officers, directors, trustees, key employees, highest compensated employees, or highest compensated professional or other independent contractors received aggregate compensation amounts of $50,000 or more from the organization and all related organizations (as defined below). For this purpose, compensation includes any amount that would be reportable in columns (C), (D), and (E) of Form 990, Part V-A, if provided by the organization.

Required attachment. If the organization answered "Yes," it must attach a schedule that lists, for each officer, director, trustee, key employee, highest compensated employee, or highest compensated professional or other independent contractor, the information requested in 1 and 2, below.

1. For Relationships 1 through 6, provide:

a. The name of the officer, director, etc., receiving compensation from a related organization or organizations;

b. The name and EIN of each related organization that provided the compensation;

c. A description of the relationship between the organization and the related organization(s); and

d. The amount of compensation each related organization provided. Use the same format as required by columns (C) through (E) of Part V-A.

2. If the organizations are related only by *Relationship 7* and/or *Relationship 8*, or if the *Volunteer exception* to *Relationship 2* applies, report the following information, but do not report compensation paid by the related organization(s).

a. The name of the officer, director, etc., receiving compensation from a related organization(s);

b. The name and EIN of each related organization that provided such compensation; and

c. A description of the relationship between the organization and the related organization(s).

Reporting compensation. Report compensation paid by a related organization for only that time period during which a relationship existed between the organization and the related organization. Report compensation paid by a related organization in the same period (either calendar or fiscal year) as the organization reports compensation it paid.

Definition of related organization. Organizations may be related in several ways; the relationships are not mutually exclusive. *Related organizations* are tax-exempt or taxable organizations related to the tax-exempt organization in one or more of the following ways.

- ***Relationship 1.*** One organization owns or controls the other organization.
- ***Relationship 2.*** The same person(s) owns or controls both organizations.
- ***Relationship 3.*** The organizations have a relationship as supporting and supported organizations under section 509(a)(3) (see *Example 1*, later).
- ***Relationship 4.*** The organizations use a common paymaster. For a definition of common paymaster and illustrated examples, see Regulations section 31.3121(s)-1(b).
- ***Relationship 5.*** The other organization pays part of the compensation that the organization would otherwise be contractually obligated to pay (see *Example 2*, later).
- ***Relationship 6.*** The organizations are partners in a partnership or members in an LLC or other joint venture (other than a publicly traded partnership as defined in section 7704(b)).
- ***Relationship 7.*** The organizations conduct joint programs or share facilities or employees.
- ***Relationship 8.*** One or more persons exercise substantial influence over both organizations (see *Example 3*, later). For purposes of this relationship, to determine if a person exercises substantial influence over an organization, use the rules stated in section 4958(f)(1) and Regulations section 53.4958-3 (treating the organization as though it were an applicable tax-exempt organization under section 4958(e)).

Substantial influence. The following persons are considered to exercise substantial influence over the organization:

1. The organization's directors, trustees, chief executive officer, and chief financial officer (see Regulations section 53.4958-3(c)),

2. Certain family members (defined as disqualified persons under section 4958(f)(1)(B)) of disqualified individuals, and

3. Certain 35% controlled entities (defined as disqualified persons under section 4958(f)(1)(C)).

Ownership. The term ownership is holding (directly or indirectly) 50% or more of the voting power in a corporation, profits interest in a partnership, or beneficial interest in a trust.

Control. The term control is having 50% or more of the voting power in a governing body, or the power to appoint 50% or more of an organization's governing body, or the power to approve an organization's budgets or expenditures (an effective veto power over the organization's budgets and expenditures). Also, control can be indirect by owning or controlling another organization with such power.

The term governing body is defined by the relevant state law. Generally, the governing body of a corporation is its board of directors and the governing body of a trust is its board of trustees.

