
UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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

**DEFENDANTS' MEMORANDUM IN SUPPORT OF
DEFENDANTS' MOTION FOR SANCTIONS**

INTRODUCTION

Defendants seek sanctions pursuant to Fed. R. Civ. P. 11(c)(2) and the Court's inherent powers in regards to two memoranda filed by Plaintiffs' counsel. (Doc. 174; Doc. 175).

Throughout this litigation, and even before it started, Defendants were struck by the lack of integrity and professional standards of the law firm, Siegel Brill Greupner Duffy & Foster P.A. ("SBGDF"). Gerald Duffy ("Duffy") invoked common law copyright to keep the public from discovering his attempt to silence concerns about child molestation allegations. (Doc. 63-18). Jerrie Hayes ("Hayes") denied in open court that a criminal investigation was going on, even though her own proposed protective order referred to an investigation by the Department of Justice. (Doc. 89 p. 33; Doc. 40-2 ¶ 4). Duffy later admitted that at the time of Hayes' denial, he was representing Plaintiffs in their investigation by the U.S. attorney. (Doc. 96-2).

Despite his alleged high ratings for ethics, Gregory Simpson ("Simpson") has continued

this pattern of questionable conduct.

FACTS

On April 27, 2009, Defendants' filed motions to reconsider and to amend findings, and to file under seal. (Doc. 169; Doc. 173). Plaintiffs responded on May 11, 2009, with memoranda in opposition to those motions, both signed by Simpson. (Doc. 174; Doc. 175). Defendants replied, demonstrating that Plaintiffs had made multiple misstatements of fact and law, at least some of which were clearly intentional, and Defendants told the Court that Defendants would file this motion if the matters were not corrected in 21 days. (Doc. 177; Doc. 179).

According to SBGDF's website, Simpson obtained his law degree in 1989, received "the highest possible distinction" in "Martindale Hubbell's peer rating process for legal ability and ethical standards," and sat on the Hennepin County Bar Association Ethics Committee every year since 1997. (Affidavit of Robert Pickle ("Pickle Aff.") Ex. A). Simpson therefore knows better.

Erroneous Statements in Plaintiffs' Responses

- A. " ... referring to perfectly proper royalty payments to Shelton from Remnant Publications for the sale of books he authored as 'kickbacks and/or royalties.' " (Doc. 174 p. 4).**

Simpson possesses the documents from Remnant Publications, Inc. ("Remnant"). (Doc. 178-17). In light of prior briefing (Doc. 161 p. 17), this misstatement must be intentional.

Pacific Press Publishing Association ("PPPA") pays Danny Lee Shelton ("Shelton") royalties for booklets by Shelton that PPPA published. (Doc. 96-11 pp. 1-3). Three Angels Broadcasting Network, Inc. ("3ABN") buys merchandise from PPPA. (Doc. 96-11 p. 4). But 3ABN instead bought Shelton's PPPA booklets from Shelton when 3ABN could have bought them from PPPA for as much as 32% less. (Doc. 96-11p. 5; Doc. 96-10 ¶¶ 11-12). Thus Shelton made sales income on these booklets to 3ABN's detriment on top of the royalties he earned from PPPA. In 2005 3ABN started buying these same booklets from Remnant for the same price it had

been buying them from Shelton, even though Remnant didn't have stock to fill the orders. (Doc. 96-11 pp. 18–22). The only logical reason for such an arrangement is that it was a kickback scheme. There is no honest way to call payments to Shelton by Remnant for sales of PPPA booklets “royalties” since Remnant was not the publisher.

For books Remnant did publish, there are still possible difficulties.¹ Payments from Remnant that far exceed industry standards for royalties, or that equate to the profits Shelton would make if he himself were the publisher or wholesaler, cannot be “perfectly proper royalty payments.” The portion in excess of industry standards would rightly be called a kickback.

The proper resolution of this motion requires a review of the Remnant documents by the Court to determine whether these documents have indeed been intentionally mischaracterized.

B. “... a matter which would have been rectified had it been brought to the attention of counsel.” (Doc. 175 p. 8).

Simpson thus denies that he was ever contacted about the missing *3ABN World* issues. However, on June 18, 2008, Defendants notified Simpson about Plaintiffs’ failure to produce the magazines. (Doc. 180-9). Simpson responded on June 20. (Doc. 81-2 p. 118). On June 25, Defendants specifically identified for Simpson the three *3ABN World* issues unobtainable from either 3ABN.org or Archive.org. (Doc. 81-11 p. 40). Defendants filed the letters of June 20 and 25 on July 9, 2008. Defendants included the problem of the missing *3ABN World* issues in an affidavit filed on September 8, 2008. (Doc. 103 p. 7). Simpson never rectified the matter.

C. “... including a simple request to 3ABN for back issues of their magazine.” (Doc. 175 p. 8).

Defendant Pickle served a request to produce upon 3ABN for issues of *3ABN World* on November 29, 2007, and asked Plaintiffs’ counsel for the missing issues on June 25, 2008. (Doc. 63-20 p. 10; Doc. 81-11 p. 40). At the request of Plaintiffs’ counsel, this Court ordered that

¹ Due to Plaintiffs’ confidential designation, despite Plaintiffs’ lack of standing to so designate documents pertaining to unrepresented corporation DLS Publishing, Inc., Defendants believe Defendants are prohibited from speaking of certainties and must speak instead of “possible difficulties.”

