In The
United States Court of Appeals
For The First Circuit

No. 09-2615

THREE ANGELS BROADCASTING NETWORK, INC.,
an Illinois non-profit corporation ;
DANNY LEE SHELTON,

Appellees,

v.

GAILON ARTHUR JOY and ROBERT PICKLE,

Appellants.

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

BRIEF OF APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Appellee Three Angels Broadcasting Network, Inc. submits the following as its Corporate Disclosure Statement. Three Angels Broadcasting Network, Inc. has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

Pursuant to Fed. R. App. P. 34(a) and Local Rule 34.0(a), Appellees Three Angels Broadcasting Network and Danny Lee Shelton respectfully request that the Court schedule this case for oral argument. Although Appellants' brief and appendix creates the illusion that this case is complex and contains extensive numbers of issues, this is not so. The dispositive issues in this case are quite narrow. Thus, this Court would likely find it helpful to be able to ask questions of the parties in order to focus its attention on the narrow issues to enhance the Court's decision process.

JURISDICTIONAL STATEMENT

Pursuant to Fed. R. App. P. 28(b), Appellees Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively referred to as "3ABN") state:

(1) Pursuant to 28 U.S.C. § 1332, subject-matter jurisdiction is proper based on diversity of citizenship. Plaintiff/Appellee Three Angels Broadcasting Network is a non-profit corporation organized and existing under the laws of the State of Illinois, with its principal place of business in West Frankfort, Illinois. (JA037). Individual Plaintiff/Appellee Danny Lee Shelton is a resident of Illinois. (*Id*.). Defendant/Appellant Gailon Arthur Joy is a resident of Sterling, Massachusetts. (*Id*.). Defendant/Appellant Robert Pickle is a resident of Halstad, Minnesota. (*Id*.). The amount in controversy exceeds the sum of $75,000, exclusive of interest and costs. (*Id*.).

Subject-matter jurisdiction is also proper based upon 15 U.S.C. § 1121 as an action arising under the Federal Trademark Act and 28 U.S.C. § 1338 as an action arising under an act of Congress related to copyright and trademark. (*Id*.).

(2) This Court has jurisdiction under 28 U.S.C. § 1291. Pursuant to Fed. R. App. P. 3(a) and 4, Appellants bring this appeal for review of a final decision of the United States District Court, District of Massachusetts, the Honorable F. Dennis Saylor, IV presiding. Pickle and Joy have appealed as a matter of right from the district court's order dated October 26, 2009. (DA027). This order

denied Pickle and Joy's: (1) motion for reconsideration and to amend or alter the judgment; (2) motion for leave to file exhibits and a related affidavit under seal; and (3) motion for sanctions against 3ABN's counsel under Fed. R. Civ. P. 11. (DA027-029). Further, by incorporation, Pickle and Joy appeal: (1) the district court's order denying its motion for costs (DA022); and (2) the district court's order dismissing this case under Fed. R. Civ. P. 41. (DA002).

STATEMENT OF LEGAL ISSUES

1. Whether the district court abused its discretion when granting Plaintiffs/Appellees' motion for voluntary dismissal under Fed. R. Civ. P. 41(a)(2) without prejudice, subject to the condition that any future lawsuit involving the same facts and circumstances be brought in the same jurisdiction.

   On October 30, 2008, the district court granted plaintiffs' motion to dismiss without prejudice under Fed. R. Civ. P. 41(a)(2) on the condition that any renewed claims brought by plaintiffs should be in that court. On October 26, 2009, the district court denied defendants' motion for reconsideration and to amend or alter the judgment.

2. Whether the district court abused its discretion when it denied Defendants/Appellants' motion for costs and attorneys fees.

   On April 13, 2009, the district court issued an order denying defendants' motion for costs and attorneys fees. On October 26, 2009, the district court denied defendants' motion for reconsideration and to amend or alter the judgment.

3. Whether the district court abused its discretion when it denied Defendants/Appellants' two motions for leave to file confidential documents under seal.

   On April 15, 2009, the district court issued an order denying defendants' motion for leave to file confidential documents under seal. On October 26, 2009, the district court denied a similar motion for leave to file confidential documents under seal.

4. Whether the district court abused its discretion when it refused to grant Defendants/Appellants' motion to sanction Plaintiffs/Appellees' counsel under Fed. R. Civ. P. 11.

   On October 26, 2009, the district court denied defendants' motion for sanctions.

STATEMENT OF THE CASE

Appellees/Plaintiffs Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively "3ABN") commenced suit on April 5, 2007, seeking to prohibit Appellants/Defendants Robert Pickle and Gailon Arthur Joy from using a website that incorporated the "3ABN" logo to lure potential donors to that unaffiliated website, which disseminated defamatory information about 3ABN and Shelton. The suit alleged theories of defamation, tortious interference with prospective business relations, and violation of trademark laws. 3ABN's complaint identified 24 specific defamatory statements that Pickle and Joy made on their web site and demanded retraction.

Although Pickle and Joy claimed to have proof of the truth of their defamatory statements about plaintiffs, they refused to reveal their sources on grounds of an alleged reporter's privilege. Pickle and Joy then began the discovery process, purportedly to seek the truth of their assertions directly from 3ABN. They sought virtually every financial and business record related to 3ABN and Shelton dating back to the inception of 3ABN in the mid-1980's. Through the discovery process, 3ABN disclosed thousands of pages of documents. Intent upon gaining as much information as possible, Pickle and Joy then issued six subpoenas from third parties in different states. 3ABN moved for a protective order to protect confidential information, which the district court granted. The district court later

struck Pickle's document requests, requiring him to narrow these requests, and prohibited defendants from serving any further subpoenas without pre-approval from the court.

In October 2008, plaintiffs made a motion for voluntary dismissal because the initial goals of the lawsuit had been met by means unrelated to litigation. Specifically, 3ABN had purchased the offending websites from Joy's trustee after he declared bankruptcy, 3ABN had received favorable rulings from governmental agencies investigating its conduct, it was apparent that Pickle and Joy would be unable to pay any damage award, and 3ABN's Board of Directors believed that donation levels to 3ABN had been restored. The district court, the Honorable F. Dennis Saylor IV presiding, granted 3ABN's motion for voluntary dismissal without prejudice on the condition that any new litigation be brought within the same jurisdiction. In doing so, the district court pointed out that it did not address the merits of the case, but relied upon 3ABN's confirmation that the goals of its lawsuit had been met. The district court also granted 3ABN's motion for the return of all confidential documents.

After the district court granted the motion, however, the litigation exploded. In the 19 months from the inception of this case to its dismissal in November of 2008, there were 129 electronic court filings in this matter. But since then, Pickle and Joy have managed to keep this case alive in the district court for an additional

two years including over 250 electronic court filings in the district court and this Court. They have more than doubled the size and length of this litigation by their meritless and duplicative motions to reconsider, motions to supplement, objections to rulings of the magistrate, and appeals when their motions are denied.

The inception of Pickle and Joy's campaign to resurrect 3ABN's claims against them began with a premature notice of appeal, which has already been briefed. This was followed by a motion for costs, two motions to file under seal, a motion to reconsider and to amend findings, and a motion for Rule 11 sanctions against 3ABN's counsel. The two motions to file under seal included irrelevant confidential information that the district court had not considered in the original motion for voluntary dismissal and had twice rejected. On October 26, 2009, the district court denied Pickle and Joy's motion for reconsideration and to amend or alter the judgment, the motion for leave to file under seal, and the motion for sanctions. Pickle and Joy then filed a notice of appeal for the second time on November 23, 2009 from this order. Since November 2009, Pickle and Joy have successfully delayed briefing on this appeal for an entire year through their various motions to enlarge the appellate record to include documents that the district court never considered and outright rejected below as part of the litigation record. This Court and the district court have consistently resisted these efforts.

Despite this large and complex litigation record, the bottom line is that 3ABN is simply attempting to end this litigation based upon 3ABN's Board of Director's belief that its objectives have been achieved. Yet despite their claims of financial woe, Pickle and Joy have continued to extend this costly exercise in order to continue discovery of confidential documentation that they would like to disseminate to the public, but cannot under the protective order. Pickle and Joy now appeal the district court's orders: (1) of voluntary dismissal without prejudice; (2) rejecting Pickle and Joy's multiple motions to file under seal; (3) rejecting Pickle and Joy's motion for costs and attorneys' fees; and (4) rejecting Pickle and Joy's motion for sanctions against 3ABN's counsel.

STATEMENT OF THE FACTS

1. 3ABN and Shelton commenced suit alleging defamation.

Plaintiffs/Appellees Three Angels Broadcasting Network, Inc. and Danny Lee Shelton (collectively "3ABN") commenced suit on April 5, 2007, seeking to prohibit Defendants/Appellants Robert Pickle and Gailon Arthur Joy[1] from using a website that incorporated the "3ABN" logo to lure potential donors and then disseminate defamatory information about 3ABN and Shelton. (JA036).[2] The Complaint contained four counts: Count I stated a claim for infringement of

[1] Pickle and Joy have been acting pro se since their counsel withdrew in November 2007. (JA005).

