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UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

CARY KATZ, an individual,

Plaintiff,

vs.

MARK STEYN, an individual; MARK STEYN ENTERPRISES, INC., a _New Hampshire corporation; and DOES 1-10, inclusive,

Defendants.

Case No. 2:18-CV-00997-JAD-GWF
Hon. Jennifer A. Dorsey, Courtroom 6D

PLAINTIFF'S REPLY IN SUPPORT OF PLAINTIFF'S MOTION FOR PROTECTIVE ORDER OVER AN IMPROPER VIDEO RECORDING OF PLAINTIFF'S LAWYERS DURING DEFENDANTS' DEPOSITIONS AND FOR SANCTIONS

Date: February 20, 2019
Time: 10:30 a.m.
Location: Courtroom 3B
Judge: Magistrate Judge Foley

Trial Date: None Set

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I. INTRODUCTION[1]

Stripped of hyperbole and rhetoric, Steyn's opposition to Katz' request for a protective order boils down to two arguments: First, Fed. R. Civ. Pro. 30(b)(3)(B) permitted Steyn as a non-noticing party to videotape Katz' lawyers taking Steyn's deposition without prior notice because the deposition notice already included notification that the deposition would be videotaped. Steyn argues that because his video was not "another method" under the Rule, but rather duplicated an already-noticed method, no prior notice to Katz was required. Second, Steyn argues he has the absolute First Amendment right to post on the internet and share through traditional media all deposition transcripts, videos, expert witness reports and other materials obtained through discovery in the case, even though they are not in the court's judicial record.

Steyn's first argument rests solely on a hyper-literal interpretation of Fed. R Civ. Pro. 30(b)(3)(B). His interpretation, however, portends an absurd result and chaos if accepted. No less an authority than the United States Supreme Court has warned against this outcome in interpreting statutes. Steyn's second argument is 100% wrong and foreclosed by this Court's 2013 decision in *Barket v. Clark*, 2013 WL 647507 in which Magistrate Judge Foley entered a protective order under very similar circumstances.

Katz' counsel (Andrew August), tried to avoid this motion (as he did with a prior emergency motion Katz filed–which was granted– for what amounted to *one extra day* to submit a supplemental/amended expert witness report, Dkt. 47). But as reflected in the astonishingly and unprofessional strident emails from Steyn's lawyer (Michael Murphy), Murphy was intractable, insolent and impossible to reason with. A protective order is therefore necessary to stop Steyn's patent violation of law and abuse of the discovery process for harassment purposes only, and to address Murphy's lack of professional decorum in resolving disagreements.

II. FACTS RELEVANT TO THIS MOTION

A. The Heart of the Matter – Steyn's Obsession with Harassing Katz and George.

In a defamation case, contentiousness and enmity between the litigants is expected. What

[1] The terminology used in this brief is the same as in Plaintiff's opening brief.

makes this case different is that Steyn is a well-known conservative media personality who, between his website, regular guest-hosting of the "Rush Limbaugh Show" and frequent appearances on Fox News programs, has an audience reach of nearly 15-million Americans.

This motion was precipitated by Mr. Steyn's callous disregard for civility, federal procedure and the limits of the First Amendment. This is not surprising given Mr. Steyn's past expressions of the American court system: He has called it "America's hideous and corrupt federal justice system"[2] and considers the "American judicial system a global laughingstock."[3, 4] These sentiments, of course, are fully protected speech. So too is posting on his website that Eric George, another of Katz' lawyers, "the same loser lawyer from the first case"[5] and calling him "loathsome and unethical"[6] in Steyn's deposition. Same goes for referring to former California Governor and U.S. Senator Pete Wilson as Katz' "sleazy business partner."[7] What is not protected are the false factual statements alleged in the complaint calling Katz a "deadbeat," "scofflaw," "dishonorable," and "criminal" among other things. For this motion, however, these defamatory statements are not at issue.