Defendants could only contact Plaintiffs through Plaintiffs' counsel. (Doc. 144 pp. 12, 19). Thus, Defendants made more than one simple request, of the only type allowed by this Court.

D. “What that ‘bearing’ may be is not explained” (Doc. 174 p. 1).

To the contrary, Defendants did explain what bearing the exhibits in question had to their motions to reconsider and amend findings:

1. Exhibits Q–R: These establish when a *3ABN World* issue would have gone to press and come back from the printer, thus clarifying when the articles in question were written. (Doc. 170 p. 7). That in turn demonstrates that Shelton's book is a pre-divorce asset, that Shelton failed to disclose royalties for that book on his 2006 financial affidavit, and that Plaintiffs thus always knew that ¶¶ 46(h) and 50(i) of their complaint were baseless. (Doc. 170 pp. 7, 19–20). Plaintiffs' suit must therefore have been filed for an improper purpose. (Doc. 170 p. 19).

2. Exhibits X–Y: These establish whether or not 3ABN administration believed the allegations against Leonard Westphal to be true, and thus whether Plaintiffs always knew that ¶ 48(b) of their complaint was baseless, and whether claims of vindication by the EEOC are fraudulent due to Plaintiffs' failure to produce these documents to the EEOC during the EEOC's investigation. (Doc. 170 pp. 9, 16–17).²

3. Exhibit BB: This demonstrates the truthfulness of Defendants' unrebutted assertions in the record regarding the vexatious nature of Plaintiffs' discovery, which has a bearing on the accuracy of a finding in the order of April 13, 2009. (Doc. 170 pp. 13–14).

E. “... Plaintiffs have not been made aware of exactly what documents Defendants seek to file” (Doc. 174 p. 3).

Defendants “made [Simpson] aware of exactly what documents” on April 20, 2009, and Simpson replied that very day. (Doc. 180-2 pp. 3–4). A simple glance at the five documents

² Plaintiffs used their fallacious EEOC exoneration claims to oppose Defendants' motion for costs. (Doc. 140 p. 6, cited at Doc. 170 p. 9).

produced by 3ABN in the list Defendants gave Simpson would have told anyone that four of those five were Exhibits Q–R and X–Y that Defendants wished to file. (*Id.*; Doc. 180 ¶¶ 2–4).

F. “... *In re Boston Regional Medical Center, Inc.*, 328 F.Supp.2d 130, 143 (D. Mass. 2004) ...” (Doc. 175 p. 3).

Simpson cited this case to show that no arguments raised the first time in a reply brief should be considered. However, this particular case concerned arguments raised the first time in *a supplemental brief*, arguments the court found could have been raised on five different, previous occasions, one of which was in *a reply brief*. 328 F.Supp.2d at 142.

G. “This Court’s order indicates that it considered the arguments raised by the Defendants in their reply brief ...” (Doc. 175 p. 4).

Plaintiffs’ quote no such language from the order of April 13, 2009. Defendants are unable to find any language that suggests that the Court read Defendants’ reply brief.

H. “These claims have been raised and rejected ... by every judge to consider them, including this Court, Magistrate Judge Hillman, and several out-of-district judges who heard motions to quash the third party subpoenas served by the Defendants.” (Doc. 175 p. 5).

Plaintiffs make this contention while citing Defendants’ facts at Doc. 170 pages 2–3. Yet Plaintiffs cite nothing to prove that Defendants’ stated concerns have been unanimously rejected. We note the following specific points raised on pages 2–3 of Doc. 170:

1. Defendants produced 1000’s of documents in their initial disclosures; Plaintiffs produced nothing until compelled by court order.

If Magistrate Judge Hillman rejected Defendants’ concerns, why did his March 10, 2008, electronic order compel Plaintiffs to produce their non-confidential Rule 26(a)(1) materials?³

2. Plaintiffs produced their Rule 26(a)(1) materials in large, unindexed PDF files, for which Court reprimanded Plaintiffs.

Defendants referred to the following in footnote 1 of Doc. 170 p. 2:

³ The non-confidential materials Plaintiffs produced in response to that order constituted about 77% of the total pages Plaintiffs ever produced. (Doc. 81 Tables 1 & 4, ¶ 14; Doc. 103 ¶ 2).

The defendants also contend that the plaintiffs' responses are inadequate because they have simply produced volumes of documents without specifying the requests as to which the documents are responsive. The plaintiffs have an obligation to produce the documents as kept in the usual course of business or organize and label them to correspond to the categories of the request. *See* Fed. R. Civ. P. 34(b)(2)(E)(i). From the parties' submissions and the issues raised during the hearing, the Court has doubts as to whether the plaintiffs have fulfilled their obligation under Rule 34(b)(2)(E)(i).

(Doc. 107 p. 4). Thus, Magistrate Judge Hillman never rejected this concern of Defendants.

3. Failure to permit inspection of the portion of a request not objected to as required by Rule 34(b)(2)(C).

This Court itself told Plaintiffs on May 7, 2008:

Well, surely, if he has asked for documents from the plaintiff, even if those requests are overbroad, it seems to me that clearly there must be a core of documents you think are relevant that could be produced to get the process rolling. In other words, if he asks for A through Z, and you believe that only A through G are relevant, I don't know why you couldn't produce A through G and preserve your rights about H through Z and fight about that.