[2] "JA" refers to the joint appendix.

trademark under 15 U.S.C. § 1114 arising out of Pickle's and Joy's alleged use of 3ABN's marks and registered domain names called "save3ABN.com" and "save3ABN.org." (JA051). Count II stated a claim for dilution of trademark under 15 U.S.C. § 1125(c) arising out of the operation and maintenance of the same websites. (JA052). Count III stated a claim for defamation arising out of specific statements published on the internet at the website www.save3ABN.com, which contained false accusations of the commission of crimes by 3ABN and Shelton. (JA053). Finally, Count IV of the Complaint stated a claim for intentional interference with economic relations, arising out of the conduct that was the subject of the defamation count, which had the impact of interfering with 3ABN's relationships with its donors. (JA054).

2. Discovery and the protective order

In August 2007, Joy filed for bankruptcy protection. (JA233). After the automatic stay from the bankruptcy filing was lifted, the parties engaged in initial discovery as well as negotiations for a confidentiality order. Pickle and Joy moved to compel Rule 26(a)(1) materials and for sanctions on December 14, 2007. (Docket #35).[3] On December 18, 2007, 3ABN moved for a protective order to ensure that disclosure of trade secret and confidential information would be appropriately limited. (Docket #40). Magistrate Judge Hillman heard these

[3] "Docket #" refers to the docket number in the district court.

motions on March 7, 2008, granted the motion to compel only with respect to non-confidential materials, granted the motion for protective order, and invited the parties to submit proposed protective orders. (JA009-10). Magistrate Judge Hillman then issued the confidentiality and protective order on April 17, 2008. (DA030).[4]

While the above-discussed motions were pending, Pickle served his written requests for production of documents on 3ABN and Shelton in late November and early December 2007. (Docket #76-2 at 1, 17). During this time, Defendants publicly acknowledged that their strategy for litigation was to reach beyond the complaint to obtain irrelevant information, where Joy states, "[u]nfortunately, because of the very narrow charges pressed by 3ABN and Danny Lee Shelton, we must substantially expand the case to bring the most damaging and certain-to-sway-the-jury details." (Docket #76-5 at 33).

To further this goal, beginning in late November 2007 and continuing until May 2008, Pickle and Joy served subpoenas on six non-parties, including: (1) Remnant Publications in Michigan demanding information concerning Shelton's royalties from the publication of his book directly from the publisher; (2) Gray Hunter Stenn LLP in Illinois demanding all financial and accounting records for both 3ABN and Shelton from their accountants; (3) MidCountry Bank in

[4] "DA" refers to Pickle and Joy's addendum as attached to their appellate brief.

Minnesota demanding Shelton's personal bank records dating back to 1998 from his bank; (4) Century Bank & Trust in Massachusetts demanding 3ABN's financial records from 2003 onward; (5) Kathi Bottomley in California demanding records from this ex-employee who had filed a charge of discrimination against 3ABN that had been dismissed; and (6) Glenn Dryden in West Virginia demanding pictorial and documentary information concerning Danny Shelton's brother, Tommy Shelton. (Docket #76-2 at 34, #76-3 at 1, 8, 10, 14, 16). 3ABN resisted these efforts as an attempted end run around the protective order, which was still under consideration at the time. Ultimately, the MidCountry Bank documents and the Gray Hunter Stenn documents were ordered produced under seal to Magistrate Judge Hillman. (Docket #76-3 at 20). The Remnant documents, the Bottomley documents, and the Dryden documents were produced directly to Pickle. (Docket #76-3 at 52; JA135).

In May 2008, Pickle moved to compel documents in conjunction with his earlier discovery request. (Docket #61). 3ABN then filed a motion for protective order to limit the scope and methods of discovery. (Docket #74). On September 11, 2008, Magistrate Judge Hillman denied appellants' motion to compel further documents from 3ABN and granted 3ABN's motion for a protective order. (JA202-206). In doing so, Magistrate Judge Hillman recognized that Pickle's requests for production of documents were overbroad. (JA203-04). The district

court struck Pickle's initial document requests and ordered that a new set be served that complied with the federal rules. (*Id*.).

a. The MidCountry Bank documents

After Pickle and Joy served the subpoena on MidCountry Bank in Minnesota seeking confidential business, financial and operational records, 3ABN moved to quash this subpoena. (EX183). The Minnesota Court, the Honorable Arthur J. Boylan presiding, denied 3ABN's motion to quash the subpoena on July 1, 2008, but with specific conditions. (*Id*.). The court ordered Pickle to pay MidCountry Bank's reasonable costs in responding to the subpoena. (EX184). Upon payment of these costs, MidCountry Bank was to ship all documents under seal to Magistrate Judge Timothy S. Hillman in Massachusetts, whereby Judge Hillman could determine what to do with the documents. (*Id*.). The MidCountry records were then produced and delivered to the Federal Courthouse in Worcester, Massachusetts on September 12, 2008. (Docket #206-2).

b. The Remnant Publications documents

Remnant Publications objected to Pickle and Joy's third-party subpoena to it in Michigan demanding information concerning Shelton's royalties from the publication of his book. (EX643). However, the United States District Court, Western District of Michigan Southern Division compelled disclosure of the requested documents. (*Id*.). These documents, subject to the protective order

issued in April 2008, were delivered directly to Pickle. (Docket #155-2). These documents were not submitted into the record before the district court dismissed this lawsuit. It was only in conjunction with Pickle and Joy's reply brief in support of their motion for costs that they first made a motion to file the Remnant documents and other documents under seal. (Docket #153). The district court ultimately denied this motion. (DA026).

Pickle and Joy then made a second attempt to add the Remnant documents to the record in conjunction with their motion for reconsideration. (Docket #173). The district court again denied this motion, confirming that these documents "should have been returned to plaintiffs some time ago." (DA029).

3. The district court granted plaintiffs' motion for voluntary dismissal.

After the commencement of this lawsuit, certain developments made much of the relief sought in the Complaint either moot or unnecessary. (JA236). Count I and Count II had sought an order shutting down two internet web sites owned and operated by Pickle and Joy. However, the offending websites had been shut down as a result of Joy's bankruptcy proceedings. (JA237). Although the complaint sought monetary relief for Pickle's and Joy's violation of federal trademark laws and common law claims, 3ABN discovered that it would be unlikely that they would recover any monetary relief based upon Joy's bankruptcy and Pickle's lack of monetary resources. (JA233; Docket #122-2).

Although 3ABN and Shelton were motivated by a desire for a judicial determination that the statements by Pickle and Joy concerning financial misconduct were false, by October of 2008 these concerns had abated. (JA237-38). While the lawsuit was ongoing, the Internal Revenue Service conducted an investigation of 3ABN and Shelton and concluded that there was no sufficient evidence to warrant prosecution. (*Id.*). Further, an ongoing EEOC investigation involving 3ABN's former employees had been dismissed for insufficient evidence. (JA238).

Finally, in the week preceding its filing of the motion to dismiss, 3ABN reviewed figures indicating that donation levels had been restored to the levels they enjoyed before Pickle and Joy began their campaign of disparagement. (JA238-39). This indicated to the Board that the public's confidence in 3ABN has been restored. As 3ABN's Board Chairman, Dr. Walt Thompson, stated:

> When the Board came to the conclusion that 3ABN's reputation was no longer being significantly harmed by the Defendants' activities and that continuation of the lawsuit could not achieve more than what we had already achieved by other means, it was time to shut the lawsuit down.

(*Id.*). The board then voted to direct its attorneys to dismiss the lawsuit. (JA239).

3ABN moved for voluntary dismissal under Fed. R. Civ. P. 41(a)(2) on October 23, 2008 (Docket #120, 121). In the same motion, 3ABN moved this Court to order the return of all confidential information pursuant to the protective

order issued on April 17, 2008, including but not limited to the MidCountry Bank records. (*Id*.). At the time dismissal was sought, the case was in the document discovery phase. (JA232-33). No depositions had been taken, nor had any dispositive motions been filed or served. (*Id*.). The parties had recently stipulated to an order extending discovery and unexpired deadlines by 90 days. (*Id*.).

On October 30, 2008, the district court considered the motion to dismiss at a previously scheduled status conference. (DA003). Pickle and Joy did not object to the district court hearing this motion at that time. (DA005). After hearing the arguments of both parties, the court granted the motion for voluntary dismissal, without prejudice, subject to the condition that any claims by the plaintiffs involving the same or similar facts and circumstances must be commenced in the same jurisdiction, a condition that had been proposed by 3ABN in answer to the concern that 3ABN might be planning to commence similar litigation in another forum. (DA013-14; JA020). The district court specifically stated that it had not reached the merits of the litigation in its decision:

> 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.

