



## Introduction

On December 23, 2008, Defendant's counsel submitted to this Court a Motion captioned as a "Motion and Memorandum to Admit the Internet Into the Courtroom." The Motion appears to seek an Order from this Court permitting audio-visual coverage of all motion and trial proceedings in connection with this case by an entity called Courtroom View Network ("CVN"). The Motion was accompanied by a Declaration of John Shin, the Managing Director of CVN, (the "Shin Declaration") as well as an additional Declaration by Defendant's counsel Charles Nesson (the "Nesson Declaration").

Curiously, Defendant's Motion was accompanied by a certification under Rule 7.1(A)(2) claiming that Defendant's counsel had "met and conferred with counsel for the Plaintiffs" regarding the subject matter of the Motion. In fact, however, there had been no such meeting or conferring with any representatives of Plaintiffs. Indeed, the first time Plaintiffs learned of Defendant's proposal relating to CVN coverage of these proceedings was upon the filing of this Motion with the Court. As a result, Plaintiffs' information regarding CVN, its activities, and its apparent relationship with Defendant's counsel is limited to the information Defendants provided in their Motion. That limited information, however, fails to provide a complete explanation of what CVN seeks to do and how.

Notwithstanding the ambiguity in Defendant's Motion, it is clear that the relief requested is barred both by the Local Rules of this Court and the clear directives of the Judicial Conference. Moreover, Defendant's proposal—which seeks permission to allow a for-profit entity into the courtroom for the purpose of "narrowcasting" these proceedings to a paid subscriber base—is inconsistent with the public interest.

I

ARGUMENT

A. Local Rule 83.3 Does Not Permit CVN to Cover and Record the Proceedings in this Case.

The Rules of this Court directly address the issue of when proceedings may be recorded.

Specifically, Rule 83.3 of those Rules provides, in relevant part, as follows:

**(a) Recording and Broadcasting Prohibited.** Except as specifically provided in these rules or by order of the court, no person shall take any photograph, make any recording or make any broadcast by radio, television or other means, in the course of or in connection with any proceedings of this court, on any floor of any building on which proceedings of this court are or, in the regular course of business of the court, may be held.

....

**(b) Voice Recordings by Court Reporters.** Official court reporters are not prohibited by section (a) from making voice recordings for the sole purpose of discharging their official duties. No recording made for that purpose shall be used for any other purpose by any person.

**(c)** The court may permit (1) the use of electronic or photographic means for the preservation of evidence or the perpetuation of the record, and (2) the broadcasting, televising, recording, or photographing of investitive, ceremonial, or naturalization proceedings.

**(d)** The use of dictation equipment is permitted in the clerk's office of this court by persons reviewing files in that office.

D. Mass. Local R.83.3. On its face—as the caption to subsection (a) plainly indicates—this Rule bars precisely the relief that Defendant requests in his Motion.

Aware of this broad prohibition, Defendant attempts to argue that the phrase “by order of the court” in Rule 83.3(a) somehow creates a broad exception to this Rule which gives this court discretion to authorize audio-visual coverage of this case by CVN. See Motion at 1, 9-11. But that interpretation misreads the plain language of the Rule. In fact, the Rule establishes only two types of exceptions by which the outright ban on recordings and broadcasts of court proceedings in this district can be avoided: (1) as “specifically provided in the rules”, such as when court

reporters are discharging their official duties or dictation equipment is being used in the clerk's office, and (2) by "order of the court" for a limited set of circumstances, such as preservation of evidence or ceremonial proceedings. Beyond those two exceptions, the local rules clearly ban recording and broadcasting proceedings.

As the Rule's use of the term "or" makes clear, the first of the two exceptions applies to those contexts in which no court order is required. Those contexts are specifically described in sections (b) and (d) of Rule 83.3. Rule 83.3(b) allows official court reporters to make "voice recordings for the sole purpose of discharging their official duties." See D. Mass. Local R. 83.3(b). Rule 83.3(d) permits "[t]he use of dictation equipment . . . in the clerk's office of this court by persons reviewing files in that office." See D. Mass. Local R. 83.3(d). Both of these exceptions are examples of recording that is "specifically provided in these rules" and for which no further court order is required. Thus, for example, an official court reporter need not seek judicial permission to make a voice recording in connection with his or her reporting duties.

The second exception arises where recording is permitted "by order of the court." But that category of exceptions is restricted by Rule 83.3(b), which sets forth the narrow circumstances in which a court in this District is permitted to issue such an order permitting photography, recording or broadcasting of judicial proceedings. The use of the term "may" in subsection (c) of the Rule makes clear that the instances set forth in that subsection are the only instances where a court may grant such permission.