(Doc. 77 p. 13). And that is precisely what Fed. R. Civ. P. 34(b)(2)(C) requires. (Doc. 170 p. 3).

4. Courts in Michigan and Minnesota enforced the subpoenas; court in Michigan found Remnant documents to be relevant.

If every court universally rejected Defendants' arguments and concerns, the Minnesota and Michigan courts would not have ruled thus. (*infra* pp. 12–13 at N(3)–(4)).

I. Defendants' appellate "briefs string together hearsay from unsourced emails" (Doc. 175 p. 6).

Statements made by Plaintiffs themselves, or by their agents, servants, representatives, or co-conspirators, are by definition not hearsay. Fed. R. Evid. 801(d)(2). Defendants already refuted this misstatement. (Doc. 178-2 pp. 20–21, 26). Since Simpson professes to have read Defendants' appellate briefs, his misstatement must be intentional.

J. "The merits had never been at issue before; thus there had been no opportunity to present evidence on that topic" (Doc. 175 p. 7).

But Defendants' appellate reply brief pointed out that Defendants twice invited Plaintiffs

to submit such evidence. (Doc. 178-2 p. 12). (a) Plaintiffs suggested that 3ABN could have been reimbursed for personal vacation travel that 3ABN paid for Linda Shelton and Brenda Walsh. (Doc. 110 p. 5). Defendants invited Plaintiffs to support that assertion with proof of such reimbursement. (Doc. 113 p. 9). (b) Plaintiffs asserted that the Remnant documents concerned transactions fully vetted by C.P.A.'s, and were perfectly legal and not wrong. (Doc. 158 p. 3). Defendants invited Plaintiffs to support that assertion with an affidavit by a C.P.A. attesting that those transactions were not improper or unethical or illegal. (Doc. 161 pp. 12–13).

What golden opportunities wasted! Defendants' twice promised not to oppose Plaintiffs' motions to file supplemental briefs in order to file such evidence. (*Id.*; Doc. 113 p. 9).

On May 24, 2007, Plaintiffs filed Mollie Steenson's affidavit with exhibits, all supposed to be supportive of the merits of the case. (Doc. 10 pp. 6–8; Doc. 10-3 ¶¶ 5–11). But Defendants already pointed this out. (Doc. 170 p. 4; Doc. 178-2 pp. 12–13).

K. “... a tape recording ... about something that is not material to the case” (Doc. 175 p. 7).

Plaintiffs asserted in May 2007 that Defendants in particular drastically affected donation levels in December 2006. (Doc. 10-5 ¶ 7). Only one thing could possibly substantiate this claim: Defendants' late 2006 exposé of Shelton's 2003 cover up of the child molestation allegations against Tommy Shelton. (Doc. 63-15). Therefore, Plaintiffs know this recording is material.

L. “... this tape ... they have had it since before the lawsuit started.” (Doc. 175 p. 8).

Simpson does not qualify by saying, “Upon information and belief.” Defendants received the recordings after June 2, 2008, and produced them on June 19 to Simpson as he requested. (Doc. 178-8; Doc. 178-7; Pickle Aff. Ex. B). The lawsuit was filed on April 6, 2007. (Doc. 1).

M. “... every one of which is said to demonstrate fraud, but every one of which is demonstrably accurate.” (Doc. 175 p. 9).

Plaintiffs thus refer to the following points which are referenced on Doc. 170 pages 7–10:

1. “The Complaint identified 24 specific defamatory statements” (Doc. 140 pp. 2–3).

The 24 “statements” referred to are ¶¶ 46(a)–(k), ¶¶ 48(a)–(d), and ¶¶ 50(a)–(i). (Doc. 1).

On October 22, 2008, Magistrate Judge Frazier found regarding ¶ 46(g):

Those are pretty broad. Are the allegations -- let me go back here to Mr. Simpson. Does your complaint state it that broadly, that there were just general allegations of financial impropriety?

Simpson replied in part, “There are some that are broad, and there are some that are narrow, Judge. And they’ve made these allegations broadly” (Doc. 152-6 p. 9). If Simpson agrees that some of the 24 “statements” are broad, he knows that they are not all at the same time specific.

2. “They were given thousands of pages of records in discovery including virtually all of 3ABN’s corporate records and tax filings” (Doc. 140 p. 3).

For Rule 11 purposes, we ignore the false implication that this material was substantive.

3ABN was founded in 1985. (Doc. 1 p. 3). 3ABN’s tax filings for the IRS and states of California, Oregon, and Illinois were produced only for the years 2001 to 2005. Some pages were illegible. The 2002 Form AG990-IL and 2005 Form CA 199 were missing. (Pickle Aff. ¶ 3). Board and executive committee minutes were produced from 2001 through about April 16, 2007, with some omissions. (Doc. 103 ¶¶ 5(ak)–(am)). No board minutes pertaining to 3ABN’s purported gift in 2007 of 40 or more acres to Shelton were produced. (Doc. 103 ¶ 5(c)).

No tax filings or corporate records were produced for Three Angels Enterprises, LLC, Crossbridge Music, Inc., and DLS Publishing, Inc.; no tax filings or corporate records were produced for Plaintiffs’ other domestic and foreign corporations; and no tax filings were produced for Shelton and D & L Publishing. (Doc. 103 ¶¶ 5(ao), (at), (by)–(bz)).