Reporting exceptions. The following exceptions apply:

- ***Bank or financial institution trustee exception.*** If the organization and the other organization are related only because they are both controlled or substantially influenced by a common trustee that is a bank or financial institution, the organization does not need to report either the relationship or the trustee's compensation from the related organization.
- ***Common independent contractor exception.*** If an independent contractor listed in Schedule A, Part II-A or II-B does not exercise substantial influence, as defined above, over either the organization or the related organization, the organization does not need to report either the relationship or the independent contractor's compensation from the related organization. However, this exception does not apply to a management services company that performs for the organization functions similar to those of president, chief executive officer, chief operating officer, treasurer or chief financial officer. Compensation paid by a related organization to such a management company must be reported by the organization unless another exception applies. See *Examples 5* and *6* later.
- ***Volunteer exception.*** If *Relationship 2* is met only because the same individuals control both the tax-exempt organization and a for-profit organization that is not owned or controlled directly or indirectly by one or more tax-exempt organizations, and none of the Relationships described in 1 or 3 through 6 are met, then the tax-exempt organization does not have to report the compensation from the for-profit organization of any persons serving the tax-exempt organization as a volunteer without compensation (see *Example 4*, later).

TIP *Providing information on compensation received from related organizations does not violate the disclosure provisions of section 7216(a). See also section 6033(a)(1).*

Examples illustrating relationships.

Example 1. X, a hospital auxiliary, raises funds for Hospital Y. Z, another hospital auxiliary, coordinates the efforts of Hospital Y's volunteer staff. Both X and Z

are supporting organizations of Hospital Y and are considered related organizations to Hospital Y. Hospital Y is also considered a supported organization of the auxiliaries.

Hospital Y must report (in an attachment to line 75c) the compensation, if any, paid by each of the auxiliaries to the officers, directors, trustees, or key employees listed in the hospital's Form 990, Part V-A, or highest-compensated employees listed in the hospital's Schedule A, Part I, or highest-compensated professional or other independent contractors listed in the hospital's Schedule A, Part II-A or II-B. Both X and Z must report (in an attachment to line 75c) the compensation, if any, paid by Hospital Y to an officer, director, etc., of the auxiliary.

Example 2. Bob, a key employee of Organization B, a 501(c)(4) social welfare organization, conducts fundraising among Organization B's members, with the proceeds going to Organization A, a 501(c)(3) public charity, to carry out disaster relief. The Chief Executive Officers (CEOs) of Organizations A and B agree that Organization A will pay a portion of Bob's salary for a period of time in recognition of Bob's role in the fundraising assistance of Organization B. Because Organization A is paying to Bob a portion of Bob's compensation that Organization B would otherwise be contractually committed to pay, Organizations A and B are related organizations for Form 990 reporting purposes. Organization B must report the payment from Organization A to Bob in an attachment to line 75c.

Example 3. Tom is a trustee of Organization A, a tax-exempt organization, and the CEO of Organization B, a for-profit taxable organization wholly owned by Tom. Tom is considered to exercise substantial influence over both organizations. So, *Relationship 8* is met. If no other relationship is met, then Tom's compensation from Organization B is not reported in an attachment to line 75c of Organization A's Form 990, however Organization A is required to report the name and EIN of Organization B, and a description of the relationship between the two organizations in the line 75c attachment.

Example 4. The facts are the same as in *Example 3*, except that Tom is the sole trustee of both organizations. So, Organizations A and B are related under *Relationship 2* because they are controlled by the same person. In this situation, Tom's compensation from Organization B (as well as the name and EIN of Organization B, and a description of the relationship between the two organizations) is reported in an attachment to line 75c of Organization A's Form 990.

However, if Tom serves Organization A without compensation and none of the other relationships described in 1 or 3 through 6 are met, then because of the *Volunteer exception*, Tom's compensation from Organization B is not reported by Organization A. However, the relationship between Organization A and Organization B must be reported.

Example 5. Organization A is filing its Form 990. Organization B is a taxable subsidiary of Organization A; so, Organizations A and B are related under *Relationship 1* because A controls B.