What is at issue is Steyn's unrelenting use of his media bully-pulpit to harass, embarrass, intimidate and taunt Katz and his lawyer with internet postings of discovery in this case. To satisfy his obsession with Katz and keep his fan base riled up with developments in the case, Steyn created a "guide" to his litigations with Katz that he updates regularly. [https://www.steynonline.com/8714/katz-crtv-vs-steyn-a-cut-outnkeep-guide].[8] In his "guide" Steyn has posted not only snippets of his taunts of George during the deposition, but the entire transcript of the deposition [Transcript from 1/8/19 Steyn Deposition]. Steyn also has posted Katz' expert's reports on damages. ["'expert' report, by a fellow called Tony Freinberg"]. August asked that they be taken down. Murphy rejected this saying "Your 'takedown request' is rejected, outright, as being

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[2] https://www.steynonline.com/9167/the-johnnie-cochran-of-the-great-white-north
[3] https://www.steynonline.com/9096/if-i-knew-you-were-coming-for-me-idve-baked
[4] Attached as collective **Exhibit A** are printouts of the webpages hyperlinked herein.
[5] https://www.steynonline.com/8714/katz-crtv-vs-steyn-a-cut-outnkeep-guide
[6] Transcript of the 1/8/19 deposition of Mark Steyn ("Steyn Transcript"), p.36:14-18.
[7] https://www.steynonline.com/8630/the-process-is-the-punishment-as-always
[8] See also: https://www.steynonline.com/8654/happy-day-is-here-again

absurd, foolish, and cynical." *See* Declaration of Andrew A. August in Support of Motion for Protective Order ("August Dec.") at ¶16. In order to prevent Steyn from abusing the discovery process again and improperly publishing online material obtained only through discovery that is not part of the judicial record, a protective order under Fed. R. Civ. Pro. 26(c) is desperately necessary.

1. The Steyn Deposition and the Stipulation between Counsel Regarding the Steyn Video.

Steyn's and Murphy's conduct at the deposition was squirrely at best and, ironically, Murphy's declaration highlights this. The Deposition Notices state that the depositions were to be videotaped (it was done by a certified Veritext technician) and taken before a certified court reporter. Steyn had a colleague of his, Whittaker Ingbretson, take the video that triggered this motion. Although the cameras were set up at the same end of the table (Murphy Decl. Exhibit C, Dkt. 57-4), their lateral orientation was different. As is common with nearly all videotaped depositions, the Veritext video camera was trained solely on Steyn as the deponent (although the back and side of George's appear occasionally). Ingbretson's camera apparently used[9] a wider image capture and included George asking the questions (when George asked, "you've been recording me?" Murphy responded in the affirmative: "Yeah. We have a video – our guy videotaping, yes." [Dkt. 38 p.19]

After the Veritext videographer identified herself and the court reporter by name, she asked "***counsel and all present in the room and anyone appearing remotely please state your appearances and affiliations for the record***." Everyone did so, *except Ingbretson*. This is critical because had either Ingbretson or Murphy told George or Stuart that they were separately videotaping the deposition, George would have immediately objected to Steyn's use of a second videographer. Declaration of Eric George in Support of Motion for Protective Order ("George Decl.") at ¶¶ 3-5. Instead, both Ingbretson and Murphy remained silent.

Murphy knows Ingbretson's failure to identify himself is a critical fact; that is why he tries to explain away his responsibility for Ingbretson's silence: "I believe I was reviewing the binder of exhibits when introductions were made on the record. I did not pay attention to who announced

[9] We say "apparently" because nobody has seen the video. It remains in a sealed envelope in Murphy's possession. Dkt. 57-1, ¶19.Murphy has repeatedly refused to provide a copy of it to August, even when August offered an "Attorneys' Eyes Only" agreement. August Dec. ¶¶ 8, 9.

themselves or when." [Dkt. 57-1 at ¶13][10] This is curious because Murphy was the first person to state his appearance as counsel for the deponent. [Steyn Transcript at 5:24-25] Even more disturbing than Ingbretson failing to announce himself is that Murphy said nothing before or after going on the record about making a duplicate videotape.