(DA014). At the time of dismissal, Pickle and Joy complained about the cost to obtain the MidCountry records, and the district court invited them to request reasonable costs and fees by motion. (DA017). The district court further granted 3ABN's motion for return of all documents designated as confidential, pursuant to the confidentiality order. (DA014).

On October 31, 2008, an Electronic Clerk's Notes of the hearing issued that summarized Judge Saylor's rulings, but incorporated the verbal ruling by reference. The district court ordered that "all confidential documents be returned, All subpoenas are ordered moot, Records in possession of Mag. Judge will be returned . . . ." (Electronic Order dated 10/31/08). On November 3, 2008, the court issued an Order of Dismissal. (DA002).

4. The appeal

Pickle and Joy then filed a premature Notice of Appeal on November 13, 2008. (Docket #133). On the same day, Pickle and Joy filed a motion for costs and attorneys' fees. (JA276). It was in conjunction with this motion for costs and attorneys' fees that Pickle and Joy first sought to file under seal copies of documents obtained through the third-party subpoena to Remnant Publications. (JA344).

In the meantime, the appellate briefing schedule continued. The parties filed briefs in February and March 2009. On April 13, 2009, this Court denied Pickle

and Joy's motion for costs and attorneys' fees. (DA022). On April 27, 2009, Pickle and Joy filed a motion to reconsider and to amend findings. (Docket # 169). In this motion, defendants attempted to argue the merits of the case as a basis for reconsideration and attempted to add "new evidence" to the record. (JA393). Pickle and Joy then filed a motion for sanctions under Fed. R. Civ. P. 11 based upon 3ABN's responsive brief to their motion to reconsider, complaining about statements in 3ABN's legal memoranda. (Docket #183, JA449).

On August 19, 2009, this Court ordered the appeal held in abeyance pending the disposition of the motion for reconsideration by the district court. (First Circuit Order dated 8/19/09). On October 26, 2009, the district court denied Pickle and Joy's motion for reconsideration and to amend or alter the judgment, motion for leave to file under seal, and motion for sanctions. (DA027). In doing so, the district court noted that "[d]efendants are not entitled to argue the same matter twice simply because they are unhappy with the result." (DA028). The district court also denied Pickle and Joy's motion to file documents under seal. (DA029). Finally, the district court denied Pickle and Joy's motion for Rule 11 sanctions. (*Id.*).

Pickle and Joy appealed from this order on November 23, 2009. (JA493). In the meantime, Magistrate Judge Hillman's office returned the MidCountry Bank records to 3ABN's counsel. (JA368).

5. Defendants' attempt to enlarge the appellate record.

After Pickle and Joy filed their current notice of appeal, they filed a motion to file the same Remnant and Westphal documents under seal with this Court that the district court had rejected below. (First Circuit motion dated 11/19/09). This Court denied defendants' motion to enlarge the record to include these documents because the documents were never part of the district court record. (First Circuit Order dated 12/4/09).

Five days later, Pickle and Joy made a motion in the district court to forward the MidCountry Bank records to the First Circuit. (Docket #205). Plaintiffs opposed this motion, and Magistrate Judge Hillman denied this motion. (Electronic Order dated 1/29/10).

Judge Saylor recused himself in January 2010 after Pickle and Joy made ethical allegations against him and his court administrative staff. (JA538; Docket #230, ¶ 3). Pickle and Joy then filed objections to Magistrate Judge Hillman's January 29, 2010 orders denying their motion to forward the MidCountry documents to the First Circuit. (Docket #229).

Pickle and Joy then filed yet another motion for leave to file the Remnant documents in the district court under seal under the guise that they responded to statements that 3ABN made in its responsive brief to their objections to the Magistrate Judge's January 2010 order. (Docket #236). They filed an additional

motion for leave to file two supplemental exhibits. (Docket #245). The district court denied the motion to file these additional documents because they were irrelevant on appeal. (Electronic Order dated 5/10/10). Finally, on October 19, 2010, the district court overruled Pickle and Joy's objection to the Magistrate Judge's order. (Docket #261). This order finally allowed the First Circuit appeal to move forward.

SUMMARY OF ARGUMENT

A district court has broad discretion to grant a motion for voluntary dismissal without prejudice under Fed. R. Civ. P. 41(a)(2) unless the court finds that the defendant will suffer legal prejudice. Legal prejudice is prejudice to a legal interest, it is not a defendant's lost opportunity to retaliate against a plaintiff by suing for malicious prosecution. Moreover, legal prejudice is not a defendant's lost opportunity for a decision on the merits of the case. The district court acted well within its broad discretion when it concluded that 3ABN's explanation for dismissal was sufficient to support dismissal without prejudice — 3ABN's Board of Directors had simply determined that the initial goals of the litigation had been achieved by other means. The district court also acted within its discretion when it ordered the return of confidential discovery documents.

The imposition of costs is not required under Rule 41, but, it may be considered necessary in the district court's discretion for the defendant's

protection. Courts have declined to exercise an exception to the "American Rule" — where each party is responsible for its own attorneys' fees — unless the court concludes that the suit was brought to harass, embarrass or abuse the defendants. The district court acted within its broad discretion when it denied Pickle and Joy's motion for costs and attorneys' fees, concluding that there was no evidence that the lawsuit had been brought for an improper purpose.

On a motion for reconsideration of a grant of voluntary dismissal, the district court has the broad discretion to reconsider its earlier order based upon errors of law or based upon newly discovered evidence. A motion for reconsideration is not an opportunity for defendants to relitigate the same issues simply because they were unhappy with the result. The district court acted within its broad discretion when it declined to reconsider its order dismissing this lawsuit without prejudice. Moreover, the district court was well within its discretion to admit or decline to add confidential documents to the record under seal. The confidential documents that Pickle and Joy have repeatedly attempted to include in the record — the Remnant and Westphal documents — were never submitted in conjunction with the motion for voluntary dismissal. Finally, the district court acted within its broad discretion when it refused to sanction 3ABN's counsel under Rule 11.

ARGUMENT

I. Standard of review

The court of appeals reviews a grant of voluntary dismissal for abuse of discretion. *Puerto Rico Maritime Shipping Authority v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981). Similarly, the district court has broad discretion concerning whether to impose costs on the plaintiff. *Id.* at 51. Finally, it is axiomatic that absent an abuse of discretion, the court of appeals will not disturb a district court's choice of sanctions. *Anderson v. Beatrice Foods Co.*, 900 F.2d 388, 393 (1st Cir. 1990).

The district court has broad discretion to decide when a protective order is appropriate and what degree of protection is required. *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 532 (1st Cir. 1993). Great deference is shown to the district court in framing and administering such orders. *Id.*

The district courts are afforded substantial discretion when ruling on motions for reconsideration. *Serrano-Perez v. FMC Corp.*, 985 F.2d 625, 628 (1st Cir. 1993). "The broad measure of discretion enjoyed by the district courts in managing the litigation before it includes the control of pre-trial discovery." *Id.*

II. The district court properly exercised its discretion when it dismissed this lawsuit under Fed. R. Civ. P. 41(a)(2).

a. The district court's October 30, 2008 order dismissing this lawsuit.

Federal Rule of Civil Procedure 41 governs dismissal of actions and authorizes the district court to dismiss a lawsuit without prejudice:

> 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. . . . Unless the order states otherwise, a dismissal under this paragraph (2) is without prejudice.

Fed. R. Civ. P. 41(a)(2). The district court's decision to dismiss under this rule "is reviewable only for abuse of discretion." *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 49 (1st Cir. 1981).

The First Circuit has long held that dismissal without prejudice should be permitted under Rule 41 "unless the court finds the defendant will suffer legal prejudice." *Id*. at 49. Legal prejudice has been defined as "prejudice to some legal interest, some legal claim, [or] some legal argument." *Westlands Water Dist. v. United States*, 100 F.3d 94, 97 (9th Cir. 1996). "Neither the prospect of a second suit nor a technical advantage to the plaintiff should bar the dismissal." *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 49 (affirming district court's dismissal of lawsuit without prejudice). Pickle and Joy argue that they will suffer legal prejudice because dismissal without prejudice will preclude them from bringing a future malicious-prosecution claim against 3ABN. (App. Br. at 40-41). However,

"plain legal prejudice is not "a defendant's lost opportunity to retaliate against a plaintiff by suing for malicious prosecution." *Camilli v. Grimes*, 436 F.3d 120, 124 (2d Cir. 2006) (holding that district court was within its discretion to dismiss lawsuit without prejudice, effectively foreclosing defendants from continuing litigation through malicious-prosecution suit).