Plaintiffs put at issue Shelton’s royalties (Doc. 1 ¶¶ 46(h)–(i), 50(i)), but no tax filings were produced for 2006, the year of 3ABN’s massive promotional campaign for Shelton’s *Ten Commandments Twice Removed* book. (Doc. 49 ¶ 4; Doc. 3-2 pp. 8–10). Arbitrarily restricting

board minutes to a post-2001 time period prevented discovery concerning embezzlement allegations against former 3ABN CFO Pete Crotser, the 1998 real estate deal, and other matters.

IRS Form 990's and minutes were incomplete due to unilateral redactions in violation of the confidentiality order. (Doc. 103 ¶ 5(at); Doc. 171 ¶ 22; Pickle Aff. ¶ 4; Doc. 60 ¶ 1).

“[V]irtually all of 3ABN's corporate records and tax filings”? Absolutely not!

3. **“Finding little help among the Plaintiffs' *relevant* documents, the Defendants adopted a strategy of seeking oppressively large amounts of irrelevant information In an email to a confidante, Defendant Gailon Arthur Joy explained the Defendants' plan”** (Doc. 140 p. 3).

The email cited is dated January 20 and 22, 2008. (Doc. 76-5 p. 33). Plaintiffs never produced document one until March 28, more than two months later. (Doc. 68-2 p. 1).

In support of his motion to limit the scope of discovery, Simpson correctly stated that Defendant Pickle's requests to produce were served in 2007, and that of all Defendants' subpoenas for six different non-parties, only the one for Glenn Dryden is dated *later* than March 10, 2008. (Doc. 75 pp. 3–4). Thus, regardless of document relevance or Defendants' strategy, Simpson knew that Defendants adopted no such strategy *after* reviewing Plaintiffs' documents.

4. **“In other words, Plaintiffs' efforts to narrow the scope of discovery were justified.”** (Doc. 140 p. 4).

This statement purports to be derived from Magistrate Judge Hillman's order of September 11, 2008. Yet that order said:

... it is apparent from the hearing that plaintiffs are taking much too narrow a view as to whether documents or other things in their possession may be relevant to their claims and/or defendants' defenses.

(Doc. 107 p. 3).

5. **“... Defendants sought to circumvent any limitations that this Court might place ... by using third party subpoenas issued by other courts. Plaintiffs resisted the end-run around this Court”** (Doc. 140 p. 5).

Subpoenas for MidCountry Bank (“MidCountry”), Remnant, and Gray Hunter Stenn LLP

(“GHS”) had to be issued by courts near where those entities are located. Fed. R. Civ. P. 45(a)(2)(C), 45(c)(3)(A)(ii). Plaintiffs complained on December 14, 2007, that Defendants’ subpoenas “were not issued from the correct court.” (Doc. 144 p. 12). Thus, Defendants had to have other courts reissue those subpoenas, subpoenas which were first issued by this Court. (Doc. 76-2 pp. 34, 39; Doc. 76-3 pp. 1, 5, 10, 12). There is thus no evidentiary basis for the assertion that Defendants attempted any sort of end-run.

6. “... the goals of the lawsuit had been met by means outside the lawsuit, namely by purchasing the offending web sites from Defendant Joy’s bankruptcy trustee” (Doc. 140 p. 6).

Plaintiffs repeatedly demonstrated in legal proceedings that their goal was to stop Defendants’ use of any domain name that included the letters “3ABN.” (Doc. 89 p. 30; Doc. 127-41 p. 4; Doc. 171-19 pp. 2–3; Doc. 171-20 pp. 37–38, 42–44, 47, 153). 16 such domain names are still in use, and Plaintiffs have not obtained the injunction against such use that they requested in their complaint. (Doc. 127 ¶ 29; Doc. 1 p. 20 at ¶¶ 2–3). Beginning about February 25, 2008, Defendants referred to and filed articles from five of these other Save 3ABN websites. (Doc. 63-29 p. 6; Doc. 63-30 pp. 10–27; Doc. 81 Tables 1 & 4, ¶ 27; Doc. 81-10 pp. 23, 53; Doc. 81-11 p. 18; Doc. 96-11 pp. 45–63; Doc. 100 ¶ 18; Doc. 100-16; Doc. 127-34 to Doc. 127-37).

7. “... and by obtaining favorable rulings from the governmental agencies that had been investigating the Plaintiffs’ conduct.” (Doc. 140 p. 6).

Walter Thompson (“Thompson”) cited anonymous attorneys as saying that the IRS does not provide letters to demonstrate that a criminal investigation has concluded favorably. (Doc. 123 ¶ 5). Therefore, Simpson already knows that he cannot demonstrate the accuracy of the statement that the IRS gave a favorable ruling despite documented private inurement and tax evasion, and despite IRS confirmation that a whistleblower’s claim is still open. (Doc. 126 pp. 12–13; Doc. 178-18).

8. “... the bankruptcy judge closed down the web site that had taken

3abn's name and was using it to malign 3abn.” (Doc. 171-21).