Organization A contracts with Company Y for janitorial services. Company Y is listed as one of Organization A's highest-compensated independent contractors. Organization B also contracts with Company Y for janitorial services. Company Y is not a 35% controlled entity of a disqualified person for organization A or Organization B. So, Company Y is listed in Organization A's Schedule A, Part II-B, and Company Y also receives compensation from Organization B, which is related to Organization A.

However, Company Y meets the requirements of the *Common independent contractor exception*, earlier. Company Y is not considered to exercise substantial influence over either Organization A or Organization B if they were applicable tax-exempt organizations within the meaning of section 4958(e). Because of the *Common independent contractor exception* earlier, the relationship between Company Y and Organization B, and Company Y's compensation from Organization B for such janitorial services is not reported by Organization A.

None of Organization A's officers, directors, etc., receive compensation from Organization B. In conclusion, Organization A does not report its relationship with Organization B in an attachment to line 75c, and Organization A answers "No" on line 75c.

Example 6. The facts are the same as in *Example 5*, except that one of Organization A's officers, Sue, receives compensation from Organization B. Organization A must report in an attachment to line 75c its relationship with Organization B, and Sue's compensation from Organization B for services provided to Organization B. Even though Organization A must report Sue's compensation from Organization B, Organization A does not report Company Y's compensation from Organization B because of the *Common independent contractor exception*.

Part V-B. Former Officers, Directors, Trustees, and Key Employees That Received Compensation or Other Benefits

List each former officer, director, trustee, and key employee (as defined in Part V-A) of the organization or disregarded entity described in Regulations sections 301.7701-1 through 301.7701-3 that received compensation or other benefits during the reporting year.

For purposes of reporting all amounts in columns (B) through (E) in Part V-B, either use the organization's tax year, or the calendar year ending within such tax year.

Give the preferred address at which these former officers, directors, etc., want the Internal Revenue Service to contact them.

Use an attachment if there are more persons to list in Part V-B.

Show all forms of cash and noncash compensation or benefits received by each listed former officer, director, etc., whether paid currently or deferred.

If the organization pays any other person, such as a management services company, for the services provided by any of its former officers, directors, trustees, or key employees, report the compensation and other items in Part V-A as if the organization had paid the former officers, directors, etc., directly.

A failure to fully complete Part V-B can subject both the organization and the individuals responsible for such failure to penalties for filing an incomplete return. See *General Instruction K*. In particular, entering the phrase on Part V-B, "Information available upon request," or a similar phrase, is not acceptable.

The organization may also provide an attachment to explain the entire 2006 compensation package for any person listed in Part V-B.

Each person listed in Part V-B should report the listed compensation on his or her income tax return unless the Code specifically excludes any of the payments from income tax. See Pub. 525 for details.

Column (A)

Report the name and address of each person who was a former officer, director, trustee, or key employee (defined in *Part V-A*) at any time during the calendar year.

Column (B)

In column (B), report all secured and unsecured loans and salary advances to former officers, directors, trustees and key employees.

Column (C)

For each person listed, report salary, fees, bonuses, and severance payments paid. Include current-year payments of amounts reported or reportable as deferred compensation in any prior year.

Column (D)

Include in this column all forms of deferred compensation and future severance payments (whether or not funded; whether or not vested; and whether or not the deferred compensation plan is a qualified plan under section 401(a)). Include also payments to welfare benefit plans on behalf of the officers, directors, etc. Such plans provide benefits such as medical, dental, life insurance, severance pay, disability, etc. Reasonable estimates may be used if precise cost figures are not readily available.

Unless the amounts were reported in column (C), report, as deferred compensation in column (D), salaries and other compensation earned during the period covered by the return, but not yet paid by the date the organization files its return.

Column (E)

Enter both taxable and nontaxable fringe benefits (other than *de minimis* fringe benefits described in section 132(e)). Include expense allowances or reimbursements that the recipients must report as income on their separate income tax returns. Examples include amounts for which the recipient did not account to the organization or allowances that were more than the payee spent on serving the

Illinois Compiled Statutes

PROFESSIONS AND OCCUPATIONS
(225 ILCS 460/) Solicitation for Charity Act.

