UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

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

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO FILE UNDER SEAL

INTRODUCTION

The Defendants appreciate the Plaintiffs' opposition to the Defendants' motion to file under seal, for the Plaintiffs have thereby provided substantial, additional evidence that this Court has other legal authority than Fed. R. Civ. P. 41(a)(2) to impose costs, expenses, and fees.

Costs, expenses, and fees maybe shouldn't be imposed under Fed. R. Civ. P. 41(a)(2) if a voluntary dismissal is with prejudice. 8 *Moore's Federal Practice*, § 41.40[10][d][viii] (Matthew Bender 3d ed.). The pending appeal could therefore affect the decision of this Court on the Defendants' motion to impose costs.

Since the Plaintiffs have chosen to oppose the imposing of any costs, expenses, or fees, the Plaintiffs should be given the opportunity to withdraw their motion for voluntary dismissal before such are imposed as conditions of the voluntary dismissal. 8 *Moore's*, § 41.40[10][f].

Imposing costs, expenses, and fees under 28 U.S.C. § 1927 or the Court's own inherent

powers would neither be affected by the pending appeal, nor require the allowance of the withdrawal of the motion for voluntary dismissal. Important to the consideration of using such legal authority are documents produced by Remnant Publications, Inc. (hereafter "Remnant"), documents rendered more difficult to submit to this Court because they must be filed under seal due to the Plaintiffs' designation of these documents as confidential. Despite the Plaintiffs' unwillingness for this Court to see these documents, they should be filed under seal.

RELEVANT PROCEDURAL HISTORY AND FACTS

On October 23, 2008, the Plaintiffs filed a motion for voluntary dismissal. (Doc. 120). On October 30, 2008, that motion was granted, and the Honorable Court stated that the Defendants were permitted to "seek recovery" of "reasonable costs, expenses, and attorney's fees incurred in this litigation." (Doc. 141 pp. 14–16).

On November 13, 2008, the Defendants filed a relatively short motion, memorandum, and affidavit seeking such recovery. (Doc. 130 through Doc. 132). On November 26, 2008, the Plaintiffs filed an opposition brief, opposing the Defendants' recovery of even 1¢ of their costs, expenses, and fees. (Doc. 140). That opposition brief raised the issue of legal authority, falsely claiming that the only legal basis for recovery was Fed. R. Civ. R. 41(a)(2). (Doc. 140 pp. 1, 10).

Accordingly, the Defendants in their reply brief of December 8 cited authorities that show that this Court may impose costs, expenses, and fees alternatively on the basis of 28 U.S.C. § 1927 or its own inherent power, because of the bad faith and vexatious conduct of the Plaintiffs and their counsel. (Doc. 149 pp. 15–18. cf. pp. 2–15; Doc. 126 pp. 6–11). Since the Defendants contend that the Remnant documents constitute *prima facie* evidence of abuse of process and misuse of civil proceedings on the part of the Plaintiffs and their counsel, and because these documents therefore go to the question raised by the Plaintiffs of the legal authority for imposing costs, expenses, and fees, the Defendants sought leave of the Court on December 8, 2008, to file

a selection of these documents under seal as Exhibit A for the Court's review.

The Plaintiffs now seek to prohibit this Honorable Court from reviewing these documents (Doc. 158), thereby hindering the Defendants from fully establishing that in this action the Court may impose costs, expenses, and fees using 28 U.S.C. § 1927 or its own inherent powers.

PLAINTIFFS' ARGUMENTS REBUTTED AND REFUTED

A. "... relevancy objections of ... the Plaintiffs ...." (Doc 158. p. 1).

The Plaintiffs contend:

> Over the relevancy objections of Remnant Publications, Inc. and the Plaintiffs, Defendants convinced the District Court for the Western District of Michigan to allow them access to records regarding dealings between Remnant and the Plaintiffs.

(Doc 158. p. 1). Yet in reality, neither Plaintiff filed an appearance in the District Court of the Western District of Michigan. And regarding relevancy, Magistrate Judge Carmody's order could not have been clearer:

> Further, on reflection, the Court will not order those documents to be submitted for *in camera* review to the Massachusetts court because the relevance of the documents seems clear and there is already a protective order in the Massachusetts case.

(Doc. 127-38).

Between November 16 and November 21, 2007, Dwight Hall, president of Remnant Publications, Inc. (hereafter "Remnant"), told Defendant Pickle that he would not make it difficult for the Defendants to obtain the documents they needed. (Doc. 81-2 pp. 133–134; Doc. 81-3 pp. 2, 10; Pickle Aff. ¶¶ 1–5). Why then did Remnant resist so long in complying with the Defendants' subpoena? Referring to Grey Hunter Stenn LLP's resistance, Magistrate Judge Frazier suggested, "And they probably don't want to get sued themselves for giving up information they shouldn't be giving up." (Doc. 152-6 p. 18–19).