About an hour into Steyn's deposition, George realized that both cameras were operating and he, George, was being filmed. Murphy made several striking statements on the record when George first questioned why there were two cameras at the deposition: He admitted that his clients were videotaping not only the deponent Steyn, but also George and the entire "process." [Dkt. 38, p.20] He admitted he did not know if Steyn's video could be used in court because it was not connected to the transcript. He admitted that the Veritext video was the "official" video. When George asked whether the video was to be used for anything other than the court proceeding, Murphy replied "I don't know what it is used – right now it is not – there's no feed. It's just being taped on to – on to an electronic media, so – " Most importantly, and the best indication that Steyn intends to publish the video in furtherance of his PR crusade against Katz and his company Blaze Media, when George asked if Mr. Murphy could represent that the video will be used solely for purposes of this Court proceeding, Mr. Murphy replied, unequivocally "No." *Id.*

After an off-the-record discussion, George and Murphy put a stipulation on the record: 1) Steyn had instructed Ingbretson to videotape the room, not just Steyn, 2) no prior notice was given to George, 3) Murphy would retain Ingbretson's videotape, 4) until this Court ruled, the video would not be shared with Steyn or anybody else, and 5) George would have 14 days to file a motion with the Court. [Dkt. 38 pp.21-22] Nothing was said about Ingbretson sending the video to Murphy in a sealed envelope or that Murphy had to keep the envelope sealed, could not review the videotape and could not give George a copy, at least for purposes of filing this motion. This later became Murphy's

[10] Murphy deflects from his role in the video ambush by baselessly suggesting that Katz' local Las Vegas counsel (Stephanie Smith), who appeared by speakerphone, was also guilty of having people in the deposition who failed to identify themselves: "[B]ecause she was in a place where other people could most certainly overhear the proceeding – people who were never disclosed to any of us." Murphy Decl.¶12. Ms. Smith was 2300+ miles away alone in her office at 6:20 a.m. local time when the deposition started on the East Coast and remained alone in her private office the entire time. *See* Declaration of Stephanie Smith in Support of Plaintiff's Motion for Protective Order.

justification, first disclosed in Steyn's opposition, for not sharing the video. [Murphy Dec., Dkt. 57-1, ¶¶19-20.]

Murphy testifies "[a]lthough I was not required to provide notice of my client's separate videographer, it had been my intent to discuss the issue prior to the deposition. In the rush caused by Mr. George's lateness, and the thick binder of exhibits, *I forgot to do so*." *Id.* at ¶13, emphasis added. "I also had *assumed* that, since it was obvious there were two video cameras in the small room, Mr. George was aware that two video recordings were being used, one paid for by Plaintiff, and one by Mr. Steyn." *Ibid*., emphasis added. Mr. Murphy offers no explanation of the basis for his assumption regarding payment. For his part, Mr. George assumed that the two cameras were both from Veritext, perhaps one as a backup so the depositions could be completed without a hitch.[11] George Decl. ¶4.

B. Steyn's and Murphy's Post-Deposition Shenanigans.

Katz filed this motion in accordance with Stipulation. Steyn immediately posted the motion on his litigation Guide saying this: "A few days later [after the deposition], Eric M George filed a motion in Las Vegas whining that Defendant Steyn is saying big meanie things about him." [https://www.steynonline.com/8714/katz-crtv-vs-steyn-a-cut-outnkeep-guide]. He also posted the entire certified deposition transcript.