Thompson made this statement on January 5, 2008. (*Id.*). Defendant Joy's bankruptcy's docket sheet through January 14, 2008, reveals no such order shutting down Save3ABN.com. (Pickle Aff. Ex. C).

9. “When it became apparent that the Defendants’ incessant badmouthing of the Plaintiffs had ceased to be a major concern within Plaintiffs’ community, and donations were restored” (Doc. 140 p. 7).

If donations had been indeed restored, 3ABN employee Hal Steenson and 3ABN president James Gilley would not have tried to raise \$5 million in 9 days by October 17, 2008, roughly a third of 3ABN's total 2007 revenue. (Doc. 127-46; Doc. 162-13 p. 1; Doc. 170 p. 9).

If 3ABN cannot prove that they disseminated information about the EEOC investigation prior to October 23, 2008, then Plaintiffs cannot demonstrate the accuracy of their contention that a favorable EEOC ruling restored donations by restoring public confidence. (Doc. 170 p. 9).

To demonstrate the accuracy of Plaintiffs' statement, Plaintiffs must finally establish what donation levels have been and why donors ceased or lessened giving since the year 2002, differentiating between donations and sales and between insider and non-insider donations. (Doc. 48 pp. 4–5; Doc. 126 p. 20). This is particularly necessary since donation levels were likely volatile during 2008, artificially lowering donation levels in the first part of 2008⁴.

10. “... documents that had no relevance to the underlying lawsuit” (Doc. 158 p. 2).

Defendants stated regarding this previous statement by Plaintiffs:

Though Plaintiffs and their counsel know that these documents are proof of Shelton's private inurement, his failure to disclose his royalties, and his

⁴ Well-known philanthropists and ASI Missions, Inc. (“ASI”) directors Garwin McNeilus (“McNeilus”) and Stan Smith (“Smith”) joined the 3ABN Board in 2007. (Pickle Aff. ¶¶ 6–9, Ex. D–H). McNeilus indicated about February 2008 that Shelton was history. (Pickle Aff. ¶ 10). Upon information and belief, at the May 2008 3ABN Board meeting, after directors learned that allegations about Remnant book deals were true, Shelton came one vote shy of being terminated, and some directors resigned in protest when that vote failed. (*Id.*). McNeilus, Smith, and long-time 3ABN director and supporter May Chung are indeed no longer directors. (Pickle Aff. ¶¶ 11–12, Ex. H–I). The loss of support from these individuals and their circle of friends in the first part of 2008 could have been substantial, especially since ASI has been such a strong supporter and promoter of 3ABN. (Pickle Aff. ¶¶ 13, Ex. J).

perjury on his July 2006 financial affidavit, and thus relevant to this case, Plaintiffs fraudulently declare that these documents have “no relevance to the underlying lawsuit.” (Doc. 158 p. 2).

(Doc. 170 pp. 9–10). Thus, without evidentiary support, Plaintiffs fallaciously assert as demonstrably accurate that the Remnant documents are irrelevant to these specific questions in their complaint. (Doc. 1 ¶¶ 46(g)–(i), 50(i)).

N. “Defendants told anybody who would listen that Plaintiffs’ position on those pretrial motions was not well-founded, but not one court agreed.” (Doc. 175 p. 10)

In actuality, Defendants’ scored a definite win over the question of the form of electronic discovery. (Doc. 33). Regarding later pretrial discovery issues:

1. Defendant Pickle’s first motion to compel Plaintiffs. (Doc. 35).

Magistrate Judge Hillman’s March 10, 2008, electronic order granted this motion in part.

2. Plaintiffs’ motion for a confidentiality order. (Doc. 40)

After Defendants complained that Plaintiffs were trying to declare confidential 3ABN’s financial statements, which are required by Illinois statute to be open to public inspection, Magistrate Judge Hillman warned the parties against abusively designating documents as confidential. (Doc. 48 p. 2, 5; Doc. 89 p. 37; Doc. 44 ¶ 11; Electronic Order of Mar. 10, 2008).

3. Shelton’s motion to quash the subpoena of MidCountry. (Doc. 76-3 pp. 18–19)

Magistrate Judge Boylan agreed with Defendants that Shelton did not have standing to object to Defendants’ subpoena of MidCountry documents pertaining to DLS Publishing, Inc. (Doc. 155 ¶ 3; Pickle Aff. ¶¶ 14–16, Ex. K). Magistrate Judge Boylan denied Plaintiffs’ motion to quash and instead enforced the subpoena. (Doc. 63-36).

4. Defendants’ motion to compel Remnant. (Doc. 81-2 pp. 121–132).

In the hearing of June 16, 2008, Magistrate Judge Carmody repeatedly stated that she believed the documents sought for were relevant, even “clearly relevant,” yet ruled from the

bench anyway that they should be sent under seal to Massachusetts for *in camera* review to determine their relevancy. (Pickle Aff. Ex. M at pp. 7, 12, 14, 20–23). However, she reversed her decision in her subsequent written order:

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). That the Michigan court thus agreed with Defendants, even Simpson admitted:

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).

5. Plaintiffs’ motion to quash subpoena of GHS. (Doc. 114-26)

Judge Gilbert markedly changed his tone toward Defendants after receiving Defendants’ filings. (Doc. 76-3 pp. 50–51; Doc. 178-5; Doc. 178-6).