That the Plaintiffs were similarly the driving force behind Remnant's resistance is likely:

On June 25, 2008, the Plaintiffs informed this Court that the "Plaintiffs will seek a Motion to Reconsider the Order [to compel] in the Western District Court of Michigan, following the present Motion." (Doc. 75 p. 5; Doc. 76 ¶ 18).[1]

One may easily conclude that Remnant cares far less about this matter than the Plaintiffs.

B. "... court ... ordered that ... documents were being produced 'subject to the Protective Order ....' " (Doc 158. p. 1).

The Plaintiffs contend:

> However, the Michigan court expressly ordered that the Remnant documents were being produced "subject to the Protective Order already entered in the underlying case."

(Doc 158. p. 1).

The Defendants filed Magistrate Judge Hillman's April 17, 2008, protective order in the Michigan court as Exhibit H in May 2008. (Doc. 81-2 p. 134). That protective order clearly states, "This Order governs all documents and information produced, or to be produced by any party or third party in connection with this litigation ...." (Doc. 60 p. 1). Thus, since even non-confidential documents are produced subject to that order, documents merely produced subject to that order are not confidential unless the requirements of ¶ 1 of that order are also complied with.

C. "On October 30, 2008, as part of its order dismissing the case, this Court ordered Defendants to return all confidential documents." (Doc 158. p. 1).

The Plaintiffs in their opposition then cite the Electronic Clerk's Notes entered on October 31, 2008, but do not cite the actual order issued from the bench by the Honorable F. Dennis Saylor. There is a critical reason why, for the clerk's notes do not accurately reflect this Court's order. From the official transcript of the October 30, 2008, status conference:

> 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.

1 The reason Remnant filed that motion instead of the Plaintiffs is probably due to too little time to comply with that district's application procedures for *pro hac vice* admissions and ECF registration. (Pickle Aff. ¶ 6, Ex. D).

> 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.

(Doc. 141 p. 12). The key point to note is that confidential documents were to be returned "as set forth in [the] order" of April 17. Similarly, copying any such materials would "only be permitted if permitted under that order."

It is a simple fact that the confidentiality order issued by Magistrate Judge Hillman on April 17, 2008, does not require any party to this litigation to return any confidential documents. (Doc. 60 pp. 1–6). Neither does it prohibit any party from retaining copies of such documents. (*Id.*). Only non-parties to this litigation, such as retained experts, must return any confidential documents they receive, as set forth in Exhibit A of the confidentiality order. (Doc. 60 pp. 7–8).

On October 30, 2008, not 90 minutes after the status conference had ended, and the day before the Electronic Clerk's Notes were entered, Plaintiffs' counsel wrote to the Defendants:

> Per Judge Saylor's order of October 30, 2008 and the terms of the Order, you will be required to return these documents to the originator and to destroy or return all copies and notes of same. You will also be required to retrieve any copies that were provided to third parties, such as experts, and to ensure that no notes or copies of these documents remain in the custody of such third parties.

(Doc. 152-8, refiled by Plaintiffs on pp. 5–7 of Doc. 159-2; Doc. 152 ¶ 17). But the order of this Court of October 30, 2008, did not require the destruction of copies of confidential documents.

While the record reflects the Defendants' appreciation for Magistrate Judge Hillman's confidentiality order of April 17, which resolved fundamental points of disagreement between the parties (Doc. 77 p. 8; Doc. 126 p. 19), the Defendants cannot locate similar statements of appreciation by the Plaintiffs for that order. The Defendants therefore submit to this Court that rather than appeal from Magistrate Judge Hillman's order to Judge Saylor, the Plaintiffs instead chose to accomplish their designs through stealth.

For example, during the interchange with the Defendants that led up to the Defendants' filing of their notice of appeal, Plaintiffs' counsel on November 11, 2008, wrote:

> I will be filing a motion to require you both to return all confidential materials, and to consent to the return of the MidCountry Bank records that are currently in the possession of Magistrate Judge Hillman.

(Pickle Aff. Ex. E). Plaintiffs' counsel hereby threatened use of the Court's power to compel the Defendants to *consent* to the return of the MidCountry Bank records, which aren't even in the Defendants' possession. This is *prima facie* evidence that Plaintiffs' counsel believed that neither the confidentiality order of April 17 nor the terms of the order of October 30 were sufficient to keep these records away from the Defendants who had paid more than $3,500 for them.

