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August 30, 2021

Hon. Thérèse Wiley Dancks
United States Magistrate Judge
United States District Court
Northern District of New York
Federal Building and U. S. Courthouse
P. O. Box 7346
Syracuse, NY 13261-7346

Re: Orr, Alana v. McGinty, Anthony et al
Northern District of New York
17-CV-1280 (GLS)(TWD)

Dear Judge Dancks,

This office represents the Plaintiff, Alana Orr, in the above-referenced matter.

The undersigned respectfully requests that the temporary protective order, dated August 18, 2021, over the deposition of Defendant McGinty, which was held on August 20, 2021 be removed. In specific, it is requested that the protective order over the video of the deposition be removed forthwith as it has been forwarded to the Court and there is no legal basis to continue the protective order.

GOOD CAUSE TO CONTINUE THE PROTECTIVE ORDER CAN NOT BE SHOWN BY DEFENDANT

Fed. R. Civ. P. 26(c) provides that "any party, for good cause, may seek a protective order to preclude or limit discovery ‘to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." FED. R. CIV. P. 26(c).

"It is well-settled that courts have broad power to enter protective orders under Rule 26(c) that prohibit parties from sharing discovery materials

with non-litigants (such orders are typically referred to as `confidentiality orders')." Sharpe v. Cty. of Nassau, No. 15-6446 (ADS) (AYS), 2016 WL 7350690Sharpe, 2016 WL 7350690 at 4; *quoting* Dorsett v. Cnty. of Nassau, 762 F.Supp.2d 500, 514-15 (E.D.N.Y. 2011), aff'd sub nom. Newsday LLC v. Cty. of Nassau, 730 F.3d 156 (2d Cir. 2013)), 800 F. Supp. 2d at 457. However, "[t]he mere fact that some level of discomfort, or even embarrassment, may result . . . is not in and of itself sufficient to establish good cause to support the issuance of protective order. To rise to a level of good cause, any such embarrassment must be substantial." Flaherty v. Seroussi, 209 F.R.D. 295, 299 (N.D.N.Y. 2001).

Rule 26(c) "is not a blanket authorization for the court to prohibit disclosure of information whenever it deems it advisable to do so, but is rather a grant of power to impose conditions on discovery in order to prevent injury, harassment, or abuse of the court's processes." Bridge C.A.T. Scan Assocs. v. Technicare Corp., 710 F.2d 940, 944-45 (2d Cir. 1983).

VIDEOTAPED DEPOSITIONS ARE INHERENTLY PUBLIC IN NATURE AND THERE IS NO BASIS FOR AN EXCEPTION HEREIN

In re NBC, 635 F.2d 945, 949 (2d Cir. 1980) held that the common law right to inspect and copy judicial records applies to "any item entered into evidence at a public session of a trial," excluding only those items entered under seal, but not distinguishing evidence on the basis of whether it was real or testimonial. Moreover, the rules prohibiting cameras in courtrooms, see Fed.R.Crim.P. 53; S. E.D.N.Y.Gen.R. 7, do not purport to create an exception to that right. The Second Circuit has opined on this issue that, "These rules forbid all filming in courtrooms whether intended for private or for public use and whatever the subject. The reasons generally given to justify these rules — judicial time needed for oversight; the need to sequester juries that they do not see televised segments of a trial from which they had been excluded; effects on witnesses, jurors, lawyers, judges and court administrators; and difficulty in selecting an impartial jury for a retrial — have only the most limited application in the case of a deposition. Indeed, because videotaping of a deposition with a view to public use at trial is clearly permissible under

Fed.R.Crim.P. 15, the sole issue before us is whether it may be broadcast as well as shown to a jury and courtroom audience." United States v. Salerno 828 F.2d 958 (2d Cir. 1987).

The Second circuit further found that, "Given the conceded permissibility of videotaping a deposition and the lack of a rule prohibiting the copying of such evidence for possible broadcast, the question is whether we should create an exception to the common law right to inspect and copy judicial records for videotaped depositions. We conclude we should not." United States v. Salerno 828 F.2d 958 (2d Cir. 1987).

The Court further found that "The analogy between a videotaped deposition introduced in evidence and live testimony does not withstand scrutiny. Whatever disruptive effects the physical presence of cameras and recording equipment may be thought to have on trials, the copying and rebroadcast of a videotaped exhibit can have no such effect. The need for judicial oversight of cameramen or other technicians is minimal; there is no danger of the jury being exposed to inadmissible evidence or argument; and depositions are taken in private" and that "Because the videotape may in fact be more accurate evidence than a transcript, moreover, its availability to the media may enhance the accurate reporting of trials. Transcripts lack a tone of voice, frequently, misreport words and often contain distorting ambiguities as to where sentences begin and end. Videotaped depositions thus convey the meaning of testimony more accurately and preserve demeanor evidence as well. Should posturing on the part of witnesses or, more likely, lawyers, occur, redaction of such material prior to the videotape exhibit's admission into evidence is possible. Accordingly, there is no reason to carve out a general exception to the Myers rule for videotaped depositions." Id.

Finally, the Second Circuit restricted the power of trial courts to undermine the general rule that the public has a right to view such deposition testimony as follows:

"Although the determination of whether circumstances exist that justify a restriction on access to evidence in a particular case is committed to the trial court's discretion, Nixon v. Warner Communications, Inc., 435 U.S. at 589, 98

S.Ct. at 1308, that discretion is limited by the strength of the presumption of public access." Id.

MEDIA ATTENTION HAS BEEN HELD NOT TO BE SUFFICIENT GOOD CAUSE

Defendant's attorney writes in a letter to this Court on August 23, 2021 that an "article, on its face, appears to violate of the temporary protective order (ordering no discussion of the deposition of Defendant McGinty beyond the existing parties to this action). In the least, the article evidences a need for additional safeguards to protect the contents of the deposition video and written transcript in light of Ms. Orr and Mr. Douglass' continued communications with the press regarding this matter."

However, as this Court has stated "insofar as defendants imply that allowing plaintiffs' to publicly disclose discovery material will lead to something of a media circus, they provide no evidence that media involvement or interest in this case rises to the extreme level recognized by other courts as warranting protective orders." *See* Kent et al v. The New York State Public Employees Federation, AFL-CIO et al, No. 1:2017cv00268 - Document 90 (N.D.N.Y 2020). As this Court further opined in Kent "For example, defendants cite Stern v. Cosby, 529 F.Supp.2d 417 (S.D.N.Y. 2007), where the Court granted a protective order barring public dissemination of a defendant's deposition transcript or video. The Court noted that the case had experienced media attention it described as a "frenzy". Id. at 422. Although there appears to be a certain degree of media interest surrounding the underlying dispute between the parties — plaintiffs reference one article in the Albany Times Union newspaper — it would not appear to be of the degree of media interest present in Stern, a case with a connection to celebrities and salacious accusations of the defendant's alleged attempt to interfere with a potential witness. See id. at 419, 422-23." *See* Kent et al v. The New York State Public Employees Federation, AFL-CIO et al, No. 1:2017cv00268 - Document 90 (N.D.N.Y 2020).

The same is true herein. This case simply does not rise to the "degree

of media interest present in Stern" so as to be on that would cause substantial embarassment. Thus, this Court does not need to continue the protective order as there is no injury, harassment, or abuse of the court's processes to protect.

CONCLUSION

Thus, this Court should remove the protective order over the video of Defendant's deposition executed August 18, 2021.

Sincerely,

/s/ Joshua A. Douglass

Joshua A. Douglass