Because Steyn's video was the primary focus of this motion and it is unknown whether the video captures any off-the-record commentary, discussions, etc., August repeatedly asked for a copy of it under a mutual "attorney's eyes only" arrangement until the court ruled on this motion. In what can be charitably described as vituperative and rude rants against August, Murphy repeatedly refused–saying this was "non-negotiable." August Declaration ¶¶ 9, 10. Even when August withdrew his "attorneys eyes only" condition, proposed a mutual sharing of the video (with Steyn) and offered to take the motion off calendar if Steyn agreed to be bound by a protective order prohibiting him from making the video public, Murphy refused with his characteristic "my way or the highway": "If you wont [sic] give me your vetted authorities now [four days before this reply

[11] This is understandable given the importance of the deponents, the distance George and Stuart had traveled to take the depositions and the then-impending discovery cut-off

was due], I wont [sic] consider any agreement whereby you would see the video." August Decl. ¶ 14.

III. LEGAL ARGUMENT

A. Steyn's Interpretation of Fed. Rule Civ. Pro 30(b)(3)(B) Leads to an Absurd Result and Must therefore be Rejected Under U.S. Supreme Court Precedent.

Under Fed. R. Civ Pro. 30(b)(3)(A), there are three authorized methods of recording a deposition: audio, audiovisual, or stenographic. Katz noticed the depositions of Steyn and Howes for videotape (audiovisual) and by certified court reporter (stenographic). Rule 30(b)(3)(B) allows non-noticing parties, at their own expense, to designate "another method" for recording the testimony ***in addition*** to that specified in the original notice. However, it requires that *prior notice* be given to the deponent and other parties. Murphy admits he did not give prior notice.[12]

The purpose of 30(b)(3)(B) is to afford the non-noticing party the right to utilize their preferred but approved method of recording a deposition and not be limited to the method chosen by the noticing party. For example, if the noticing party noticed only a video deposition, the non-noticing party, after giving notice, has the right to pay for a court reporter. Similarly, if the noticing party noticed it only for a stenographic recording by a court reporter, a non-noticing party has the right to pay for a videographer, as long as prior notice was given.[13] But Steyn argues that because Katz gave notice of both methods, Steyn, as the non-noticing party, was relieved of any obligation to give prior notice that he was bringing his own videographer.

Steyn purports to rely on the literal language of Rule 30(b)(3)(B). But the Rule is silent on whether a non-noticing party may *duplicate* approved and noticed methods. Nor does the Rule address whether the camera angle of a properly noticed video and stenograph deposition may, without prior court order for good cause, include the questioning attorney and others at the deposition, or whether a video recording may capture "off-the-record" conversations as may have

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[12] George testifies that in the off-the-record discussion that resulted in the Stipulation, Murphy apologized for not giving the required notice. George Decl. ¶6.

[13] In nearly all cases, the videotape would be of the deponent only rather than the entire room, as is customary, and certainly would not be a "recording of the entire process" as described by Murphy. Moreover, the videotaping in a properly noticed recording would undoubtedly be turned off during times the court reporter goes off the record. We do not know if Ingbretson did so.

been the case here. And not surprisingly, there is no case that has addressed the situation here: A non-noticing party brings its own videographer unannounced to a properly noticed videotape and court-reporter deposition to take an unofficial videotape of the "the room" and "the process", including the questioning lawyer where the party taking the unofficial videotape fully acknowledges it can't be used at trial and rather is taking it solely so the party can post it online and use it in broadcast media to harass the attorney and the other party.

The absurd implications of Steyn's interpretation of 30(b)(3)(B) are demonstrated by a not-too-far from real-world hypothetical: A famous Las Vegas hotel is sued for negligence arising from a shooting nearby the hotel. There are eight (or twenty) law firms from around the country representing different clients in the case. One firm notices the defendant's Rule 30(b)(6) deposition for both video and a certified court reporter. The other seven firms each show up with their own videographers and court reporters, no prior notice given and thus no opportunity for anyone to seek a protective order. Under Steyn's interpretation of the Rule, all of the lawyers and their clients have a First Amendment right to post their copies of the transcript/exhibits and each of their videos online and send them to Fox News, CNN, the Las Vegas Review Journal, etc., before the trial of the subject lawsuit. Clearly this is not a permissible use of discovery.