Furthermore, Remnant's counsel filed an opposition to the Defendants' motion to compel on May 19, 2008, more than one month after the confidentiality order of April 17 was issued. That opposition requested the Michigan court, if the motion to compel was not denied, to "direct a protective order to be put in place to preserve the confidentiality of any documents obtained pursuant to Fed. R. Civ. P. 26(c)." (Doc. 76-3 p. 32). Logically, Remnant would seek a second protective order if the Plaintiffs did not think Magistrate Judge Hillman's confidentiality order was sufficient to conceal evidence of the laundering by Danny Lee Shelton (hereafter "Shelton") of the revenue of Three Angels Broadcasting Network, Inc. (hereafter "3ABN") through Remnant into Shelton's own pockets.

Also, when the documents finally were produced by Remnant on September 22, 2008, Remnant's counsel unsuccessfully sought to have the Defendants sign copies of Exhibit A of the confidentiality order (Doc. 155-2; Pickle Aff. ¶ 8), even though as parties to this litigation the Defendants are already subject to that order. Signing a copy of Exhibit A could conceivably have subjected the Defendants to the same return requirements non-parties must adhere to.

D. "Defendants refused to comply with this Court's order ...." (Doc. 158 p. 1).

The Plaintiffs contend:

> Defendants refused to comply with this Court's order, both with respect to the Remnant documents at issue in this motion and with respect to all other documents designated as confidential ....

(Doc. 158 pp. 1–2). Though the Plaintiffs at this point cite their refiled copy of Docket Entry # 152-8, the communications in question of October 30–31, 2008, tell a very different story.

Defendant Joy pointed out to Plaintiffs' counsel that the Defendants have a right under ¶ 7 of the confidentiality order to challenge the confidentiality designation of the Plaintiffs. (Doc. 152-8 p. 1). The Defendants have never waived that right. ¶ 7 states:

> 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.

(Doc. 60 ¶ 7). Challenging the confidentiality designation of the Plaintiffs after the conclusion of this action would be impossible if the Defendants returned all confidential documents.

In bold defiance of these terms of Magistrate Judge Hillman's order, Plaintiffs' counsel denied the Defendants' right to so challenge, writing on November 13, 2008:

> It doesn't matter if you don't think it is confidential. It is *our* designation of it as confidential that makes it subject to the order. Appeal all you want ....

(Pickle Aff. Ex. F p. 1).

Plaintiffs' counsel dared not file as exhibits to his opposition memorandum these communications. In them on November 12, 2008, he sought to determine whether or not the Defendants were refusing to return the documents in question, suggesting that on that date he wasn't sure. (Pickle Aff. Ex. F p. 3). Defendant Joy replied, "Again, let me clarify that we do intend to file an appeal of the District Court dismissal ...." (Pickle Aff. Ex. F p. 2). Plaintiffs' counsel responded, "Appeal all you want – you don't get to keep documents that were produced solely for litigation that has ended." (Pickle Aff. Ex. F p. 1). Plaintiffs' counsel hereby brazenly

attempted to violate or circumvent the terms of the confidentiality order, for non-parties who are subject to Exhibit A of that order must agree to return all confidential documents "within 30 days after the final termination of instant litigation, including appeal." (Doc. 60 p. 8).

The Honorable Timothy S. Hillman's electronic Order on Motion for Protective Order of March 10, 2008, stated:

> The parties are warned that abuse of the confidentiality process, including but not limited to the improper designation of documents as privileged or confidential, could result in the imposition of sanctions.

Evidence of the most transparent abuse by the Plaintiffs was filed by the Plaintiffs themselves. (Doc. 68-2 p. 3). Among the so-called extremely sensitive and confidential Rule 26(a)(1) materials produced on May 14, 2008, was a 2007 edition of *Ten Commandments Twice Removed*; that edition's cover says, "Over 5 MILLION Copies in Print." (*Id.*; Pickle Aff. ¶ 10, Ex. G). The Defendants must therefore be permitted to invoke ¶ 7 of the confidentiality order to demonstrate the extent of the Plaintiffs' abuse and the resulting broad basis for considerable sanctions.

E. "The Remnant documents were designated as confidential by both Remnant and Plaintiffs." (Doc. 158 p. 2).

Yet Remnant denied that Remnant was the designating party. (Doc. 155-3). On both October 24 and October 30, 2008, Plaintiffs' counsel stated that the Plaintiffs were the designating party, and did not so identify Remnant. (Pickle Aff. Ex. H; Doc. 152-8 p. 1).