Indeed, if the loss of the opportunity to initiate a malicious-prosecution suit could always defeat dismissal without prejudice, every defendant could insist on a dismissal with prejudice on this basis. *Id*. This is why even courts that have dismissed suits with prejudice where a party is considering a malicious-prosecution claim — including two cases cited by Pickle and Joy — have refrained from imposing a broad rule requiring that all voluntary dismissals be with prejudice. *See, e.g.*, *Selas Corp. of America v. Wilshire Oil Co. of Texas*, 57 F.R.D. 3, 7 (E.D. Pa. 1972) (dismissing counterclaim with prejudice, but limiting decision "very closely to the facts of this case."); *In re Sizzler Restaurants Int'l, Inc.*, 262 B.R. 811, 824 (Bankr.C.D.Cal. 2001) (conditioning dismissal with prejudice on particular facts of case concerning defendants' counterclaim). Thus, Pickle and Joy's lost opportunity to initiate a malicious prosecution lawsuit is not plain legal prejudice. The district court did not abuse its discretion when it dismissed this lawsuit without prejudice.

In considering voluntary dismissal, a district court can consider factors such as defendants' efforts in preparing for trial, plaintiff's excessive delay or diligence in prosecuting the action, and whether the explanation for dismissal is sufficient. *Doe v. Urohealth Systems, Inc.*, 216 F.3d 157, 160 (1st Cir. 2000). These factors are not requirements, they are "simply a guide for the trial judge in whom the discretion ultimately rests." *Id*. (quoting *Tyco Lab., Inc. v. Koppers Co.*, 627 F.2d 54, 56 (7th Cir. 1980)). As such, the district court is vested with the power to analyze the case as a whole and make a decision based upon the particular facts of each case. Here, the district court found that 3ABN's explanation for dismissal was sufficient:

> 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.

(DA013-14). This observation is well-supported by the record in the affidavit of the 3ABN Board Chairman, Walt Thompson. (JA236). Count I and Count II had sought an order shutting down two internet web sites owned and operated by Pickle and Joy. (JA051-53). After Joy filed for bankruptcy protection on August 14, 2007, 3ABN purchased the infringing website domain names from the bankruptcy trustee, and immediately shut them down. (JA236-37). Thus, as of

February 12, 2008, the relief sought in the complaint with respect to Counts I and II was obtained in the course of the bankruptcy proceeding. (*Id*.).

Although the complaint sought monetary relief for Pickle's and Joy's violation of federal trademark laws and common law claims, 3ABN discovered that it would be unlikely that they would recover any monetary relief no matter what the final outcome of the lawsuit might be. (JA233). As to Joy, the bankruptcy court order that lifted the automatic stay had required 3ABN to give up its right to seek damages against Joy. (*Id*.). As to Pickle, 3ABN's counsel determined that, based on affidavits that Pickle had filed to establish his lack of resources, he would be unable to pay any substantial award of damages. (*Id*.). In any case, the prospect of an award of monetary damages had never been a significant motivation for the lawsuit, and 3ABN and Shelton were not interested in continuing it merely to obtain an uncollectible monetary award. (*Id*; JA237-38).

Although 3ABN and Shelton were motivated by a desire for a judicial determination that the statements by Pickle and Joy concerning financial misconduct were false, by October of 2008 these concerns had abated. While the lawsuit was ongoing, the Internal Revenue Service conducted an investigation of 3ABN and Shelton. (JA237-38). The audit took more than a year and encompassed over 100,000 financial records. (*Id*.). The IRS found insufficient evidence to warrant prosecution. (*Id*.).

Also during the lawsuit, several additional allegations made by Pickle and Joy involving the treatment of certain employees of 3ABN's wills and trusts department were investigated by a California state agency and the U.S. Equal Employment Opportunity Commission. (JA238). In March of 2008, 3ABN and Shelton were advised that the complaints had been dismissed for insufficient evidence. (*Id.*). This also served as a vindication of 3ABN with respect to Pickle and Joy's statements with respect to that issue. (*Id.*).

Finally, in the week preceding its filing of the motion to dismiss, 3ABN reviewed figures indicating that donation levels had been restored to the levels they enjoyed before Pickle and Joy began their campaign of disparagement. (JA238-39). This indicated to the Board that the public's confidence in 3ABN has been restored. As Thompson, stated:

> When the Board came to the conclusion that 3ABN's reputation was no longer being significantly harmed by the Defendants' activities and that continuation of the lawsuit could not achieve more than what we had already achieved by other means, it was time to shut the lawsuit down. The Board promptly voted to direct its attorneys to dismiss the lawsuit.

(JA239). Thus, in light of the fact that the appellees' activities were no longer disrupting 3ABN's mission and in view of the fact that neither Joy nor Pickle had the means to pay a monetary judgment, 3ABN concluded that nothing positive could be accomplished by way of further litigation and instructed its attorneys to terminate the lawsuit. (*Id.*). Thus, the Thompson affidavit provided the district

court with a sufficient explanation under which the court could dismiss the lawsuit.[5]

Pickle and Joy argue, however, that the Thompson affidavit lacks credibility and object to various statements in the affidavit, alleging that there exist issues of material fact. (App. Br. at 29-31). They further object to the district court's denial of an evidentiary hearing on these issues. (*Id*.). Yet it is entirely up to the district court whether to rely entirely on written submissions from the parties or to hold an evidentiary hearing to resolve issues of fact. *McLaughlin v. Cheshire*, 66 F.2d 855, 857 (D.C.Cir. 1982). Moreover, this was not a motion for summary judgment. Thus, the legal standard was not whether there was a question of material fact, but whether the defendant would suffer any legal prejudice. The district court decided to rely on the written submissions and dismissed this case, "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 . . ." (DA013-14). Thompson, as chairman of the board of directors of 3ABN, had personal knowledge and information concerning the board's beliefs regarding this

[5] Pickle and Joy argue that the district court lacked a factual basis to dismiss Shelton individually because he did not submit an affidavit. But Shelton, as a founder and longtime board member of 3ABN, had claims that were identical to 3ABN's. Thus, the same factual basis for dismissal applied to both Shelton and 3ABN.

litigation. (JA236). Thus, his testimony was not hearsay and was admissible. *See, e.g.*, Fed. R. Civ. P. 56(c)(4) (stating that supporting affidavits must be made on personal knowledge, set forth facts as would be admissible in evidence, and show that affiant is competent to testify about matters therein).

Pickle and Joy challenge the veracity of Thompson's testimony through various exhibits. Yet they failed to make these particular arguments using these particular exhibits to the district court at the time of the hearing on the motion to dismiss. (*Cf.* App. Br. at 29-31; JA260-61). In fact, the "evidence" cited to this Court includes documents filed with the district court long after the district court considered the motion to dismiss. (*See* EX800, 751-54, 773) It also includes documents that Pickle and Joy never cited to in support of the motion to dismiss, but in support of motions to the district court made both separately and earlier than the motion for voluntary dismissal. (*See, e.g.*, EX84, 179, 495, 498, 359, 473, 86-88, 280-85, 289). Because the district court did not consider these particular exhibits in opposition to the motion for voluntary dismissal, they cannot be considered here. *See Johnston v. Holiday Inns, Inc*. 595 F.2d 890, 894 (1st Cir. 1979) ("It is by now axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal."). The remaining exhibits that were presented to the district court are simply fragmented pieces of information that do not directly contradict Thompson's assertion that 3ABN's Board of Directors

believed that their objectives had been achieved.[6] The district court acted within its discretion when it considered and then rejected this evidence.

Pickle and Joy then argue that this lawsuit should not have been voluntarily dismissed because 3ABN and Shelton engaged in vexatious conduct by bringing this lawsuit in the first place. (App. Br. at 35-38); *see S.E.C. v. Oakford Corp*., 181 F.R.D. 269, 271 (S.D.N.Y. 1998) (requiring that courts "must expressly address" any undue vexatiousness). Yet while allegedly vexatious conduct may be relevant to a motion for costs and fees in the district court, this factor is not considered on a motion for voluntary dismissal in this jurisdiction. *See Doe*, 213 F.3d at 160 (listing factors generally considered by district court for voluntary dismissal).