* * * * *

(225 ILCS 460/2) (from Ch. 23, par. 5102)

Sec. 2. Registration; rules; penalties.

* * * * *

(f) Subject to reasonable rules and regulations adopted by the Attorney General, the register, registration statements, annual reports, financial statements, professional fund raisers' contracts, bonds, applications for registration and re-registration, and other documents required to be filed with the Attorney General shall be open to public inspection.

* * * * *

(Source: P.A. 90-469, eff. 8-17-97; 91-444, eff. 8-6-99.)

* * * * *

(225 ILCS 460/4) (from Ch. 23, par. 5104)

* * * * *

Sec. 4. (a) Every charitable organization registered pursuant to Section 2 of this Act which shall receive in any 12 month period ending upon its established fiscal or calendar year contributions in excess of $150,000 and every charitable organization whose fund raising functions are not carried on solely by staff employees or persons who are unpaid for such services, if the organization shall receive in any 12 month period ending upon its established fiscal or calendar year contributions in excess of $25,000, shall file a written report with the Attorney General upon forms prescribed by him, on or before June 30 of each year if its books are kept on a calendar basis, or within 6 months after the close of its fiscal year if its books are kept on a fiscal year basis, which written report shall include a financial statement covering the immediately preceding 12 month period of operation. Such financial statement shall include a balance sheet and statement of income and expense, and shall be consistent with forms furnished by the Attorney General clearly setting forth the following: gross receipts and gross income from all sources, broken down into total receipts and income from each separate solicitation project or source; cost of administration; cost of solicitation; cost of programs designed to inform or educate the public; funds or properties transferred out of this State, with explanation as to recipient and purpose; cost of fundraising; compensation paid to trustees; and total net amount disbursed or dedicated for each major purpose, charitable or otherwise. Such report shall also include a statement of any changes in the information required to be contained in the registration form

filed on behalf of such organization. The report shall be signed by the president or other authorized officer and the chief fiscal officer of the organization who shall certify that the statements therein are true and correct to the best of their knowledge, and shall be accompanied by an opinion signed by an independent certified public accountant that the financial statement therein fairly represents the financial operations of the organization in sufficient detail to permit public evaluation of its operations. Said opinion may be relied upon by the Attorney General.

* * * * *

(Source: P.A. 90-469, eff. 8-17-97; 91-444, eff. 8-6-99.)

Illinois Compiled Statutes

CRIMINAL OFFENSES
(720 ILCS 5/) Criminal Code of 1961.

ARTICLE 14. EAVESDROPPING

(720 ILCS 5/14-1) (from Ch. 38, par. 14-1)

Sec. 14-1. Definition.

(a) Eavesdropping device.

An eavesdropping device is any device capable of being used to hear or record oral conversation or intercept, retain, or transcribe electronic communications whether such conversation or electronic communication is conducted in person, by telephone, or by any other means; Provided, however, that this definition shall not include devices used for the restoration of the deaf or hard-of-hearing to normal or partial hearing.

(b) Eavesdropper.

An eavesdropper is any person, including law enforcement officers, who is a principal, as defined in this Article, or who operates or participates in the operation of any eavesdropping device contrary to the provisions of this Article.

(c) Principal.

A principal is any person who:

(1) Knowingly employs another who illegally uses an eavesdropping device in the course of such employment; or

(2) Knowingly derives any benefit or information from the illegal use of an eavesdropping device by another; or

(3) Directs another to use an eavesdropping device illegally on his behalf.

(d) Conversation.

For the purposes of this Article, the term conversation means any oral communication between 2 or more persons regardless of whether one or more of the parties intended their communication to be of a private nature under circumstances justifying that expectation.

* * * * *

(Source: P.A. 91-657, eff. 1-1-00.)

(720 ILCS 5/14-2) (from Ch. 38, par. 14-2)

Sec. 14-2. Elements of the offense; affirmative defense.