From Plaintiffs’ perspective, Magistrate Judge Frazier agreed with Defendants on many, many points: (a) ¶ 46(g) of Plaintiffs’ complaint was “pretty broad,” wouldn’t “get to a jury,” and Plaintiffs needed “to come up with specifics.” (b) “Well, of course, they want everything. I mean, I would. Wouldn’t you want everything?” (c) Plaintiffs were “obviously ... trying to back you down for some reason”; their suit was “a nice public way of refuting those statements ... saying it ain’t so, Joe.” (d) “They don’t have to come in and disprove that Mr. Shelton was a crook You guys have to prove that he was a crook” “And the only way they are going to do that is, well, by getting into these records.” (e) Regarding the need to challenge Plaintiffs’ information in their financial statements and auditor’s reports, “I have no doubt that you are entitled to a large amount of the financial information that pertains to Three Angels Broadcasting” “Would it be relevant ... if it turns out that the documents that the accountant has are different from the

documents that actually exist or maintained by Three Angels Broadcasting ...?” “And there are a lot of different ways that financial impropriety could be disguised by clever bookkeeping. ... changes in accounting methods, any number of these that might be relevant” (g) The subpoena was not quashed. (Doc. 152-6 pp. 8–9, 11, 13, 19, 22–24, 27, 32, 36).

6. Plaintiffs’ motion to limit the scope of discovery. (Doc. 75)

Magistrate Judge Hillman denied Plaintiffs’ requests (a) to limit the scope of discovery as to subject matter or time frame, (b) to prohibit discovery of donor information, and (c) for *in camera* review of the MidCountry, Remnant, and GHS documents. (Doc. 107; Doc. 74 pp. 2–3; Doc. 75 pp. 16–17). While Plaintiffs’ request that leave of the court be obtained before issuing subpoenas was granted, that requirement was imposed on Plaintiffs as well as Defendants, which Plaintiffs’ counsel likely did not consider either complimentary or agreeable. (Doc. 107 pp. 4–5).

About Plaintiffs’ efforts to narrow the scope of discovery, Magistrate Judge Hillman said:

... it is apparent from the hearing that plaintiffs are taking much too narrow a view as to whether documents or other things in their possession may be relevant to their claims and/or defendants’ defenses. ... Plaintiffs should not have to be reminded that it is they who have initiated this action and as part of their claims, they are seeking significant monetary damages from the defendants. Documents which they may deem irrelevant to the specific statements they allege were defamatory may well be relevant to put the statements in context, or relevant on the issue of whether the plaintiffs have actually been damaged by the alleged statements. If the plaintiffs fail to produce documents which are relevant to their claims or potential defenses, then they may be subject to sanctions, including limiting evidence which they may introduce at trial, or limiting the scope of any damages to which they could be entitled should they prevail.

(Doc. 107 p. 4). Not one court agreed with Defendants’ concerns? Preposterous!⁵

O. “To the contrary, Plaintiffs prevailed every time: in getting a protective order issued, ... in getting out-of-district documents funneled to the Massachusetts court for consideration of their relevancy, and so on.” (Doc. 175 p. 10)

If Plaintiffs truly believe that they “prevailed,” they would not still be covertly seeking

⁵ Magistrate Judge Hillman also acknowledged Defendant Pickle’s claim that he had in part modeled his requests to produce after those of Plaintiffs. (Doc. 107 p. 3 n.1; cf. Doc. 108 p. 7).

revocation of ¶ 7 of the confidentiality order, and the imposing of that order's non-party return requirements upon parties. (Doc. 161 pp. 4–7; Doc. 174 pp. 3–4; Doc. 179 pp. 1–3, 10).

The only documents “funneled” to Massachusetts were the MidCountry records, and those were sent to Massachusetts to ensure that they complied with the yet future confidentiality order of April 17, 2008, not for consideration of relevancy.⁶ (Doc. 63-36 pp. 2–3).

P. “They also offer a tape recording of Danny Shelton saying something they, without apparent justification, consider a lie.” (Doc. 175 p. 11)

Defendants never claimed that the 2003 recordings contained a lie. Rather, the recordings prove: (a) Shelton had Dryden's action items which alluded to allegations against Tommy Shelton for conduct occurring between 1995 and 2000. (b) Shelton believed child molestation incidents had occurred for which the statute of limitations applied. (Doc. 170 pp. 5–6).

The recordings of Shelton's messages to Dryden thus prove that Shelton lied in 2003 when he told Thompson that the allegations were 30 years old, when they were as recent as three years old at the time. (Doc. 81-2 pp. 50, 53–54, 61, 64).

ARGUMENT

I. APPLICABLE STANDARDS

A. Fed. R. Civ. P. 11

An attorney must make reasonable inquiry before making or denying factual or legal contentions. Fed. R. Civ. P. 11(b). An attorney may not sign, file, submit, or later advocate papers that make or deny factual contentions which do not have evidentiary support, unless specifically so identified. *Id.* Legal contentions must be warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law. Fed. R. Civ. P. 11(b)(2). Papers must not be presented for any improper purpose. Fed. R. Civ. P. 11(b)(1).

Under Rule 11, an attorney has 21 days after service of a motion for sanctions to correct

⁶ Plaintiffs' motion for a confidentiality order explicitly reserved questions of relevancy. (Doc. 41 p. 3).

or withdraw the challenged paper. Fed. R. Civ. P. 11(c)(2). Thus a Rule 11 motion must be filed before the controversy is resolved by resolving the motions in question.