Moreover, Pickle and Joy's argument that 3ABN's lawsuit was vexatious based upon the fact that it allegedly had no merit is the same as arguing the merits of the case. The merits of the case — e.g., whether Pickle and Joy could adequately defend themselves against 3ABN's claims against them — were never at issue on this motion to dismiss. In fact, the district court "ma[d]e 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 . . ." (DA013-14). Nevertheless, Pickle and Joy misunderstand the standard of voluntary dismissal and consistently argue the

[6] For example, EX651-54 is a fragment of an e-mail that does not contradict Thompson's testimony; JA272-73 is Pickle's own affidavit testimony; and EX659 is a request for donations that does not directly contradict anything in Thompson's affidavit.

merits of the case. Yet the standard is that "[d]ismissal without prejudice *should be permitted* under the rule *unless* the court finds that the defendant will suffer legal prejudice." *Puerto Rico Maritime Shipping Auth*., 668 F.2d at 50. There is no plain legal prejudice because the district court does not rule on the merits of the case. *See Spencer v. Moore Business Forms, Inc.*, 87 F.R.D. 118, 119 (N.D.Ga. 1980) (holding that a mere missed opportunity for legal ruling is not sufficient to deny motion for voluntary dismissal); *Watson v. Clark*, 716 F.Supp. 1354, 1355 (D.Nev. 1989) ("Neither does plain legal prejudice arise from defendant's missed opportunity for a legal ruling on the merits."). Thus, it was not plain legal prejudice for the district court to decline to entertain Pickle and Joy's alleged evidence that 3ABN's claims had no merit. Whether Pickle and Joy could have ultimately defended themselves on the merits of this lawsuit is irrelevant under the voluntary-dismissal standard.

Pickle and Joy next argue that the district court did not sufficiently consider 3ABN's alleged lack of diligence in prosecuting the case. Yet they admit that 3ABN served discovery upon them. (App. Br. at 37). At the time of 3ABN's motion, the case was in the document-discovery phase. (JA232). No depositions had been taken and no dispositive motions had been filed or served. (JA233). The parties had just stipulated to an order extending discovery and unexpired deadlines by 90 days. (*Id*.). The lengthy delays that had occurred originated with

defendants, including Joy's bankruptcy, the wrangling over the protective order and scope of discovery, and by Pickle's various out-of-state third-party subpoenas spawning satellite litigation. (*Id*.). Moreover, the district court had conducted six status conferences throughout the first year and a half of this litigation, making it well aware of the discovery process. Thus, the district court was well informed about the status of discovery, was in the best position to make a decision concerning 3ABN's diligence in conducting discovery, and did not consider this to be a bar to granting voluntary dismissal.

Pickle and Joy complain about the timing of the motion to dismiss, claiming that it should have been brought earlier and that it was only brought at a critical point in the litigation where — after Pickle and Joy received the Remnant documents — they had a "solid basis" for a counterclaim against 3ABN. (App. Br. at 40). Yet 3ABN's motion for dismissal was sought within one week of 3ABN's board's review of their financial figures which they believed showed donation levels to be restored and within a few months of the positive outcomes of the EEOC and IRS investigations. (JA236-39). The timing had nothing to do with when it was finally allegedly convenient for Pickle and Joy to find support for counterclaims *that had never been pleaded in their answer to the complaint*.

Moreover, Pickle and Joy had adequate time to respond to the motion to dismiss and filed a full brief and affidavit to oppose 3ABN's motion. They never

objected to the district court hearing the motion at that time, but rather answered "yes" when asked if they would like to be heard. (DA005-06). Pickle and Joy were given ample opportunity to argue their case during the hearing. (DA006-007, 0011). Finally, plaintiffs did in fact comply with L.R. D.Mass. 7.1's meet and confer requirement as confirmed in their motion papers. (JA220).

3ABN never gave "avoidance of discovery" as a reason to end the case, as Pickle and Joy insist. (App. Br. at 38). This statement is Pickle's own hearsay interpretation of a conversation with 3ABN's counsel. (JA267). Finally, Pickle and Joy's time and expense put into this litigation — largely the result of their own mission to uncover any and all documentation about Shelton and 3ABN whether relevant to the litigation or not — was considered by the district court in the motion for fees and costs. This issue was not relevant during the motion for voluntary dismissal.

Pickle and Joy then turn their ire toward Judge Saylor in the district court, arguing that his order should be reversed because Judge Saylor was biased, did not take enough time to consider defendants' arguments, was only trying to clear the docket, was unfamiliar with the case filings, did not have a handle on the case, did not read their brief, and did not given them an opportunity to be heard. (App. Br. at 22, 25-26, 29). Because Pickle and Joy did not make these arguments to the district court in their motion to reconsider and amend findings, they cannot be

considered here. *See Johnston v. Holiday Inns, Inc*. 595 F.2d 890, 894 (1st Cir. 1979) ("It is by now axiomatic that an issue not presented to the trial court cannot be raised for the first time on appeal.") (citations omitted); (JA393-412).

Nevertheless, in an attempt to support this argument, Pickle and Joy misleadingly quote sound bites from earlier status conferences. (App. Br. at 22). For example, they argue that Judge Saylor admitted he did not have a "good enough handle on the case" to rule on the motion to dismiss. (*Id*.). However, Judge Saylor never confessed an overall lack of familiarity with the case during the motion to dismiss. Rather, this quote is from a hearing on December 14, 2007, where Judge Saylor states that he did not have a "good enough handle on the case" to make a ruling on cross-motions on the permissible scope of discovery. (JA310). Pickle and Joy complain that the district court did not consider their brief because during the motion hearing, after defendants referred to their opposition brief the district court stated "When was that filed?" (App. Br. at 22; DA6). However, Pickle and Joy neglect to include the next statement of the court, where it confirmed that "Yes, I did see it." (*Id*.). In short, none of the sound bites that Pickle and Joy identify confirm that the district court lacked sufficient knowledge about the case to rule on the motion for voluntary dismissal. Beyond these misstatements, Pickle and Joy offer no evidence but speculation based solely on the fact that the district court declined to rule in their favor. Pickle and Joy's

accusations about the district court's conduct do not support reversal. Thus, the district court acted within its discretion when it dismissed the lawsuit without prejudice.

b. The district court's order of October 29, 2009 denying reconsideration.

Plaintiffs argue that the district court's October 29, 2009 order denying reconsideration was erroneous because Pickle and Joy offered "newly discovered evidence" in their motion to reconsider that would have strengthened their defense of the case on the merits and exemplified the frivolousness of 3ABN's lawsuit against them. (App. Br. at 55-58). Yet Pickle and Joy misunderstand the standard under which this Court reviews the district court's denial of a motion to reconsider and the district court's review of its own order for voluntary dismissal. The district court has broad discretion when making the decision to grant or deny a Rule 59 motion to alter or amend a judgment. *Williams v. Poulos*, 11 F.3d 271, 289 (1st Cir. 1993).[7] Rule 59 motions must either clearly establish a manifest error of law or must present newly discovered evidence.[8] *Fed. Dep. Ins. Corp., v. World Univ., Inc.*, 978 F.2d 10, 16 (1st Cir. 1992). These motions are "'aimed at

[7] Pickle and Joy complain that the district court should not have found Fed. R. Civ. P. 52(b) inapplicable, but Rule 52 only applies to an action "tried on the facts without a jury or with an advisory jury . . ." Fed. R. Civ. P. 52(a)(1). Thus, this rule is inapplicable.

[8] Thus, Pickle and Joy's argument that the district court's order is "internally inconsistent" is not a proper legal basis for review of the district court's October 2009 order. (App. Br. at 54-55).

*re*consideration, not initial consideration." *Id*. (citation omitted). Thus, parties cannot raise new arguments that should have been made before judgment was issued. *Id*. The district court has the discretion on whether to allow a party to argue new material. *Williams*, 11 F.3d at 289. Thus, even if a party labels evidence as "newly discovered," it does not guarantee that the court will consider the evidence. This is especially true if, as here, a party uses the evidence to argue the identical arguments that the district court already considered and rejected. Here, the district court was not convinced that it should reconsider its previous decision, much less reverse it:

> 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.

(DA028). The district court acted well within its discretion when it declined to re-address identical arguments that it had already rejected.

Pickle and Joy argue that the district court's decision not to reconsider its original decision granting voluntary dismissal is "clearly erroneous, giving further evidence that Defendants' submissions weren't read, and Defendants' arguments and evidence weren't considered" because the district court did not find purported "newly discovered evidence" to be significant. (App. Br. at 55). The district court's decision to grant or deny a Rule 59 motion "must be respected absent abuse." *Williams*, 11 F.3d at 289. Thus, the standard of review in this Court is

abuse of discretion, it is not a "clearly erroneous" standard as Pickle and Joy repetitively insist. Further, Pickle and Joy's alleged evidentiary support for their argument is irrelevant, obscure information, that they label as "new" and then use it to argue the identical points that they argued before the district court in responding to the motion for voluntary dismissal. It is at this point that Pickle and Joy made their second motion to file documents under seal, which they did not originally submit in support of their motion for voluntary dismissal. They use this information to again attempt to argue the merits of the case — that 3ABN should not have brought this lawsuit against them in the first place because they can allegedly defend themselves against the claims.