Haggar Co. v. Helvering, 308 U.S. 389, 394 (1940) cautions that "A literal reading of [statutes] which would lead to absurd results is to be avoided when they can be given a reasonable application consistent with their words and with the legislative purpose." *See also*, *Pub. Citizen v. U.S. Dept. of Justice,* 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (describing the absurd results canon of interpretation as a "narrow exception to our normal rule of statutory construction" that "demonstrates a respect for the coequal Legislative Branch, which we assume would not act in an absurd way"); *Hurston v. Dir., OWCP,* 989 F.2d 1547, 1554 (9th Cir.1993) ("We are required by traditional canons of statutory construction to avoid a literal interpretation of a statute that leads to an absurd result.")

Even if the statute is given a distorted interpretation to allow for duplicative recording, the only reasonable interpretation of 30(b)(3)(B) that will avoid the circus Steyn is trying to create is that if a non-noticing party intends to *duplicate* properly noticed methods, they must nonetheless

give prior notice so timely court intervention can be sought to prevent mischief. Here, it is undisputed that no prior notice was given.

B. The Court Has the Authority Under Fed. R. Civ. P. 26(c) To Issue A Protective Order Prohibiting Steyn From Posting Online Any Material Obtained Solely Through Discovery Without a Prior Court Order.

1. Steyn's Video and His Misuse of Non-Judicial Records is Intended to Harass, Annoy and Embarrass Mr. Katz and Mr. George.

Fed. R. Civ. P. 26(c) permits the court in which an action is pending to "make any order which justice requires to protect the party or person from annoyance, embarrassment, oppression or undue burden or expense" upon motion by a party or a person from whom discovery is sought. The burden of persuasion under *Fed. R. Civ. P. 26(c)* is on the party seeking the protective order. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986). To meet that burden of persuasion, the party seeking the protective order must show good cause by demonstrating a particular need for the protection sought. *Beckman Indus., Inc., v. Int'l. Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992).

Here, there is both the official court reporter transcript and the official Veritext videotape. The Steyn video, therefore, will never be used at trial. That raises two obvious questions: Why did Steyn have it taken and what is he going to do with it? Sadly, the answers are just as obvious and go to the heart of the matter - Steyn hates Katz and George so much, he wanted his own video of him challenging and taunting George. *See* Section II. A above. More heinously, Mr. Steyn, who fancies himself as the great defender of the First Amendment [See, https://www.steynonline.com/section/71/the-war-on-free-speech[14] wants to publish the video (or clips from it) and every other video and transcript of future depositions in this case.

There is only one "rational" explanation for Steyn's obsession with ruining Katz' business and personal reputation and trying to humiliate George who brought the breach of contract dispute *that Steyn won*[15]: The commercial benefit of creating content for his website to feed his fan-base.

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[14] Mr. Steyn is an abuser of the First Amendment because he neither recognizes nor respects the limits that are attendant to the right of free speech in America. That is why this case and *Competitive Enterprise Institute v. Mann,* 150 A.3d 1213 (D.C. 2016) exist (this is another long-running defamation case against Steyn).

[15] Katz' company paid in full immediately upon the judgment becoming final, except for the portion that Katz' company appealed, which was bonded in full immediately upon the judgment

As recognized in *Paisley Park Enters., Inc. v. Uptown Prods.,* 54 F. Supp. 2d 347, 349 (S.D.N.Y. 1999), Rule 30's provision for videotaped depositions was not intended to further a party's commercial goals or private pursuits or "to be a vehicle for generating content for broadcast and other media." 54 F.Supp.2d at 349. As *Paisley Park* also recognized, courts must be vigilant to ensure that its processes are not used improperly for purposes unrelated to their role. *Id*. *See also*, *Drake v. Benedek Broad. Corp*., 2000 WL 156825, (D. Kan. Feb. 9, 2000).

2. The Video and Certified Transcript of Steyn's Deposition and Katz's Expert Witness Reports Are Not Judicial Records and Thus Steyn Has No Right to Publish Them.