(a) A person commits eavesdropping when he:

(1) Knowingly and intentionally uses an eavesdropping device for the purpose of hearing or recording all or any part of any conversation or intercepts, retains, or transcribes electronic communication unless he does so (A) with the consent of all of the parties to such conversation or electronic communication or (B) in accordance with Article 108A or Article 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended; or

* * * * *

(3) Uses or divulges, except as authorized by this Article or by Article 108A or 108B of the "Code of Criminal Procedure of 1963", approved August 14, 1963, as amended, any information which he knows or reasonably should know was obtained through the use of an eavesdropping device.

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(Source: P.A. 91-657, eff. 1-1-00.)

* * * * *

(720 ILCS 5/14-4) (from Ch. 38, par. 14-4)

Sec. 14-4. Sentence.

(a) Eavesdropping, for a first offense, is a Class 4 felony and, for a second or

subsequent offense, is a Class 3 felony.

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(Source: P.A. 91-357, eff. 7-29-99; 91-657, eff. 1-1-00.)

Oregon Revised Statutes

Chapter 128 — Trusts; Charitable Activities

2007 EDITION

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CHARITABLE TRUST AND CORPORATION ACT

* * * * *

128.670 Filing of reports; rules; fees; authority of Attorney General relating to reports; civil penalty.

(1) Except as otherwise provided, every charitable organization subject to ORS 128.610 to 128.750 shall, in addition to filing copies of the instruments previously required, file with the Attorney General periodic written reports setting forth information as to the nature of the assets held for charitable purposes and the administration thereof by the corporation or trustee.

* * * * *

(6) The Attorney General shall make rules as to the time for filing reports, the contents thereof, and the manner of executing and filing them. The Attorney General may make additional rules and amend existing rules as necessary for the proper administration of the Charitable Trust and Corporation Act.

* * * * *

[1963 c.583 §8; 1971 c.589 §7; 1973 c.506 §40; 1973 c.775 §4; 1975 c.388 §5; 1981 c.593 §7; 1985 c.730 §9; 1991 c.734 §7; 2007 c.571 §1]

* * * * *

Oregon Revised Statutes

Chapter 192 — Records; Public Reports and Meetings

2007 EDITION

* * * * *

ARCHIVING OF PUBLIC RECORDS

192.005 Definitions for ORS 192.005 to 192.170. As used in ORS 192.005

to 192.170, unless the context requires otherwise:

* * * * *

(5) "Public record" includes, but is not limited to, a document, book, paper, photograph, file, sound recording or machine readable electronic record, regardless of physical form or characteristics, made, received, filed or recorded in pursuance of law or in connection with the transaction of public business, whether or not confidential or restricted in use. * * * * *

* * * * *

[1961 c.160 §2; 1965 c.302 §1; 1983 c.620 §11; 1989 c.16 §1; 1999 c.55 §1; 1999 c.140 §1]

* * * * *

192.420 Right to inspect public records; notice to public body attorney.

(1) Every person has a right to inspect any public record of a public body in this state, except as otherwise expressly provided by ORS 192.501 to 192.505.

* * * * *

Federal Rule of Civil Procedure 26(c)(1)

Rule 26. Duty to Disclose; General Provisions Governing Discovery

* * * * *

(c) Protective Orders.

(1) In General.

A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending — or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

* * * * *

Federal Rule of Civil Procedure 34(b)(2)(C), (E)(i)–(ii)

Rule 34. Producing Documents, Electronically Stored Information, and Tangible Things, or Entering onto Land, for Inspection and Other Purposes

* * * * *

(b) Procedure.

* * * * *

(2) Responses and Objections.

* * * * *

(C) *Objections*. An objection to part of a request must specify the part and permit inspection of the rest.

* * * * *

(E) *Producing the Documents or Electronically Stored Information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing

electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

* * * * *

Federal Rule of Civil Procedure 37(b)(2)(A)

Rule 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

* * * * *

(b) Failure to Comply with a Court Order.