So why are the Plaintiffs now changing their position of who was the designating party for the Remnant documents? The documents in question pertain to kickbacks and/or royalty payments by Remnant to DLS Publishing, Inc. (hereafter "DLS"). The Defendants have argued that neither 3ABN nor Shelton have standing to designate these documents as confidential, since they concern the business activities of Remnant and DLS, not 3ABN and Shelton,[2] and since

2 To argue against this point, the Plaintiffs must pierce DLS's corporate veil and acknowledge the Defendants' contention that DLS served principally as a channel for 3ABN funds to flow into Shelton's pockets. (Doc. 96-9 p. 2; Doc. 63-28 p. 13).

counsel for DLS has neither made an appearance in this litigation nor communicated with the Defendants. (Doc. 154 p. 2). The Plaintiffs find these arguments so convincing that they now claim that Remnant was a designating party after all. But even if such a reversal of position is deemed acceptable by the Court, if Remnant really cared about the issue, Remnant's counsel would have entered an appearance and filed his own opposition brief.

F. "... Defendants began talking freely about them on the internet ...." (Doc. 158 p. 2).

The Plaintiffs contend:

> Instead of complying with this Court's order to return the Remnant documents, Defendants began talking freely about them on the internet, stating falsely that they prove wrongdoing by the Plaintiffs.

(Doc. 158 p. 2). Yet Plaintiffs' counsel knows this is not the case, since the Defendants already pointed out in their reply memorandum in support of their motion to impose costs that the $300,000 figure Defendant Joy gave in the post in question came from Nicholas Miller's email of September 19, 2006. (Doc. 149 pp. 8–9). That date is more than two years before Remnant produced any documents, and even before the instant case was filed.

Further, the Defendants demonstrated in that same filing from public documents that the Remnant documents must substantiate sums of roughly $90,378, $482,589, and $176,739 in 2005, 2006, and 2007 respectively, not $300,000. (Doc. 149 p. 9). Table 1 of Docket Entry # 154 gave even more detailed estimates of the sums the Remnant documents must substantiate, using publicly available documents. (Doc. 154 p. 3).[3]

The Plaintiffs are well aware that the Defendants have been talking on the internet before this action was filed about Shelton receiving several hundred thousand dollars in royalties, since the Plaintiffs filed the Defendants' article to this effect as pages 8–10 of Docket Entry # 3-2.

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3 This language is carefully chosen, since the documents in question were designated confidential. Rather than saying the documents "do" or "do not substantiate," we instead say that they "must substantiate," according to publicly available information.

As far as whether Remnant's documents really do prove wrongdoing, Plaintiffs counsel himself asserted in his memorandum in support of his motion to dismiss that to say that those documents prove wrongdoing is to reveal the information those documents contain. (Doc. 121 pp. 7–8). However, Plaintiffs' counsel wishes to retract that position as well, now maintaining that the Remnant documents do not prove wrongdoing after all.

G. "... veiled death threats ... 'ethnic cleansing.' " (Doc. 158 p. 2).

The Plaintiffs contend:

> ... Defendant Joy began making veiled death threats against the Plaintiffs, suggesting that Plaintiff Shelton was like a conquered king and "you know what they do with conquered kings? Ask the czar and his entire family!!!" ..., and referring to his actions against Shelton and supporters of the Plaintiffs as "ethnic cleansing."

(Doc. 158 p. 2). These comments by the Plaintiffs are totally irrelevant to the pending motion.

The Defendants disagree upon whether such figures of speech for removal of sin from the church are appropriate. Nevertheless, it is a fact that such language as "cleanse the camp from Achans" refers to the relatively innocuous penalties of removal from church membership or office, Achan's stoning in Joshua 7:24–25 notwithstanding. (Pickle Aff. ¶ 12, Ex. I at pp. 2–3).

Shelton allows his followers to liken him to Moses and John the Baptist, and to teach that God declares it wrong for any human being to disagree with him or to correct him. (Doc. 81-10 pp. 51–53; Pickle Aff. Ex. J at pp. 1–2, 4–6, 9–10). Shelton admitted that a physician found him to be "physcotic" and "out to lunch" (Doc. 100-3 p. 1), or more precisely, a "psychopath." (Pickle Aff. Ex. K at p. 5). A quasi-cult leader and mental illness are a dangerous combination.

Like Napoleon, Shelton refuses to disappear, being reported by 3ABN at least three times now as still being president, even though he was supposedly replaced on September 6, 2007. (Doc. 127 ¶ 43; Doc. 127-44 p. 2; Doc. 127-45; Pickle Aff. Ex. L at p. 12; Doc. 63-34 ¶ 1).

Shelton has surrounded himself with compromised people who dare not cross him lest he

expose their secrets. (Doc. 63-12 pp. 15–16). A 3ABN Board member is alleged to have privately admitted to having been involved with an unsolved murder from years ago, and another board member is alleged to have always been a liar and petty thief. (Pickle Aff. ¶ 16). These individuals confront Shelton to their peril.