For example, they specifically cite to some issues of a magazine called *3ABN World* that was published by 3ABN to defend themselves against "Plaintiff's frivolous complaint." (App. Br. at 57). This is not a new argument, and it only refers to the merits of the case, which was not an issue in the motion for voluntary dismissal. (*See* JA255).[9] They also cite to tape recordings that Pickle and Joy had in their possession even before 3ABN brought the motion to dismiss that

[9] Pickle and Joy make a three-sentence reference to spoliation and *3ABN World*. Their argument is unclear. (App. Br. at 41-42). However, the documents that Pickle and Joy cite to are not evidence that 3ABN ordered the destruction of original documentation relevant to this lawsuit. The identified letter merely confirms that at the conclusion of the IRS investigation, 3ABN agreed that the *copies* it had produced for purposes of *that investigation* could be destroyed. (EX394-95).

supposedly exemplify an inconsistency that "Plaintiffs' claims regarding a donation decline in 2006 were retaliatory and malicious." (App. Br. at 57). Again, this is not a new argument and refers only to the merits of the case. (*See* JA260-61). Their final argument is that 3ABN's statement in their first appellate brief that, "[t]here is nothing available in the district court record from which 3ABN and Shelton can respond to the web of innuendo and speculation that infests the appellants' brief" should be interpreted to mean that there is nothing in the record to rebut Pickle and Joy's many citations. (EX726; App. Br. at 56). This is not evidence. This is an inaccurate interpretation of a statement in 3ABN's first appellate brief.[10] This argument is similarly not new. (JA256-57). The district court did not abuse its discretion when it refused to reconsider its order on voluntary dismissal based upon Pickle and Joy's arguments that were identical to their previous arguments. In short, Pickle and Joy fail to show that the district court abused its discretion when it declined to reconsider its earlier order granting voluntary dismissal without prejudice.

III. The district court properly exercised its discretion when it denied defendants' motion for costs and attorneys fees.

a. Costs

[10] Read in its proper context, it is clear that 3ABN means to convey that because the merits of the case were not at issue on the motion for voluntary dismissal, 3ABN did not have the opportunity to submit documentary evidence on the merits of the case.

When granting dismissal without prejudice under Fed. R. Civ. P. 41(a)(2), the district court has broad discretion concerning whether to impose costs on the plaintiff. *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 51 (finding no abuse of discretion where court did not impose costs on plaintiff). This Court has "not read Fed. R. Civ. P. 41(a)(2) as always requiring the imposition of costs as a conduction to a voluntary dismissal," but it is often considered necessary for defendant's protection. *Id*. Thus, contrary to Pickle and Joy's insistence that the district court erred when concluding that costs should not be awarded, Rule 41 *does not require the district court to do so*.[11]

Pickle and Joy argue that the district court erred by "restricting" costs by the list in 28 U.S.C. § 1920 and they cite to specific costs that the district court allegedly misinterpreted. (App. Br. at 43, 46). But because Rule 41 does not require the district court to award costs to defendants, the federal statute could not have restricted any potential award. Rather, the district court merely used Section 1920 to illustrate that even if costs were required for voluntary dismissal, Pickle and Joy's requested costs are not the type that are typically awarded to a litigant. Recovery of costs is governed by 28 U.S.C. § 1920, which states that the "judge or

[11] Defendants are not a "prevailing party," so recovery of costs is not governed by Fed. R. Civ. P. 54(d); *see Szabo Food Serv. v. Canteen Corp*., 823 F.3d 1073 (7th Cir. 1987) (stating that dismissal without prejudice does not make defendant "prevailing party.").

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 under section 1923 of this title[.]

28 U.S.C. § 1920 (2008).

In their initial motion to the district court, Pickle and Joy requested reimbursement for the following costs: (1) mileage attributable to two fact-finding trips by Pickle, totaling $993.62; (2) various miscellaneous expenditures by Pickle over the course of the lawsuit, totaling $4,614.09; (3) costs for copies made on Pickle’s equipment for filing, totaling $206.70; (4) cost of time invested in research and motion preparation by Pickle, totaling $30,114.75; (5) an invoice by an alleged expert witness, who was never disclosed and never supplied testimony, totaling $20,342.32; and (6) attorney fees totaling $54,266.94. (JA278-81). The district court denied all of these costs. (DA024). The court concluded that four items on this list were not costs even identified in Section 1920, including: (1)

mileage; (2) miscellaneous expenditures; (3) Pickle's cost of time for preparation; and (4) expert-witness invoices. (DA024).

The district court also noted that although Section 1920 allows recovery of expert-witness fees, they are not recoverable beyond a statutorily prescribed per diem of $40 per day of a witness's appearance in court. (*Id*. at n. 1). The court further denied the $200 copy costs: "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 by plaintiff shall be brought in this Court." (DA024). In other words, if additional litigation were to follow, plaintiffs would still have the benefit of these documents. Thus, the district court was not required to award Pickle and Joy any costs and did not abuse its discretion when it concluded that each party should bear its own costs. *See Puerto Rico Maritime Shipping Auth*., 668 F.2d at 51 (affirming district court's decision to deny costs to defendants).

b. Attorneys' fees

The decision to impose attorneys' fees is similarly left to the sound discretion of the district court. *See Puerto Rico Maritime Shipping Auth*., 668 F.2d at 51 (affirming district court's decision to deny attorneys' fees to defendants). Courts have declined to award attorneys' 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 the plaintiff "deliberately sought to increase the defendants' costs by unduly protracting the litigation." *Blackburn v. City of Columbus, Ohio*, 60 F.R.D. 197, 198 (S.D. Ohio 1973) (cited with approval in *Puerto Rico Maritime Shipping Auth.*, 668 F.2d at 51). In the absence of such showings, the traditional "American Rule" — whereby each party pays their own attorney fees — prevails. *Id*.

Pickle and Joy object to the district court's citation to *Blackburn* — allowing for attorneys fees only if the plaintiff initiated the lawsuit to harass the defendant — as a basis for denying them attorneys fees. (App. Br. at 46). Instead, they cite to caselaw that directly contradicts the First Circuit standard to argue that attorneys' fees are always required. *See GAF Corp. v. Transamerica Ins. Co.*, 665 F.2d 364, 369 (D.C. Cir. 1981) (rejecting good faith standard under *Blackburn*). Yet *Blackburn's* rationale was adopted by the First Circuit in the *Puerto Rico Maritime Shipping Authority* decision and is, therefore, the standard in this Circuit. 668 F.2d at 51 (relying on *Blackburn's* rationale for denying attorney fees). Thus, the district court properly considered whether 3ABN filed this lawsuit for purposes of harassment in conjunction with the attorneys' fees issue.

Pickle and Joy requested $54,266.94 in attorneys' fees attributable to the attorney who represented them until November 2007. (JA277; JA005). Here, the

district court concluded that "[t]here is nothing in the record to suggest that the plaintiffs field this suit simply to harass, embarrass, or abuse the defendants or that they sought to increase their costs . . ." (DA024-25). Pickle and Joy argue that based upon their own interpretation of the record, the "*only* plausible finding" is that defendants acted in bad faith when initiating this lawsuit. (App. Br. at 44). However, Pickle and Joy did not argue in their opening brief to the district court below that 3ABN brought this lawsuit to harass them. (Docket #131). Instead, they began this discussion for the first time in their reply brief — only then attempting to add confidential documents under seal. (JA322). Theories offered for the first time in reply briefs are not properly preserved. *Wills v. Brown University*, 184 F.3d 20, 27 (1st Cir. 1999). Thus, this issue cannot be reviewed on appeal. *See Johnston v. Holiday Inns, Inc*. 595 F.2d 890, 894 (1st Cir. 1979) (holding that issue not presented to trial court cannot be raised for first time on appeal.). Further, they did not argue to the district court in their opening brief that costs should have been a substitute for the loss of the malicious prosecution-claim. (Docket #131; *Cf.* App. Br. at 42-43). Thus, Pickle and Joy present no sufficient argument to counter the district court's broad discretion in declining to award them attorneys' fees.

IV. The district court properly exercised its discretion when it denied defendants' motion for Rule 11 sanctions.

Fed. R. Civ. P. 11 calls for sanctions upon a party for making arguments or filing claims that are frivolous, legally unreasonable, without factual foundation, or asserted for an improper purpose. *Salois v. Dime Sav. Bank of New York, FSB*, 128 F.3d 20, 28 (1st Cir. 1997). The court of appeals will not disturb a district court's decision concerning sanctions absent an abuse of discretion. *Anderson*, 900 F.2d at 393. This rule is anchored in common sense because district courts are in a far better position than appellate tribunals to determine the presence of misconduct. *Id*. "The trial judge, steeped in the facts and sensitive to the interplay amongst the protagonists, is ideally equipped to review these ramifications and render an informed judgment." *Id*. at 394. Here, Pickle and Joy specifically targeted 26 statements made in 3ABN's legal memoranda, complaining of inaccuracies and complaining of 3ABN's attempts to limit the scope of discovery to relevant information. (JA449-68). The district court concluded that after careful consideration of defendants' arguments, "all of the disputed assertions fall within the bounds of permissible zealous advocacy, and none are sufficiently problematic to warrant the imposition of sanctions." (DA029).