* * * * *

(2) Sanctions in the District Where the Action Is Pending.

(A) For Not Obeying a Discovery Order. If a party or a party's officer, director, or managing agent — or a witness designated under Rule 30(b)(6) or 31(a)(4) — fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;

(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;

(iii) striking pleadings in whole or in part;

(iv) staying further proceedings until the order is obeyed;

(v) dismissing the action or proceeding in whole or in part;

(vi) rendering a default judgment against the disobedient party; or

(vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Federal Rule of Civil Procedure 41(a)(2)

Rule 41. Dismissal of Actions

(a) Voluntary Dismissal.

* * * * *

(2) By Court Order; Effect.

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

Federal Rule of Civil Procedure 52(a)(6), 52(b)

Rule 52. Findings and Conclusions by the Court; Judgment on Partial Findings

(a) Findings and Conclusions.

* * * * *

(6) Setting Aside the Findings.

Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.

(b) Amended or Additional Findings.

On a party's motion filed no later than 28 days after the entry of judgment, the court may amend its findings — or make additional findings — and may amend the judgment accordingly. The motion may accompany a motion for a new trial under Rule 59.

Federal Rule of Civil Procedure 60(b)

Rule 60. Relief from Judgment or Order

* * * * *

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding.

On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

* * * * *

Federal Rules of Evidence

Rule 802. Hearsay Rule

Hearsay is not admissible except as provided by these rules or by other rules prescribed by the Supreme Court pursuant to statutory authority or by Act of Congress.

* * * * *

Rule 805. Hearsay Within Hearsay

Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these rules.

DISTRICT OF MASSACHUSETTS LOCAL RULES

RULE 5.1 FORM AND FILING OF PAPERS

* * * * *

(e) Removal of Papers. Except as otherwise provided, papers filed in the office of the clerk shall not be removed from the office except by a judge, official, or employee of the court using the papers in official capacity, or by order of the court. All other persons removing papers from the office of the clerk shall prepare, sign and furnish to the clerk a descriptive receipt therefor in a form satisfactory to the clerk.

RULE 7.1 MOTION PRACTICE

(a) Control of Motion Practice.

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(2) *Motion Practice.* No motion shall be filed unless counsel certify that they have conferred and have attempted in good faith to resolve or narrow the issue.

* * * * *

RULE 7.2 IMPOUNDED AND CONFIDENTIAL MATERIALS

(a) Whenever a party files a motion to impound, the motion shall contain a statement of the earliest date on which the impounding order may be lifted, or a statement, supported by good cause, that the material should be impounded until further order of the court. The motion shall contain suggested custody arrangements for the post-impoundment period.

(b) The clerk shall attach a copy of the order to the envelope or other container holding the impounded material.

(c) If the impoundment order provides a cut-off date but no arrangements for custody, the clerk (without further notice to the court or the parties) shall place the material in the public information file upon expiration of the impoundment period. If the order provides for post-impoundment custody by counsel or the parties, the materials must be retrieved immediately upon expiration of the order, or the clerk (without further notice to the court or the parties) shall place the material in the public file.

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

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

RULE 26.5 UNIFORM DEFINITIONS IN DISCOVERY REQUESTS

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(c) Definitions. The following definitions apply to all discovery requests:

* * * * *

(5) *Parties.* The terms "plaintiff" and "defendant" as well as a party's full or abbreviated name or a pronoun referring to a party mean the party and, where applicable, its officers, directors, employees, partners, corporate parent, subsidiaries, or affiliates. This definition is not intended to impose a discovery obligation on any person who is not a party to the litigation.

RULE 26.6 COURT FILINGS AND COSTS

(a) Nonfiling of Discovery Materials. Automatic or voluntary disclosure materials, depositions upon oral examinations and notices thereof, depositions upon written questions, interrogatories, requests for documents, requests for admissions, answers and responses thereto, and any other requests for or products of the discovery process shall not be filed unless so ordered by the court or for use in the proceeding.

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