Shelton tried the same blackmail-like tactics with Defendant Joy in October 2006, but it didn't work. (Pickle Aff. ¶ 17, Ex. M). Shelton's own voluminous venom, examples of which can be found throughout the record, found its match in the retorts of Defendant Joy.

Members of Shelton's church, the Thompsonville Seventh-day Adventist Church, could discipline Shelton on a number of grounds (Pickle Aff. Ex. I at p. 4), but such an attempt puts them at risk of losing their jobs at 3ABN. Thus Shelton can continue sweet talking widows and the unsuspecting to turn over their assets so that he can do who knows what with all their money.

Shelton's hypnotic sway must be forever neutralized by a free press educating the public about Shelton's moral, financial, and unethical improprieties.

H. "... documents that had no relevance to the underlying lawsuit ...." (Doc. 158 p. 2).

It is not the Defendants' fault that the Plaintiffs chose to put at issue in their complaint the questions of Remnant's royalty payments to Shelton, and whether Shelton correctly reported those payments in IRS filings and in proceedings related to his divorce. (Doc. 1 ¶¶ 46(g)–(i), 50(i)). The Defendants adequately demonstrated that Shelton must have funneled 3ABN revenue through his publishing companies into his own pockets, and that from at least 2005 onward he had used Remnant for the same purpose. (Doc. 81-2 pp. 122–128, 134–135, 137–143).

That Remnant's counsel would maintain that documents pertaining to Remnant's royalty payments to Shelton are irrelevant to the question of Remnant's royalty payments to Shelton (Doc. 103-3 pp. 3–4) was utterly absurd. By echoing the same fallacious claim here, the Plaintiffs give evidence that Remnant's counsel adopted that position because of the insistence

and pressure of the Plaintiffs, not out of incompetence.

I. "... point of filing these documents under seal ... undermined ...." (Doc. 158 pp. 2–3).

The Plaintiffs contend:

> The benefit of filing the document under seal is somewhat diminished, however, by Defendants' description of Exhibit A as "a selection of the documents from Remnant [Publications, Inc.] pertaining to kickbacks and/or royalties from Remnant to DLS Publishing, Inc…." The point of filing these documents under seal is obviously undermined by Defendants' characterization of what they represent."

(Doc. 158 pp. 2–3).

Remnant did not produce any documents to the Defendants until September 22, 2008. (Doc. 155-2). More than a month before that date, on August 20, 2008, the Defendants argued that the Remnant documents would demonstrate that Shelton received kickbacks amounting to between 10% and 32% on sales by Remnant to 3ABN of his booklets published by Pacific Press Publishing Association (hereafter "PPPA"). (Doc. 96-9 pp. 3, 10).

The Defendants' wording as quoted by the Plaintiffs was carefully chosen. Rather than saying that the Remnant documents pertain to kickbacks and royalties, the Defendants instead said that they pertain to kickbacks and/or royalties, allowing for the unlikely possibility that their contention of August 20, 2008, regarding kickbacks was wrong. A review of these documents would take but a few minutes, and the Court would be able to see whether or not the Defendants were correct in their argument of August 20, 2008.

J. "... perfectly legal transactions ... fully vetted by ... accountants ...." (Doc. 158 p. 3).

The Plaintiffs contend:

> In point of fact, the Remnant documents reflect perfectly legal transactions that have been fully vetted by certified public accountants and evidence no wrongdoing by anybody.

(Doc. 158 p. 3).

Previously, the Plaintiffs' missed a golden opportunity to file documents proving that

3ABN's payment of personal, private vacation travel was in fact reimbursed. (Doc. 113 p. 9). Before the final document is filed in this action, it would be ideal if the Plaintiffs could file at least one document disproving the Defendants' allegations. They have again missed a golden opportunity to do so by not filing an affidavit by a certified public accountant explaining how there was nothing improper or unethical or illegal in Shelton laundering 3ABN revenue through Remnant into his own pockets in the form of kickbacks and/or royalties.

Accordingly, as the Defendants did before (*Id.*), the Defendants hereby state their support of the Plaintiffs seeking leave of the Court to file such an affidavit from the Plaintiffs' auditor, Alan Lovejoy, as a supplement or amendment to the Plaintiffs' opposition memorandum. The Defendants could then seek concurring opinions from the American Institute of Certified Public Accountants, the Illinois Society of Certified Public Accountants, and the Illinois Department of Financial and Professional Regulation.