Defendant interprets "by order of the court" to provide the Court complete discretion to permit recording and broadcasting whenever it may so choose. But if that interpretation were correct, there would be no need for subsection (c) of the Rule. Instead, judges in this District would be free to issue orders permitting broadcasting whenever they saw fit. Defendant's

interpretation improperly conflates the exceptions in subsections (b) and (d), for which no court order is required, and the narrow exceptions in subsection (c) which requires a court order.

Here, CVN does not meet either of the two categories of exceptions available under Rule 83.3. CVN is not an official court reporter, nor is it proposing to use dictation to review files in the clerk's office. See Local Rule 83.3(b), (d). The purpose of its proposed recording is not to preserve evidence or to perpetuate the record. See Local Rule 83.3(c)(1). And, of course, the court proceeding that CVN apparently wishes to record is not an "investitive, ceremonial or naturalization proceeding." See Local Rule 83.3(c)(2). Because CVN does not fall within the exceptions listed in Rule 83.3, it cannot be allowed to conduct a "narrowcast" of the proceedings in this case.

**B. Local Rule 83.3 Follows the Policies of the Judicial Conference of the United States, Which Also Preclude the Recording of these Proceedings.**

It is not surprising that Defendant's Motion is barred by Rule 83.3, as that Rule tracks the Policy Statement that has been established by the Judicial Conference of the United States, which Defendant acknowledges runs contrary to his request. See Motion at 7-8. That Policy Statement provides as follows:

A judge may authorize broadcasting, television, recording, or taking photographs in the courtroom and in adjacent areas during investitive, naturalization, or other ceremonial proceedings. A judge may authorize such activities in the courtroom or adjacent areas during other proceedings, or recesses between such proceedings, only:

- (a) for the presentation of evidence;
- (b) for the perpetuation of the record of the proceedings;
- (c) for security purposes;
- (d) for other purposes of judicial administration; or
- (e) for the photographing, recording or broadcasting of appellate arguments.

See Administrative Office of the U.S. Courts, *Guide to Judiciary Policies and Procedures*, Vol. 1, Ch. 3, Part E.3. (Exhibit A) (attached hereto). Under this Policy Statement, the Judicial Conference permits cameras and other recording equipment *only* for specified purposes, such as “investitive, naturalization or other ceremonial proceedings”—and does not permit such recording for coverage of pre-trial proceedings or trials. As the commentary to the Policy Statement explains:

The general policy of the Conference recognizes a distinction between ceremonial proceedings and non-ceremonial proceedings. Cameras and electronic reproduction equipment may be used in the courtroom during ceremonial proceedings for any purpose. *During non-ceremonial proceedings, they may be utilized only for the limited purposes specified in the policy statement. . . .*

*Id.* at Part E.4. (emphasis added). Thus, the Judicial Conference’s policy is straightforward -- unless a request to broadcast court proceedings falls within a specific exception to the general ban on cameras and recording devices, such a request should not be granted.

This policy was reiterated in September 2007 when the Judicial Conference was asked to provide testimony to the Judiciary Committee of the United States House of Representatives in response to a bill that proposed to authorize the use of cameras in the federal district courts. In that Statement, Hon. John R. Tunheim, the Chair of the Court Administration and Case Management Committee of the Judicial Conference explained that “the Judicial Conference *strongly opposes any legislation that would allow the use of cameras in the United States district courts.*” See Exhibit B (emphasis added).

The Judicial Conference’s policy is relevant here for at least two reasons. First, in this District, “the views of the Judicial Conference are entitled to respectful attention.” *United States v. Merric*, 166 F.3d 406, 412 (1<sup>st</sup> Cir. 1999). Second, and equally important, Rule 83.3 *directly tracks* the language used in the Policy Statement. The exceptions listed in Rules 83.3(c) are

identical to exceptions set forth in the Judicial Conference policy. Indeed, that Local Rule 83.3 is intended to follow the policy of the Judicial Conference is evidenced by the timing of its enactment. Local Rule 83.3 was enacted in September 1990, the same time the Judicial Conference first enacted its current Policy Statement. See Report of the Proceedings of the Judicial Conference of the United States (September 12, 1990) (Exhibit C) (attached hereto). Thus, Rule 83.3 was plainly designed to implement the Judicial Conference's recommendations. This District's intent to follow the Judicial Conference policy is further evidenced by the fact that, to Plaintiffs' counsel's knowledge, no judge in this District has deviated from the Judicial Conference's policies regarding the use of cameras or recording equipment in non-ceremonial proceedings. Thus, it is clear that Rule 83.3 was intended to mirror that policy, and unless one of the two exceptions are met, both Rule 83.3 and Judicial Conference policy dictate that requests for allowing cameras and other recording equipment in a courtroom should be denied.<sup>1</sup>