In *Barket v. Clark*, this Court (Magistrate Judge Foley), entered a protective order very similar to the one sought here under very similar circumstances. Relying on *Larson v. American Family Mut. Ins. Co.,* 2007 WL 622214, (D.Colo.2007), Judge Foley wrote:

> [In Larson] the court entered a protective order that video depositions taken in the case not be publicly disseminated at any time, except as to those portions of video depositions actually admitted at trial and which therefore become part of the public record in the case. In so holding, the court echoed *Seattle Times Co. v. Rhinehart* in stating that "[a] videotaped deposition is, by nature, information that would not otherwise be obtained by opposing counsel, absent this litigation. It is, therefore, appropriate that such information be limited to use in this lawsuit, if the Defendant can establish that other uses will subject the deponents to annoyance, harassment and embarrassment." *See also Patterson v. Burge,* 2007 WL 2128363 (N.D.Ill. 2007) (protective order entered barring the public dissemination of deposition transcripts and videotapes).
>
> *Barket v. Clark*, No. 2:12-CV-00393-JCM, 2013 WL 647507, at *2 (D. Nev. Feb. 21, 2013)

The Court concluded that because depositions are information that the parties only obtain by virtue of the court-governed civil discovery process, it is appropriate to issue a protective order precluding the posting of the parties' depositions on the Internet. This conclusion was bolstered by several good cause findings, all of which exist here: The subject dispute there concerned the alleged improper use of the Internet to harm the parties [Same here]; concern that the plaintiff might post the deposition or excerpts therefrom on the Internet to support his position in this case or to possibly make other criticisms or accusations against the defendant [Steyn has already done this]; such postings would likely serve only to add fuel to the dispute between the parties [That certainly has happened here as evidenced by Murphy's incendiary emails to Mr. August]; it is impossible to

becoming final.

control the editing of such material by others once it has been posted [We do not know if this has yet occurred]; and finally, public dissemination of the depositions in this case prior to trial may undermine the witness exclusionary rule in Fed.R.Evid. 615 by giving potential trial witnesses access to Steyn's testimony prior to their own depositions or trial testimony.[16] *Barket* at 2013 WL 647507, at *3.

Mr. Steyn's media/political credentials do not entitle him to a different result. In *U.S. v. McDougal,* 103 F.3d 651, 656 (8th Cir. 1996) a number of media organizations moved for access to a video recording of President Clinton's deposition testimony in a criminal case immediately after it was taken or, in the alternative, at the time of its display to the jury. The court held "as a matter of law the [deposition] videotape itself is not a judicial record to which the common law right of public access attaches [and] [e]ven if the defendants had moved for the admission of the videotape into evidence, the videotape itself would not necessarily have become a judicial record subject to public review. The court reasoned:

> "the videotape at issue ... is merely an electronic recording of witness testimony. Although the public had a right to hear and observe the testimony at the time and in the manner it was delivered ... in the courtroom, we hold that there was, and is, no additional common law right to obtain, for purposes of copying, the electronic recording of that testimony. *Id*. at 657. In other words, a deponent's videotaped testimony should be "on equal footing" to a live witness's testimony, for which photography and broadcasting is prohibited.[17]

See also Fish v. Kobach, WL 5295891 (D. Kan., Oct. 25, 2018) (a videotape deposition was not a judicial record and because the deposition was never made part of the judicial record, it retained its status as a matter of nonpublic pretrial discovery under a protective order. The court found that the video may not be copied and used outside the litigation).

In *Apple iPod iTunes Antitrust Litigation*, 75 F. Supp.3d 1271, 1274-1275 (N.D. Cal. 2014), the court also agreed with *McDougal* and held that a videotape deposition of Steve Jobs was not a judicial record because it was not admitted into evidence as an exhibit and thus could not be used outside of the litigation. The court noted several anomalous results if the law was contrary: "For

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[16] August relied on these exact same reasons is his requests to have Steyn take down the deposition transcript and expert report. Murphy called them "absurd, foolish, and cynical" and frivolous in the extreme." August Decl. ¶ 16.