However, the Defendants believe this claim by Plaintiffs' counsel is as hollow as his earlier claim that 3ABN's auditors had determined that there was nothing wrong with Shelton reporting his donation of horse(s) as cash instead of as property on IRS Form 8283 for the year 2003. (Doc. 127 ¶ 9). Alan Lovejoy would not dare risk his career by committing such fallacious claims to writing.

K. "... quote themselves ... with citation to a public filing ...." (Doc. 158 p. 3).

The Plaintiffs contend:

> By calling these documents evidence of "kickbacks and/or royalties" in a public filing, the Defendants can now quote themselves endlessly on the internet, as they tend to do, with citation to a public filing for support.

(Doc. 158 p. 3).

In saying that these documents pertained to kickbacks and/or royalties, the Defendants were merely using language from their memorandum dated August 20, 2008, filed in Michigan

in opposition to Remnant's appeal. (*supra* p. 12). Further, it should also be pointed out that the Plaintiffs and their counsel have filed plenty of unsupportable statements which then get posted and commented on the internet by their allies who are seeking to destroy the reputations of the Defendants. The record already demonstrates that the son of 3ABN Board chairman Walter Thompson (hereafter "Thompson"), Gregory Scott Thompson, has so posted and commented. (Doc. 63-33 pp. 17–19; Doc. 63 ¶ 21). It would therefore be inequitable to take cognizance of this argument by the Plaintiffs.

L. "This case is over." (Doc. 158 p. 3).

Thus wrote Plaintiffs' counsel on Monday, December 22, 2008. Yet just two days later, the same counselor wrote to the Defendants, "I'm going to miss you when this case is over." (Pickle Aff. Ex. N at p. 2). Thus, Plaintiffs' counsel does not really believe that at this point in time "this case is over."

M. "The only remaining issue is the pending motion by Defendants for reimbursement of 'costs' ...." (Doc. 158 p. 3).

Plaintiffs' counsel pretends that there is no appeal, and that the Defendants have not given him notice that they intend to invoke ¶ 7 of the confidentiality order. (Doc. 133; Doc. 152-8 p. 1).

N. "... including Mr. Pickle's cost of showering ...." (Doc. 158 p. 3).

The Plaintiffs contend:

> ... which to them means every expense they incurred that is metaphysically related to this case, including Mr. Pickle's cost of showering at a camp site while supposedly traveling to investigate allegations related to the lawsuit.

(Doc. 158 p. 3).

Shelton plundered 3ABN of perhaps millions of dollars over the years, including between roughly $749,706 and $808,614 from 2005 to 2007 just in book deals with Remnant. (Doc. 154 p. 3). 3ABN's reported legal expenses for 2007 were $1,100,545, a sizable increase over 2006's expense of $152,654, but 3ABN did not report 3ABN's payment of Shelton's personal, private

legal expenses as compensation to Shelton. (Pickle Aff. Ex. O & L at ln. 32 on p. 2, Ex. L at p. 12; Doc. 81-9 p. 18). Shelton claimed that Garwin McNeilus would foot the bill for a lawsuit, a man who sold his company in 1998 for $212 million. (Doc. 109-15 p. 7; Pickle Aff. Ex. P). Thompson claimed that Garwin McNeilus, a longtime 3ABN supporter who was made a 3ABN Board member in 2007, has helped pay for the instant action. (Pickle Aff. Ex. Q; Doc. 63-30 p. 28). 3ABN reported that the two law firms representing the Plaintiffs received a total of $752,399 in 2007 alone. (Pickle Aff. Ex. L at p. 8). How comparatively miniscule are all of the Defendants' costs, expenses, and fees, not to mention the $6 shower.

"N. Lisbon Travel Center" where the shower was purchased (Doc. 132 p. 2) is a truck stop, not a camp site.

O. "This contention is itself frivolous." (Doc. 158 p. 4).

The Plaintiffs contend:

> Pickle's affidavit indicates that the Remnant documents somehow show that the lawsuit itself was frivolous. This contention is itself frivolous. The lawsuit mentions royalties in just two allegations: Complaint ¶ 46(h) and 46(i) – alleging that Defendants defamed Plaintiffs by stating that Shelton refused to disclose royalties in divorce proceedings.

(Doc. 158 p. 4). This is false on numerous counts.

First, ¶ 46(g) of the Plaintiffs' complaint without qualification alleges that the Defendants stated, "3ABN Board members have personally enriched themselves as officers and directors of 3ABN in violation of the Internal Revenue Code." Certainly Shelton's laundering of 3ABN revenue through Remnant into his own pockets, to the tune of between roughly $749,706 and $808,614 in kickbacks and/or royalties from 2005 to 2007 (Doc. 154 p. 3), goes to the question of ¶ 46(g).