Pickle and Joy misstate the district court's order and argue that the district court must have found that plaintiffs' counsel's assertions were problematic because it used that word in the above sentence. (App. Br. at 51). Yet they fail to appreciate the context within which it was used. The district court did not find

3ABN's counsel's assertions to be "problematic," but found them well within the bounds of zealous advocacy. Thus, this is not an inconsistent statement. Pickle and Joy then invite this court to take a de novo review of the issue and substitute its own judgment for that of the district court. Yet this is not the standard. *Anderson*, 900 F.2d at 393 (confirming abuse-of-discretion standard in determining sanctions issue). Pickle and Joy offer no insight into how the court abused its discretion in reviewing their various complaints about plaintiffs' counsel, but merely insist that the court must have been wrong because it did not agree with their own subjective interpretation of 3ABN's statements in legal memoranda.

Pickle and Joy made their motion for sanctions based in part upon their characterization of statements made in 3ABN's responsive briefs. (JA449). For example, Pickle and Joy argue that 3ABN's characterization of the Remnant documents as irrelevant is fallacious. (App. Br. at 52). Yet even the district court found these documents to be irrelevant. (DA029). Pickle and Joy disagree with 3ABN's counsel's interpretation of their strategy as seeking oppressively large amounts of irrelevant information. (JA284). But in that same memorandum, 3ABN cites to an e-mail from Joy that confirms this characterization: "Unfortunately, because of the very narrow charges pressed by 3ABN and Danny Lee Shelton, we must substantially expand the case to bring in the most damaging and certain to sway the jury details." (*Id*.). Finally, Pickle and Joy complain that

they explained the "bearing of the additional documents needing to be filed under seal." (App. Br. at 53-54). 3ABN simply disagreed that these documents were relevant. Pickle and Joy provide absolutely no evidence to this Court of sanctionable conduct. The district court acted well within its discretion when it refused to grant defendants' motion for Rule 11 sanctions.

V. The district court properly exercised its discretion when it denied defendants' motion for leave to file under seal, and ordered the return of confidential information upon dismissal.

a. The confidentiality order dated April 17, 2008

Trial courts enjoy a broad measure of discretion in managing pretrial affairs, including the conduct of discovery. *Mack v. Great Atlantic and Pacific Tea Co.*, 871 F.2d 179, 186 (1st Cir. 1989). The appellate court will intervene in discovery matters "only upon a clear showing of manifest injustice, that is, where the lower court's discovery order was plainly wrong and resulted in substantial prejudice to the aggrieved party." *Id*. Pickle and Joy argue that 3ABN abusively requested a confidentiality agreement to "chill" Pickle and Joy's First Amendment rights — specifically, that documents gained during discovery "shouldn't receive judicial protection" and that "[d]istrict courts shouldn't exercise any degree of control over the trial record's contents . . ." (App. Br. at 27, 32). They also argue that this Court should modify D. Mass. L.R. 7.2 to permit filing under seal without regard to the confidentiality order. (App. Br. at 31-32).

As a basis for their argument, Pickle and Joy refer to the United States Supreme Court case of *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 104 S.Ct. 2199, 81 L.Ed.2d 17 (1984) — the seminal case that discusses whether parties to civil litigation have a First Amendment right to disseminate information gained through the pretrial discovery process. Similar to this case, the *Seattle Times* case involved a religious organization that brought suit against newspapers based on defamation. *Id.*, 467 U.S. at 22, 104 S.Ct. at 2202. The defendants initiated extensive discovery concerning financial documents and donor information for which the plaintiffs sought a protective order. *Id*. at 25-26, 104 S.Ct. at 2204. The defendants then challenged the district court's grant of this protective order.

Although the United States Supreme Court recognized the public interest in material gained during the discovery process, "[i]t does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery." *Seattle Times*, 467 U.S. at 31, 104 S.Ct. at 2206-07. Moreover, "*[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit*." *Id*. at 32, 104 S.Ct. at 2207 (emphasis added). Rather, the rules authorizing discovery are a matter of legislative grace. *Id*. Restraints on discovered but not yet admitted information are "not a restriction on a traditionally public source of information." *Id*. at 32; 104 S.Ct. at 2208. Thus, protective orders prohibiting dissemination of

discovered information are "not the kind of classic prior restraint that requires exacting First Amendment scrutiny." *Id*. at 33; 104 S.Ct. at 2208.

The United States Supreme Court has therefore proclaimed that it is "necessary" for the district court to have the authority to issue protective orders under Rule 26(c). *Id*. at 34; 104 S.Ct. at 2208. Protective orders are necessary to prevent discovery abuses. *Id*. at 35; 104 S.Ct. at 2209. Thus, the United States Supreme Court directly contradicts Pickle and Joy's bold proclamation that the district court has interfered with their First Amendment right to do whatever they please with any and all documents regarding 3ABN and Shelton. This is simply not the law. Pickle and Joy, therefore, offer no constitutional authority for this Court to declare the confidentiality and protective order null and void, to ignore its requirements, or to modify D. Mass. L.R. 7.2 to permit filing under seal without following the required procedure.

Next, Pickle and Joy argue that "the blanket Confidentiality Order was issued without a *finding* of good cause." (App. Br. at 27) (emphasis added). The *Seattle Times* decision speaks to this requirement, but first confirmed that the district court has "substantial latitude to fashion protective orders." *Seattle Times*, 467 U.S. at 36; 104 S.Ct. at 2209. The Supreme Court held that where a protective order is "entered on a *showing of good case* as required by Rule 26(c), is limited to the context of pretrial discovery, and does not restrict dissemination of information

gained from other sources, it does not offend the First Amendment. *Id*. at 36; 104 S.Ct. at 2209-10 (emphasis added). The First Circuit has adopted this identical standard. *See Anderson v. Cryovac, Inc*., 805 F.2d 1, 7 (1st Cir. 1986) (adopting *Seattle Times* three-part test). *Anderson* confirmed that a showing of good cause must be based upon a factual demonstration of potential harm, which the reviewing court can determine through examination of the record. *Id*. at 7-8 (examining the record and concluding that good cause was sufficiently articulated in pretrial hearings).

Thus, the district court does not have to "find" good cause, as Pickle and Joy insist. (App. Br. at 27). Rather, the movant must "show" good cause through its submissions to the district court. Pickle and Joy do not contest on appeal any of the particular good-cause arguments that 3ABN made in support of its motion for protective order. (Docket # 41). The fact that the district court did not make a "finding" of good cause in its order does not support rejecting the protective order. Instead, the district court properly exercised its discretion when it filed the protective order "[b]ased upon the pleadings, written and oral submissions of the parties, the proceedings before the Court, and the file and record in this matter . . ." (DA030).

b. The order requiring return of all discovery materials under the confidentiality and protective order.

Pickle and Joy argue that the district court should not have ordered the return of all confidential discovery documents upon dismissal, claiming that the protective order did not require the return of these documents. (App. Br. at 41). The protective order covered all confidential discovery: "[t]his order governs all documents and information produced, or to be produced by any party or third party in connection with this litigation . . ." (DA030). Moreover, a party receiving confidential information was required to sign a document that confirmed that the party will return all confidential information after the termination of litigation. (DA037). The district court's order that all confidential documents be returned "as set forth in that order" did not conflict with the protective order and was within the district court's wide discretion. (DA014).

Moreover, the federal courts do not have the responsibility to maintain a repository of documents filed under seal after the case has been dismissed. *See, e.g.*, *Littlejohn v. BIC Corp.*, 851 F.2d 673, 681-82 (3d Cir. 1988) (holding that district courts are not responsible for holding documents for public access after case has terminated); *Grundberg v. UpJohn Co.*, 140 F.R.D. 459, 468 (D. Utah 1991) (holding that courts are not obligated to maintain repository of documents filed under seal after case is terminated). Thus, the district court's order to return the documents filed under seal is not only consistent with the protective order, it is consistent with federal law. The court properly exercised its discretion when it

ordered the return of confidential discovery documents along with the dismissal of this lawsuit.[12]

Pickle and Joy then turn their attention specifically to the MidCountry Bank documents, which were *never introduced in the district court in conjunction with the motion for voluntary dismissal or for costs*. In other words, these documents are completely irrelevant for purposes of this Court's review of the district court's orders dismissing this lawsuit, for costs, or for reconsideration. Generally, only documents and evidence presented to the district court can be included in the record on appeal. *See, e.g., Commonwealth v. United States Veterans Admin.*, 541 F.2d 119, 123 n. 5 (1st Cir. 1976) (striking portions of appendix that were not part of district court record.). Nevertheless, Pickle and Joy make the argument for the first time on appeal that once the district court declined an in camera review of these documents in response to Pickle and Joy's motion to compel discovery and 3ABN's motion to protective order, the documents should have been given directly to Pickle and Joy.[13] (App. Br. at 33). Yet the district court did not single out the

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[12] For the very same reasons, the district court did not abuse its discretion when it observed that the Remnant documents "should have been returned to plaintiffs some time ago" in compliance with the protective order when denying Pickle and Joy's second attempt to file these documents under seal. (DA029).