Rule 11 sanctions may be monetary or non-monetary, and are limited to whatever is necessary to “deter repetition of the conduct” by the attorney or others. Fed. R. Civ. P. 11(c)(4). For violations, sanctions may be imposed on the attorney’s client as well, and his law firm must usually be held jointly responsible. Fed. R. Civ. P. 11(c)(5)(A), 11(c)(1).

Sanctions under Rule 11, even an award of attorney fees, is based upon an objective standard of reasonableness, and, like sanctions under 28 U.S.C. § 1927, does not require a finding of bad faith. *Cruz v. Savage*, 896 F.2d 626, 634 (1st Cir. 1990); *see also Dubois v. USDA*, 270 F.3d 77, 81(1st Cir. 2001). “A violation of Rule 11, as revised, might be caused by inexperience, incompetence, willfulness, or deliberate choice.” *Cruz*, 896 F.2d at 631.

In a case involving racial discrimination, an attorney quoted an affidavit in a response brief, inadvertently adding a single word. That word turned a statement that on its face had nothing to do with race into a statement that did. He was sanctioned for “not verifying the accuracy of the alleged quotation[,] ... not promptly withdrawing it when the error was pointed out,” and “put[ting] before the Court a false piece of evidence.” *Jenkins v. Methodist Hosps. of Dallas, Inc.*, 478 F.3d 255, 263, 265-266 (5th Cir. 2007).

As simply an illustrative list, the Advisory Committee on 1983 amendments to Rules notes that sanctions may take the form of “striking the offending paper; issuing an admonition, reprimand, or censure; requiring participation in seminars or other educational programs; ordering a fine payable to the court; referring the matter to disciplinary authorities ..., etc.”

B. Court’s Inherent Powers

Sanctions under the court’s inherent powers accomplish similar ends as Rule 11, particularly when Rule 11 cannot apply. However, a finding of bad faith is required. *Roadway*

Express, Inc. v. Piper, 447 U.S. 752, 767 (1980). Sanctions may include fines, contempt citations, disqualifications or suspensions of counsel, and drawing adverse evidentiary inferences.

Shepherd v. ABC, 62 F.3d 1469, 1475 (D.C. Cir. 1995).

While attorney fees (or the value of opportunities lost by a litigant due to time expended) may not be awarded under Rule 11 to a *pro se* attorney, such fees may be awarded under the court's inherent power. "Failure to do so ... would place a *pro se* litigant at the mercy of an opponent who might engage in otherwise sanctionable conduct, but not be liable for attorney fees to a *pro se* party." *Pickholtz v. Rainbow Techs., Inc.*, 284 F.3d 1365, 1377 (Fed. Cir. 2002).

The same logic applies to *pro se* litigants whether they be attorneys or not, but Defendants are unclear whether there is presently any legal authority to make or ignore that distinction when imposing sanctions under the court's inherent powers. If that distinction may be ignored, which it should be if abuses are to be properly deterred, "*Chambers* thus permits, indeed requires, the court to separately consider" a request for fees or opportunity costs under the court's inherent power. *Id.*, citing *Chambers v. NASCO, Inc.*, 501 U.S. 32 (1991).

II. APPLICATION OF STANDARD TO CONDUCT

A. LEGAL CONTENTIONS WARRANTED BY EXISTING LAW

Simpson used a case in which the court found that a party should have raised certain arguments in a reply brief to support his position that no argument first raised in a reply brief should be considered. (*supra* 5; Doc. 175 p. 3).

Simpson provides no argument for modifying existing law so that the statements of Plaintiffs themselves, or their agents, servants, representatives, or co-conspirators, which Defendants cited in their appellate brief, must now be considered hearsay. (Doc. 175 p. 6). To illustrate, Defendants' use of "EX 625" and "EX 434, 459, 666–667, 722–723, 726" on Doc. 171-3 p. 10–11 is of statements by and an article provided by Shelton himself, clearly not

hearsay by existing law. Fed. R. Evid. 801(d)(2)(A). Simpson knows this, having already read Defendants' rebuttal of his argument⁷. (Doc. 175 p. 6; Doc. 178-2 pp. 20–21, 26).

B. FACTUAL CONTENTIONS

The number of glaring, factual misrepresentations in Plaintiffs' oppositions that are devoid of evidentiary support is truly astounding. (*supra* 2–15). Even if Simpson failed to make reasonable inquiry, a violation of Fed. R. Civ. P. 11(b), not all can be explained that way.

Defendants' repeated identification of the Remnant documents as being *prima facie* evidence for claims against Simpson and his colleagues (Doc. 126 pp. 4–5, 13–14; Doc. 127 ¶¶ 13, 16; Doc. 149 p. 3; Doc. 161 pp. 2–3, 16–17) must have strongly motivated Simpson to thoroughly investigate those documents. His mischaracterization of the kickback issue therefore must have been intentional and in bad faith, an attempt to shield himself and his colleagues from the liability incurred by litigating an action they have always known to be frivolous. This clear instance of bad faith allows the imposition of sanctions under the Court's inherent powers.