Second, ¶ 46(h) also concerns Shelton's refusal to disclose his royalties to the 3ABN Board, as alleged by Nicholas Miller and filed by the Plaintiffs. (Doc. 3-2 p. 8). It isn't just about

Shelton's division of marital assets case.

Third, ¶ 50(i) alleges that the Defendants stated, "Danny Shelton perjured himself through the course of court proceedings relating to his divorce from Linda Shelton." So vital were these allegations concerning Shelton's unethical business dealings with Remnant that the Plaintiffs repeatedly reference them in their complaint, including ¶ 50(i), since Shelton failed to report all his royalties and publishing assets on his July 2006 financial affidavit. (*infra* p. 17).

Fourth, in the hearing of October 22, 2008, in the Southern District of Illinois, Plaintiffs' counsel stated, "It's the paragraphs 46 and 48 of the complaint are where the specific allegations are of defamation," thus unofficially again dismissing the allegations of ¶ 50(a)–(i). (Doc. 152-6 pp. 9–10). As Magistrate Judge Hillman pointedly noted, the Plaintiffs have tried to narrow the issues too far. (Doc. 107 pp. 3–4). But the more the Plaintiffs narrow the issues, the more relevant the Remnant documents become, since there aren't many issues left if the Plaintiffs get their way.

Fifth, Plaintiffs' counsel in the hearing of May 10, 2007, made a major point of emphasizing the question of books deals and royalties, and used those allegations as a basis for a claim of defamation *per se*, with assumed damages. (Doc. 17 pp. 8, 13). About the same time, the Plaintiffs filed incomplete copies of the Defendants' articles about Shelton's July 2006 financial affidavit, and about Shelton's profits from his *Ten Commandments Twice Removed* book deal with Remnant. (Doc. 3-2 pp. 5–6, 8–10). The Defendants promptly filed complete copies. (Doc. 8-2 pp. 14–33, 35–38). There aren't many other exhibits filed by the Plaintiffs in the record that constitute the Defendants' pre-lawsuit, allegedly defamatory activities.

Sixth, it isn't the Remnant documents alone that demonstrate that this lawsuit is an abuse of process and a misuse of civil proceedings. One must also take into consideration the fact that Thompson and Gerald Duffy both claim that the law firm representing the Plaintiffs did a thorough review of the Plaintiffs' finances (Doc. 127-6 p. 1; Doc. 96-2), and thus they knew or

should have known that Shelton had laundered 3ABN revenue through Remnant into his own pockets in the form of kickbacks and/or royalties.

P. "There was never any dispute that Remnant paid royalties. The issue was whether these were properly disclosed." (Doc. 158 p. 4)

When this lawsuit began, this statement was correct. It is no longer so. The dispute now includes whether Remnant paid Shelton kickbacks intentionally mischaracterized as royalties.

3ABN receives 6% royalties from PPPA for books neither 3ABN nor 3ABN's employees have authored; this is understood to be an advertising and distribution fee rather than a true royalty. (Doc. 96-11 pp. 12–13; Doc. 96-9 p. 3). Similarly, since Shelton already receives royalties from PPPA for his 2001 and 2002 booklets (Doc. 96-11 pp. 1–3), if kickback payments from Remnant to DLS for sales of those same booklets to 3ABN are called royalties, it is a lie.

Q. "... never produced even an iota of evidence ...." (Doc. 158 p. 4).

The Plaintiffs contend:

> Defendants have never produced even an iota of evidence that the Remnant royalty payments were improperly characterized in any court proceeding or in IRS reporting.

(Doc. 158 p. 4). Or not disclosed to the 3ABN Board? That was the issue the Plaintiffs themselves made a part of the record in the early stages of this case when they filed an article containing former 3ABN board member Nicholas Miller's claim to that effect. (Doc. 3-2 p. 8).

On May 10, 2007, the Defendants filed articles which outlined Shelton's entire July 2006 financial affidavit, and which pointed out that Shelton had failed to report any royalties as income or DLS as an asset in that affidavit which was part of Shelton's division of marital assets case. (Doc. 8-2 pp. 14-38).

On May 15, 2008, the Defendants filed part of 3ABN's 2006 Form 990, signed by Shelton, in which he denied receiving income from any related organization. (Doc. 63-32 p. 19 at ln. 75c, p. 21). According to IRS instructions that year, DLS was a related organization because

of "Relationship 8," making Shelton's denial in that filing false. (Pickle Aff. Ex. R at p. 2).

On August 26, 2008, the Defendants filed a portion of Shelton's interrogatories from his division of marital assets case in which he reported an amount for his Remnant royalties as "varies." (Doc. 96-6 p. 2).