[17] This Court's local rules similarly prohibit cameras and recording in the courtrooms in the district. See LR IA 2-1(c).

example, the public would have special access to videos that would not even be available to the court of appeals in the appellate record. And snippets of previously recorded impeachment testimony played at trial would be publicly available for copying and distribution, while the direct live testimony of witnesses would remain sheltered from audiovisual recording." *Id*. at 1275. And in a warning that is particularly prescient for this Court, the judge repeated the *McDougal* court's concern: "courts should avoid becoming the instrumentalities of commercial or other private pursuits." Although the was no evidence that the news media seeking the Steve Jobs video intended to use it for improper purposes, the same cannot be said about Mr. Steyn here.

3. Steyn Has No First Amendment Right to Use the Video or Deposition Transcripts (or Expert Reports) Outside of the Litigation.

In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984), a religious organization, its spiritual leader, and other members brought a defamation action against newspapers. The newspapers' motions to compel discovery were granted, but protective orders were issued covering information relating to donations to the group, and the parties appealed. The Supreme Court of Washington affirmed and the newspapers sought certiorari. The Supreme Court held that where a protective order is entered on a showing of good cause, is limited to the context of pretrial discovery and does not restrict the dissemination of the information if it is gained from other sources in addition to the discovery, it does not offend the First Amendment.

In upholding the protective order, the Supreme Court stated that it was important to recognize the extent of the impairment of *First Amendment* rights that the protective order may cause. The Court noted that the defendants gained the information they wished to disseminate only by virtue of the trial court's discovery processes. To that, the Court stated:**A litigant has no First Amendment right of access to information made available only for purposes of trying his lawsuit. (Citation omitted).** *Id*. at 32. [Emphasis added.]

The Court further stated that pretrial depositions and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law, and depositions are generally conducted in private as a matter of modern practice. *Id*. The Court also noted that much of the information that surfaces during pretrial discovery may be unrelated or only

tangentially-related to the underlying cause of action and therefore not admissible at trial. *Id.* at 33.

In the face of this on-point authority from the highest court in the land, Steyn relies on two cases that could not be more inapposite. *Animal Legal Defense Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018) upheld a First Amendment challenge to an Idaho criminal statute that, among other things, prohibited a person from entering a private agricultural production facility and, without express consent from the facility owner, making audio or video recordings of the conduct of an agricultural production facility's operations. *American Civil Liberties Union of Illinois v. Alvarez*, 679 F.3d 583 (7th Cir. 2012) , invalidated enjoined enforcement of a state eavesdropping statute against the ACLU's "police accountability program," which included a plan to openly make audiovisual recordings of police officers performing their duties in public places and speaking at a volume audible to bystanders. Neither case involved pre-trial internet publication of discovery materials obtained in the course of civil litigation. Both cases involved statutory prohibitions against video recordings in the first instance but Katz is not relying on any statute in any jurisdiction that bars recordings *per se*. Nor is he challenging Steyn's right to have his deposition videotaped. It was, by a certified videographer.

IV. CONCLUSION – SCOPE OF REQUESTED PROTECTIVE ORDER

The Court must not countenance Steyn's ambush of George or Steyn's legally bankrupt protest that he has unfettered the First Amendment to post anything and everything he gets in discovery from the case on his media regardless of whether the material is part of the judicial record. It is clear that Steyn and Murphy are abusing the discovery process, not only because of Steyn's continuous and immediate posting of court records to Steyn's website (e.g., deposition transcripts and expert witness reports), but also because the video admittedly was taken for use at trial but for "any other purpose" that Steyn intends. Based on the foregoing, the Court should enter a protective order with the terms and conditions set forth in **Exhibit B** attached hereto, and should award sanctions as requested in Katz' moving papers.

Dated: February 12, 2019

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