United States District Court
District of Connecticut

Justin Mustafa,
Plaintiff

v.

Christopher Byars,
Defendant

No. 19-cv-1780

December 23, 2024

Reply in Further Support of Limited Intervention and Disclosure of Court Records

1. Exhibits in this pending case are the Court's records, not the parties'.

Plaintiff Justin Mustafa does not oppose the ACLU's limited intervention or the normal disclosure of the trial exhibit videos. ECF # 141. Although there is no order barring it, defendant Christopher Byars opposes regular public access to the trial exhibits because, he posits, the Court "destroyed [them] in the normal course of business," "the Court no longer has the materials in question," and ACLU did not request copies of the videos within thirty days of judgment. Def.'s Opp. 3. These arguments are non sequiturs because the trial exhibits are the Court's records, not the parties', even if the Court has delegated physical custody of them to the parties "until final determination of" this still-pending action. D. Conn. Local R. 83.6(c).

The Court has inherent supervisory power over its records, *e.g.*, *Nixon v. Warner Comm'cns*, 435 U.S. 589, 598, and is well within its authority to dictate how materials are submitted, marked, and stored through its decisions and local rules. The Court could very well choose to retain physical custody of trial exhibits until case disposition, as other judicial districts do. *See*, *e.g.*, D. Maine Local R. 39(f)(1); D. Md. Local R. 113.1(a); D.N.H. Local R. 83.14(b); E.D. Pa. Local R. 39.3(d); D.R.I. Local R. Gen 103(a);

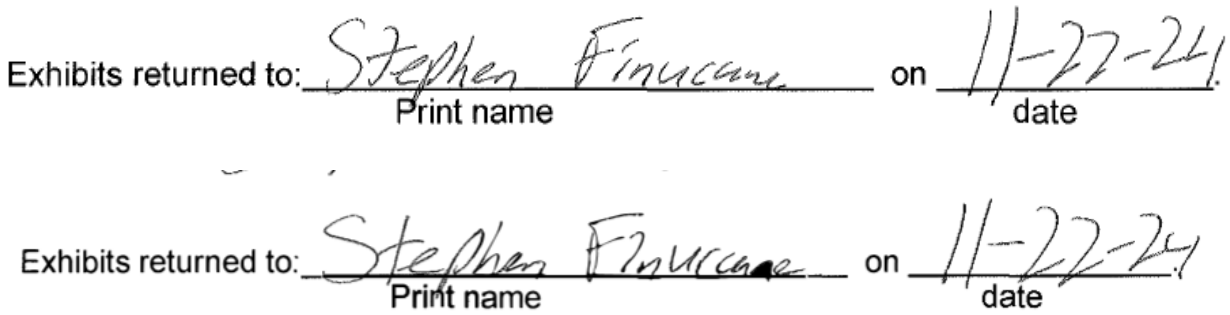
D. Vt. Local R. 40(f). But like the Southern and Eastern Districts, this Court has chosen to delegate physical custody of exhibits to the parties, which its southern neighbors note "differs from the practices of many other courts." Combined S.D.N.Y. & E.D.N.Y. Local R. 39.1 comm. note. That is this Court's prerogative, but its devolution of temporary physical custody does not divest it of legal control over those records, wherever housed. *Cf. Coventry Cap. US LLC v. EEA Life Settlements Inc.*, 333 F.R.D. 60, 64 (S.D.N.Y. 2019) (explaining that as regards Fed. R. Civ. P. 34 requests, "documents are considered to be under a party's control when that party has the right, authority, or practical ability to obtain" them). The retention period, D. Conn. Local R. 83.6(c), enables the Court to re-take trial exhibits for its own use, such as a motion for a new trial or a request for public inspection. Some judicial districts have made that plain in their local rules to head off bad behavior by counsel,[1] but the concept is implicit in the Court's adjudicative function: no party may frustrate the Court's use of its own records by holding them hostage.

Moreover, it is far from clear that the videos were returned[2] in the normal course of business *before* the ACLU asked for copies of them. The ACLU made its request on November 14th, following up with a clerk's office supervisor a few days after that. But on November 22nd, while the ACLU's request was pending and a clerk's office supervisor was looking into whether the Court still had copies of the exhibits, the clerk's office issued Mr. Byars two notices. Each set out that "enclosed is/are the" plaintiff's

[1] *E.g.*, N.D. Ill. Local R. 79.1(b) ("Exhibits retained by counsel are subject to orders of the court."); D. Md. Local R. 113.1(a) ("Upon request by counsel for another party or the Court, counsel having custody of the exhibits must make them available for inspection.").

[2] Mr. Byars conveys finality by using the word "destroyed." Unlike yesteryear's boxes of paper documents, the Court's having returned thumb drives with digital files on them, and/or deleted digital copies from its own systems, does not inhibit it from effortlessly re-taking a copy of each within minutes via the Internet. Mr. Byars does not claim that he has destroyed his copies.

exhibits, ECF # 126, and the defendant's exhibits. ECF # 127. The notices ordered that Mr. Byars "acknowledge receipt of the return at the bottom" of each notice and to file the acknowledgment. His counsel did so, representing to the Court in conformance with Fed. R. Civ. P. 11(b) that the exhibits had been returned that very day.



Ultimately, why the clerk's office returned the records to Mr. Byars alone[3] while the ACLU's records request was pending is immaterial, because the request was timely. Now as then, the Court has the authority to re-take the trial exhibit videos and furnish them to the public for inspection.

2. The 'good cause' standard governing protective orders like the one Mr. Byars relies on falls far short of clearing the common law and First Amendment guarantees of public access to trial exhibits.