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<sup>1</sup> Defendant's citation to several decisions from federal district courts in New York do not suggest otherwise. See Defendant's Memo at 8-9 & n. 4-5. The rule governing the use of cameras and recording equipment in these Districts is dramatically different from Local Rule 83.3. Local Civil Rule 1.8 for the Eastern and Southern District of New York governs the use of recording equipment in those districts, and provides only that "[n]o one other than court officials engaged in the conduct of court business shall bring any camera, transmitter, receiver, portable telephone or recording device into any courthouse or its environs without written permission of a judge of that court." E.D.N.Y. & S.D.N.Y. Civ. R. 1.8. Unlike Rule 83.3, this New York rule is permissive, does not track the Judicial Conference's policy statements, and apparently leaves the use of cameras up to any judge willing to give "written permission." The Massachusetts rule, with its embracement of the Judicial Conference policy, does not allow the same broad discretion as the New York rule, and only provides for the allowance of cameras in the Court under the narrow exceptions set forth in the Rule. Regardless, at least one New York court has concluded that Judicial Conference policy bars video coverage of its proceedings. See UBS Securities LLC v. The Finish Line, et al., No. 07-cv-10382 (LAP) (Order of February 25, 2008) (denying CVN's request to provide video coverage of proceedings "[i]n light of the policy of the Judicial Conference of the United States against the use of cameras in federal trial courts." (attached hereto as Exhibit D)

C. **At a Minimum, Defendant's Request to Allow CVN to "Narrowcast" these Proceedings to Paying Subscribers Should be Considered by a Full Panel of Judges in the District of Massachusetts.**

Given that the both the plain language of Local Rule 83.3 and the Judicial Conference policy forbid precisely the type of recording that Defendant seeks in his Motion, the Motion essentially amounts to an attempt to overturn Local Rule 83.3. As such, the mechanism CVN seeks to utilize – a court order from a single judge of this Court – is simply not appropriate. CVN's attempt to overturn the long-standing policy of this Court, as defined in the Local Rules, should not be effectuated by a single member of this Court. Rather, as the Federal Rules of Civil Procedure mandate, once enacted, "a local rule. . . remains in effect *unless amended by the court* or abrogated by the judicial council of the circuit." Fed. R. Civ. P. 83(a)(1) (emphasis added). The Rule further provides that for the Court to act upon its local rules, it must do so "by a majority of its district judges." *Id.*

Here, Defendant essentially asks this Court to overturn Local Rule 83.3, regardless of what opinion a majority of the judges of the District of Massachusetts may have on the matter. Indeed, the practical effect of a decision granting Defendant's Motion would be to allow cameras to enter a federal court in Massachusetts for non-ceremonial proceedings for the first time in fifteen years. Given the dramatic impact of such a result upon the existing rules of this Court, as well as upon the daily practice in every courtroom in this District, any decision to allow the broadcasting proposed by Defendant should involve the input of the entire judiciary of the District of Massachusetts as required by the Federal Rules of Civil Procedure. Indeed, when last faced with such a request, this Court considered precisely this approach. See Miller v. Countrywide, No. 07-CV-11275-NG (Order of July 8, 2008) (questioning whether "an individual



judge may order broadcasting in an individual case, or does such a decision require a collective decision by all of the judges of this Court?”).

Accordingly, in the event that this Court decides to entertain the Motion, Plaintiffs respectfully submit that it should only do so after convening a full panel of the judges of this District.

**D. Permitting CVN to Cover the Proceedings in this Matter Would Not Further the Public Interest.**

Defendant cloaks his Motion with broad rhetoric regarding what he claims are “overwhelming reasons of public policy and public interest” that somehow favor disregarding the Local Rules and Judicial Conference policy and allowing CVN to record and broadcast the proceedings in this case. As explained above, Plaintiffs contend that the rules are clear and that no such recording is permissible. Accordingly, no further analysis is required. Plaintiffs note, however, that the information actually submitted in connection with Defendant’s Motion indicates that there is little basis to conclude that allowing CVN to broadcast the proceedings in this case would in any way actually further the “public policy” or “public interest”.