Additionally, Simpson used this mischaracterization to try to induce the Court to “order Defendants to show cause why they should not be held in contempt” for using arguments regarding kickbacks that Simpson knows Defendants made before ever receiving the Remnant documents. (Doc. 174 p. 4; Doc. 96-9 pp. 3, 10; Doc. 155-2).

Despite Defendants' citation of the June 25, 2008, letter requesting Simpson to produce the missing *3ABN World* issues (Doc. 170 p. 6 citing Doc. 81-11 p. 40), Simpson retorted that Defendants had never made such a request. (Doc. 175 p. 8).

⁷ Plaintiffs' appellate brief argued that Defendants' evidence was hearsay regarding (a) Defendants' impeachment of Thompson, (b) unspecified dozens of exhibits suggesting bad faith and vexatious conduct, and (c) Nicholas Miller's allegation of document fraud. (Pickle Aff. Ex. N pp. 2–4). Defendants responded: (a) Thompson's and 3ABN's statements are not hearsay, and the findings of an administrative law judge are an exception to the hearsay rule. (b) Statements made by Plaintiffs or their coconspirators or agents are not hearsay, and Plaintiffs gave no examples of exhibits they considered hearsay. (c) Nicholas Miller's allegations are mostly confirmed by Doc. 93 at Ex. O (Ex. HHH), a document that was part of Plaintiffs' Rule 26(a)(1) materials, and evidentiary standards for judicial protection of evidence are not the same as those for conviction. (Doc. 178-3 pp. 20–21, 26, 31). Because Plaintiffs failed to cite specific examples for (b), further analysis as to exclusions from or exceptions to the hearsay rule is impossible.

How could Simpson have forgotten by May 11, 2009, that Defendants had indeed notified him on April 20, 2009, regarding what documents they were contemplating filing? (*supra* 4–5).

It would be rare indeed if every argument Defendants raised was universally rejected by seven judges and magistrate judges in four federal judicial districts⁸. (*supra* 5–6, 12–14).

Some misstatements clearly fall into the category of continued advocacy of factual contentions already proven false. Regarding the contention that 24 statements in Plaintiffs’ complaint are specific, even Simpson acknowledged that to be untrue. (*supra* 8; Doc. 75 p. 2).

III. FACTORS THAT MAY BE CONSIDERED

Not only is Simpson trained in the law, but he is also promoted as having high marks for legal ability and ethics. (Pickle Aff. Ex. A). Thus, the violations of Rule 11 outlined herein are more worthy of sanctions, especially since the misstatements infected the entire briefs. The matter goes far beyond mere zealous advocacy.

The improper conduct described herein was, at least in some instances, clearly intentional. (*supra* 2–3, 6–14). For example, Simpson’s continuing to maintain that the Remnant documents “had no relevance to the underlying lawsuit” can only be intentional, since those documents pertain to matters Plaintiffs explicitly put at issue in their complaint. (*supra* 11–12).

That Simpson earlier tried to end written discovery by stealth before Defendants received a single responsive document demonstrates a pattern of misconduct⁹. (Doc. 171-3 pp. 33).

The objective is deterrence. Reprimand, removal from the case, and drawing adverse evidentiary inferences would effectively deter such conduct in the future, especially if dismissal

⁸ But then, if Plaintiffs defeated Defendants on every front and at every turn, Plaintiffs would never have moved for dismissal.

⁹ By June 5, 2008, Simpson agreed to an extension of the June 11 deadline for written discovery, but Defendants did not receive the promised draft stipulation, and the draft did not extend the June 11 deadline. (Doc. 71 ¶¶ 14–15; Doc. 73-3 p. 4; Doc. 103 ¶ 8). Late on June 11, Simpson threatened sanctions, demanding that Defendants withdraw their June 10 motion to extend the time, even though that would have made a later attempt to extend the time untimely. (Doc. 103-6). Simpson claimed the draft stipulation was sent to the wrong fax number, but the detective agency at that number told Defendant Joy it had received no such fax, and despite Simpson’s claim that copies were mailed to Defendants, Defendants never received them. (Doc. 73 ¶ 5; Doc. 73-3 p. 6; Doc. 146 p. 7).

with or without prejudice is not upheld on appeal.

The parties and their counsel have considerable means at their disposal, with the parties having spent \$752,399 on the two law firms of record in 2007 alone, and with Simpson billing at \$300 an hour. (Doc. 162-13 p. 8; Doc. 73 ¶ 11). A fine paid into the court would also deter.

Defendants spent considerable time preparing the instant motion and the reply memoranda to Plaintiffs' oppositions at issue in the instant motion. If monetary sanctions under the Court's inherent power should be awarded to non-attorneys *pro se* in order to deter sanctionable conduct by represented parties against those *pro se* litigants, then Defendants request such sanctions as they pertain to Defendants' preparation of the instant motion and the reply memoranda, made necessary by the sanctionable conduct.

CONCLUSION

Simpson is an attorney claiming to have considerable experience, ability, and ethics. That he filed opposition briefs riddled with so many misstatements is sanctionable, especially since some of the misstatements are demonstrably intentional. His mischaracterization of the kickback issue as it pertains to the Remnant documents was in bad faith, intended to shield him and his colleagues from liability, and intended to persuade the Court to launch contempt proceedings against Defendants. Sanctions are therefore warranted.

Respectfully submitted,

Dated: May 28, 2009

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