[13] In their motion for protective order, 3ABN requested that the district court appoint someone to review the MidCountry Bank documents in camera. (JA132-33). Magistrate Judge Hillman's September 11, 2008 order did not specifically address this request, but granted 3ABN's motion for a protective order and denied plaintiffs' motion in all other respects. (JA206). This lawsuit was dismissed less

MidCountry Bank records and affirmatively considered their placement during the pendency of the litigation. (JA206).

Although Pickle and Joy now claim that these records are necessary to support their motion for attorney fees, they never argued to the district court that these documents were relevant in support of their motion for costs and attorneys fees. (JA276-277; Docket #131). Pickle and Joy only attempted to put Shelton's personal financial documents at issue *after the lawsuit had been dismissed* when they erroneously attempted to include these documents into the appellate record — a motion that the district court denied. (Docket #261). Thus, the MidCountry Band records are completely irrelevant for purposes of this appeal.

Finally, Pickle and Joy argue that by virtue of their request and payment for copies of the MidCountry Bank records, they acquired a property interest in these records of which the district court deprived them when it returned the records — Shelton's personal financial records — to plaintiffs' counsel. (App. Br. at 48-49); s*ee Boston Herald Inc. v. Connolly*, 321 F.3d 174, 190 (1st Cir. 2003) (holding that personal financial information is universally presumed to be private). Pickle and Joy offer absolutely no legal support for this absurd position — that by virtue of paying copying costs they now own the legal rights to a bank's business records — beyond an irrelevant citation to the Rules of Professional Conduct. Instead, Pickle

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than two months later and before the parties made any more requests with respect to the MidCountry Bank documents.

and Joy's proper remedy for their complaint that they paid $3,682.50 for these copies is through their motion for costs — and this motion was denied.

c. The April 15, 2009 and October 26, 2009 orders denying the motions to file under seal.

This Court reviews the district court's decision to admit evidence under an abuse-of-discretion standard. *Davignon v. Hodgson*, 524 F.3d 91, 112 (1st Cir. 2008). Further, the district court has considerable leeway to determine whether or not to seal or unseal materials. *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998). The rules of civil procedure prohibit the filing of discovery materials unless used in connection with a motion or where the court orders that the documents be filed. *See* Fed. R. Civ. P. 5(d)(1) ("the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: . . . requests for documents."); LR, D. Mass. 26.6 (a) ("any . . . requests for or products of the discovery process shall not be filed unless so ordered by the court or for use in the proceeding."). Moreover, the protective order required that a party receive permission from opposing counsel or the court in order to file confidential documents in support of a motion. (DA033).

Although Pickle and Joy argue that their failure to timely file the Remnant documents was based upon their own misinterpretation of the requirements of the protective order, their first attempt to file "a selection of" the Remnant documents was in conjunction with their December 2008 *reply brief* to their motion for costs

where they requested permission to file these documents under seal. (Docket #153; JA357). They never attempted to file these documents in support of their motion for voluntary dismissal. The district court denied their motion for leave to file under seal, holding that the documents were not relevant. (DA026). Pickle and Joy then again attempted to file the Remnant and Westphal documents with the court under seal in conjunction with their motion to amend and for reconsideration. (Docket #173). The district court again denied the motion to file under seal. (DA029).

Pickle and Joy argue that the initial decision of irrelevance was in error because the district court's "finding of irrelevance is impossible." (App. Br. at 45). This argument is based upon the Federal District Court in Michigan's conclusion when considering the Remnant subpoena that the Remnant documents were relevant to the lawsuit. (EX643-648). Yet the Michigan Court and the district court were determining relevancy for two different purposes. For the purposes of discovery in general, relevancy is very broad. *See United States v. Mass. Indus. Fin. Agency*, 162 F.R.D. 410, 414 (D. Mass 1995) ("[R]elevant information includes any matter that is or may become an issue in the litigation.") The Michigan Court may have found the Remnant documents relevant to the litigation as a whole, but this conclusion has no bearing at all on the district court's determination of whether these documents were admissible under seal in

conjunction with the motion for attorneys' fees. *See Siedle v. Putnam Investments, Inc.*, 147 F.3d at 10 (holding that district court has leeway to decide if documents can be filed under seal). Thus, the district court did not abuse its discretion when determining that the documents were not admissible under seal for the purpose of supporting the motion for attorneys' fees.

Pickle and Joy insist that the Remnant documents are prima facie evidence of vexatiousness, bad faith, and malicious prosecution, and support their motion for attorneys' fees. (App. Br. at 19, 45). They insist that the Remnant documents convey a portion of their defense to this litigation; specifically that Shelton improperly reported the Remnant payments in IRS filings and in proceedings related to his divorce. (App. Br. at 36). Yet invoking the bad faith exception to the American Rule regarding attorneys fees "requires more than a showing of a weak or legally inadequate case." *Americana Indus., Inc. v. Wometco de Puerto Rico, Inc.*, 556 F.2d 625, 628 (1st Cir. 1977). In other words, merely because the Remnant documents allegedly allow Pickle and Joy to defend themselves against the charges of defamation does not prove that 3ABN brought this lawsuit with the intent to harass defendants. Thus, the district court did not abuse its discretion when it determined that documents that Pickle and Joy attributed to the defense of their case were not relevant to the costs and attorney fees issue.

Finally, Pickle and Joy filed a second motion to file under seal, attaching additional documentation never before filed in the district court allegedly in support of the motion for reconsideration. (Docket #173). This two-page motion broadly identified additional exhibits — including confidential Remnant and Westphal exhibits — that "have a bearing on defendants' motion for reconsideration and motion to amend findings." (*Id*.). Pickle and Joy's motion to file these documents under seal failed to specifically identify the relevance of these documents to the motion to amend and reconsider the initial motion for voluntary dismissal and motion for costs. (Docket #173). The district court had no information with which to determine relevancy to the earlier motions. Pickle and Joy still fail to fully explain the relevancy of these documents to this Court on appeal — merely proclaiming their own subjective interpretation of what these documents mean to them. (App. Br. at 59-60). They do not explain how this new evidence would have justified the extraordinary remedy of the motion to reconsider. *See Fed. Dep. Ins. Corp.*, 978 F.2d at 16 (stating that Rule 59 motions must either clearly establish manifest error of law or present newly discovered evidence).[14] The district court was within its discretion when it recognized that these documents were being used in an attempt to reargue the same issues.

[14] Pickle and Joy are in error when they insist that there is no legal basis for requiring submitted evidence to be newly discovered. (App. Br. at 59).

Pickle and Joy argue that 3ABN used the protective order to "shield highly relevant information from the lower court's review." (App. Br. at 61-62). Yet Pickle and Joy did not attempt to submit materials covered under the protective order in response to 3ABN's motion for voluntary dismissal. When they did attempt to submit confidential documentation to the district court, it was in support of their reply brief for the motion for costs and attorneys' fees and then again on the motion for reconsideration. And instead of being relevant to the issue at hand, Pickle and Joy put forth these documents in alleged support of the merits of this case. 3ABN did not shield these documents — which were already protected by the protective order — the district court simply decided that they were not relevant to the particular issue at hand. Nevertheless, this has not stopped Pickle and Joy from their post-dismissal and post-appeal attempts to submit these confidential documents to this Court. The admissibility issue remains the same as it was in the district court below, and this Court should ignore Pickle and Joy's continued attempts to find any way that they can to publicly disseminate confidential information.

In sum, Pickle and Joy have failed to demonstrate that the district court abused its discretion in: (1) ordering voluntary dismissal without prejudice; (2) rejecting Pickle and Joy's multiple motions to file under seal; (3) rejecting Pickle and Joy's motion for costs and attorneys fees; and (4) rejecting Pickle and Joy's

motion for sanctions against 3ABN's counsel. Furthermore, this Court should reject all of Pickle and Joy's new motions on appeal as described in their conclusion — e.g., permitting filing of confidential exhibits, sanctions against 3ABN's counsel, rejecting federal rules, modifying the protective order and creating new conditions upon dismissal.

CONCLUSION

3ABN respectfully requests that this court affirm the district court's orders: (1) ordering voluntary dismissal without prejudice; (2) rejecting Pickle and Joy's multiple motions to file under seal; (3) rejecting Pickle and Joy's motion for costs and attorneys fees; and (4) rejecting Pickle and Joy's motion for sanctions against 3ABN's counsel.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 12,752 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. 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 Word 2002 in Times New Roman, proportional 14 point type, which includes serifs.

Dated: January 17, 2011

s/ M. Gregory Simpson
M. Gregory Simpson

CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2011, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system:

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