First, as mentioned above, Defendant’s proposal is unusual insofar as it proposes to use CVN to conduct what is commonly referred to as a “narrowcast” of the proceedings in this case. According to Mr. Shin’s Declaration, CVN will provides its coverage only “to authorized persons who pay a fee<sup>2</sup> to CVN and who receive a password to log in through their computers.” See Shin Declaration at ¶ 3. Mr. Shin further states that CVN only “sometimes” provides access to the general public, but then only on the conditions that “they are a CVN subscriber” and “agree to be bound by all rules and regulations.” Id. Unfortunately, Mr. Shin does not explain or

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<sup>2</sup> According to the CVN website, the standard “fee” for such access is typically \$400.00 per trial day. See Exhibit E (attached hereto) (sample page views from www.courtroomlive.com).

even identify those “rules and regulations.” Under these circumstances, Defendant’s claim that a CVN “narrowcast” of these proceedings would somehow serve to educate and inform the general public is specious.

Second, there are significant questions regarding the precise manner and scope in which CVN proposes to provide the requested coverage of the proceedings. Mr. Shin refers only generally to “cameras,” but he does not specify the precise number and location of those cameras, or the exact manner in which they would be used. Intuitively, the number and location of cameras in the courtroom could impact the proceedings. Mr. Shin also does not clarify whether the cameras would be limited to video cameras or whether still photographs might also be included. Nor does Mr. Shin clarify whether all of those cameras would be operated by CVN personnel, who presumably would also have to be present in the courtroom during these proceedings.

Third, the Motion—but not Mr. Shin’s Declaration—claims that “CVN plans to record the proceedings and webcast live over a connection to the Internet, *and serve as the pool camera for any news gathering entity.*” See Motion at 2 (emphasis added). Presumably, then, the CVN courtroom cameras that are proposed by Defendant’s Motion would be subject to some sort of unspecified pooling agreement involving multiple media entities. But of course the precise manner and scope of that pooling agreement, and the obligations of the Court to provide access to that agreement to other media entities, remains unknown.<sup>3</sup>

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<sup>3</sup> In jurisdictions that permit camera coverage in courtrooms, the need for coordination among and equal treatment of multiple media entities is typically addressed in a rule that discusses the precise manner and form by which media entities are permitted access to courtrooms. See, e.g., Mass. Supreme Judicial Ct. Rule 1:19 (limiting the number of cameras in the courtroom and barring judges from making “an exclusive arrangement with any person or organization for news media coverage in the courtroom.”)

Finally, Plaintiffs have significant and serious questions regarding the so-called “public interest” purpose of Defendant in making this motion. In a typical case, including the cases cited by Defendant in his Motion, a media entity seeking to broadcast what it has independently determined to be a newsworthy proceeding files on its own behalf either a motion to intervene or an application for the limited purpose of engaging in that newsgathering activity. See, e.g., Nesson Declaration at Exhibits 13-22. That separate, independent application by a media entity tends to support the entity’s effort to prove its neutrality. See Ethics Code of the Radio-Television News Directors Association (RTDNA) (adopted September 14, 2000) (requiring, inter alia, that “professional electronic journalists should present the news with integrity and decency, *avoiding real or perceived conflicts of interest*”) (emphasis added).

Here, however, it is Defendant—not CVN—who has filed the Motion seeking leave to broadcast the proceedings in this case. The fact that Defendant here is acting on behalf of CVN is highly unusual. Indeed, Plaintiffs suspect that Defendant’s true motives include the desire to influence the proceedings themselves and to increase the Defendant’s and his counsel’s notoriety. Such conduct has already been evidenced by Defendant counsel’s efforts to record surreptitiously communications in this case. Defendant has even posted such surreptitious recordings (including supposedly off-the-record discussions with counsel) on his counsel’s website.<sup>4</sup> Under these circumstances, Defendant’s suggestion that he is acting to further the “public interest” should be dismissed.

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<sup>4</sup> As referenced in Plaintiffs’ Response to Defendant’s Discovery Plan ( See DE 707 at n.1), Defendant’s counsel tape-recorded Defendant’s deposition without informing Plaintiff’s counsel in advance, and posted the entire recording (including off-the-record discussion among counsel) on his website. In addition, Defendant’s counsel has refused to participate in mandatory meet-and-confer sessions unless those conferences can be recorded and presumably revealed on his website.

**CONCLUSION**

For all the foregoing reasons, Plaintiffs respectfully submit that Defendant's Motion should be denied.

Respectfully submitted,

SONY BMG MUSIC ENTERTAINMENT;  
WARNER BROS. RECORDS INC.; ATLANTIC  
RECORDING CORPORATION; ARISTA  
RECORDS LLC; and UMG RECORDINGS, INC.

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**CERTIFICATE OF SERVICE**

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF) and paper copies will be sent to those indicated as non-registered participants on January 12, 2009.

/s/ Daniel J. Cloherty