On August 26, 2008, the Defendants filed Shelton's PPPA contracts which proved that his booklets published by PPPA were authored before his June 25, 2004, divorce, and thus belong in part to Linda Shelton, Shelton's ex-wife. (Doc. 96-11 pp. 1–3, 9–10). On May 15, 2008, the Defendants filed an affidavit by Shelton in which Shelton claimed he had not used D & L Publishing since before his divorce. (Doc. 63-34 ¶ 3). Thus Shelton must have reported any kickbacks received from Remnant for his PPPA booklets (*supra* p. 12) as being paid to DLS, even though DLS did not exist until after his divorce. (Doc. 63-34 ¶ 5). Reporting such payments as entirely attributable to DLS is therefore fraudulent, and is *prima facie* evidence that Shelton fraudulently converted these pre-divorce marital assets. Since the origins of Shelton's book *Ten Commandments Twice Removed* also predate the divorce, the same logic applies to it.

R. "The point of dismissing the lawsuit ...." (Doc. 158 p. 4).

The Plaintiffs contend:

> The point of dismissing the lawsuit was to stop the lawsuit prior to reaching a determination on the merits, to spare the resources of the Court and the parties.

(Doc. 158 p. 4). This statement would appear to be an admission that if the lawsuit had reached a determination on the merits, the Plaintiffs would have lost.

Thus far the Plaintiffs have shown little interest in sparing the resources of the Court or the Defendants. The Plaintiffs themselves have now told the Court what the Defendants previously did, that the motion for dismissal was to avoid expense as well as discovery. (Doc. 127 ¶ 5). Thus, Thompson's testimony that donations are now back to what they used to be is

even less credible. (Doc. 123 ¶ 8).

S. "... should not be allowed to add new arguments and evidence ...." (Doc. 158 p. 4).

The Plaintiffs contend:

> Defendants did not see fit to offer Exhibit A in connection with that motion, and should not be allowed to add new arguments and evidence in support of their position now. If the merits of a dismissed lawsuit are to be addressed in the context of a motion for costs, there is no opportunity for Plaintiffs to respond adequately.

(Doc. 158 p. 4). The Defendants had no idea that the Plaintiffs in their opposition brief would raise the question of legal authority in regards to paying even 1¢ of the Defendants' reasonable costs, expenses, and fees. The only way the Defendants could respond adequately was in their reply memorandum. If the Plaintiffs require another round of briefing or oral argument, the Defendants would not oppose such, and would in fact welcome it.

T. "... an endless procession of affidavits ...." (Doc. 158 p. 4).

The Plaintiffs contend:

> Further, the benefit of dismissing the case would be lost if Plaintiffs were now forced to produce all the evidence that supported the case in what would be an endless procession of affidavits from the many witnesses who would have proven Plaintiffs claims had the case proceeded to a resolution on the merits.

(Doc. 158 p. 4). Endless procession? The Plaintiffs' witness list as disclosed in their Rule 26(a)(1) disclosures consisted of only most of 3ABN's directors and officers, Linda Shelton, the Defendants, Gregory Matthews, and Laird Heal. (Doc. 37-2 pp. 2-5).

By referring only to affidavits the Plaintiffs thus reveal that they weren't even going to let the Court see documentary and foundational evidence.

On December 14, 2007, Plaintiffs' counsel argued regarding the Defendants' document requests, "There's nothing, as far as we're concerned, that they would need more ...." (Doc. 144 p. 10). Even before this suit was filed, there were indications that Shelton would refuse to

produce documents. (Pickle Aff. ¶ 23, Ex. S). Yet this strategy of failing to disclose documents and witnesses, and relying on testimony alone, doomed 3ABN's property tax case. (Doc. 81-4 p. 5–7, 9; Doc. 81-8 pp. 7–10, 13–15, 17–20; Doc. 127-43 pp. 3–4). Shelton hasn't learned a thing.

CONCLUSION

In order to properly respond to the issue the Plaintiffs raised regarding legal authority to impose costs, expenses, and fees, the Defendants seek to file under seal as Exhibit A a selection of documents pertaining to kickback and/or royalty payments by Remnant to DLS from 2005 through 2007. The documents should be filed under seal, and the Court should consider the Plaintiffs' opposition memorandum, with the additional facts brought out in this reply memorandum, as an additional basis for sanctions. The Defendants welcome additional briefing and/or oral argument to adequately address the Plaintiffs' concerns.

Respectfully submitted,

Dated: December 29, 2008

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AFFIDAVIT OF SERVICE

Under penalty of perjury, I , Bob Pickle, hereby certify that this document, with accompanying affidavit and exhibits, filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

Dated: December 29, 2008

/s/ Bob Pickle
Bob Pickle