Mr. Byars is additionally wrong to lean on the existence of a protective order as grounds for restricting public access to the trial evidence. Def.'s Opp. 3-5. Protective orders are governed by the low bar of Rule 26's good cause standard, because the public has no First Amendment right to the information passed between adversaries in discovery. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984). But judicial documents, like the trial exhibits here, "stand on a different footing," *Olson v. Major*

[3] The clerk's office returned Mustafa's exhibits "C/O Stephen R. Finucane on behalf of" Mustafa's lawyer.

League Baseball, 29 F.4th 59, 90 (2d Cir. 2022) (internal quotation omitted), as "a traditionally public source of information." *Seattle Times*, 467 U.S. at 33. And so, even if a document "is properly designated as Confidential or Highly Confidential by a protective order governing discovery, that same material might not overcome the presumption of public access once it becomes a judicial document." *Dodona I, LLC v. Goldman, Sachs & Co.*, 119 F. Supp. 3d 152, 155-6 (S.D.N.Y. 2015) (granting movant-intervenor's motion to unseal summary judgment filings).

Protective orders that fail to account for the public's twin common law and First Amendment rights to judicial documents cannot impede normal access. "[P]ost-trial restriction on disclosure of testimony or documents actually introduced at trial" may be justified by "only the most compelling showing." *Poliquin v. Garden Way, Inc.*, 989 F.2d 527, 533 (1st Cir. 1993) (reversing protective order as applied to trial evidence). *See also, e.g.*, *DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants,* 990 F.3d 1364, 1370 (Fed. Cir. 2021) (affirming unsealing order, and expressly turning aside litigant's contention that conclusions of protective order could govern publicly filed documents without satisfying sealing burden). No such order restricting the public's access to the trial videos exists, and so the Court must permit the ACLU to copy them.

3. Mr. Byars has failed to carry his burden of proving that the trial exhibits may be sealed by restricting their viewing to 'controlled settings' or imposing any other limits on their obtainment.

There is also no hope for the suggestion that the Court restrict access to viewing the exhibits played in open court in a "controlled setting," with anyone viewing it "sign a document agreeing to be subject to the Court's protective order" governing the parties.

Def.'s Opp. 6-7. That is sealing by a different name, and Mr. Byars has not met his burdens of proving entitlement to it.

A movant seeking to seal a judicial document bears the burden of proving that the common law and First Amendment are outweighed, and that sealing is the least-information-squelching method available. *E.g.*, *DiRussa v. Dean Witter Reynolds Inc.*, 121 F.3d 818, 826 (2d Cir. 1997). The burden requires demonstration that specific reasons exist to displace the public's rights of access, such that the Court may make "particularized findings on the record" that restrictions are essential. D. Conn. Local R. 57.1(a). "Broad and general" concerns are insufficient, *United States v. Erie County*, 763 F.3d 235, 239 (2d Cir. 2014), yet that is all that Mr. Byars offers. Def.'s Opp. 4. He does not identify which part of which of the six videos he wishes to restrict from public access, what it shows, or how the depiction harms him. The Court of Appeals has time and again forbade restricting public access on so thin a reed. *E.g.*, *Brown v. Maxwell*, 929 F.3d 41, 48 (2d Cir. 2019) (reversing sealing of summary judgment materials in part because "the District Court made generalized statements about the record as a whole" rather than specific findings). Each of the three cases Mr. Byars cites for the general proposition that prison videos contain sensitive information are protective order decisions.[4] Each applies the lenient good cause standard rather than satisfying the common law and First Amendment access guarantees through particularized findings. *See* D. Conn. Local R. 57.1(c) (collecting applicable standards).

Mr. Byars's opposition also fails to set forth how his interests in sealing could clear the strict scrutiny bar set by the First Amendment and the near-ironclad *NBC* rule

[4] Def.'s Opp. 4. The first citation is incomplete, but is to *Harris v. Livingston County*, No. 14-cv-6260 , 2018 WL 6566613 (W.D.N.Y. Dec. 13, 2018).

of the common law. *In re Nat'l Broad. Co.*, 635 F.2d 945, 952 (2d Cir. 1980) ("Once the evidence has become known to the members of the public . . . through their attendance at a public session of court, it would take the most extraordinary circumstances to justify restrictions on the opportunity of those not physically in attendance at the courtroom to see and hear the evidence, when it is in a form that readily permits sight and sound reproduction.").

Had Mr. Byars done the analysis, it would reveal tough sledding for him, because he "greatly diminished" any sealing interests by playing the videos for the public at trial. *Olson*, 29 F.4th at 91-92 (affirming unsealing order based on "critical" common law balancing fact that "MLB voluntarily disclosed major portions of the content and pertinent conclusions of the internal investigation . . . to the public in the 2017 Press Release."). Attempts to seal information already in the public domain generally fail on that basis. *See*, *e.g.*, Order Denying Defs.' Mot. to Seal [ECF # 169], *Lord v. Padro*, No. 22-cv-322 (D. Conn. Mar. 28, 2024) (denying correctional defendants' motion to seal videos that "have been on the court docket and in the public domain" for seven months); *Matter of Upper Brook Cos.*, No. 22-mc-97, 2023 WL 172003, at *9 (S.D.N.Y. Jan. 12, 2023) (denying motion to seal certain business agreements as containing trade secrets where "several key terms—including the fees [movant-intervenor] charged—have already been made public in the Dutch court decisions that [movant-intervenor] expressly concedes are non-confidential."); *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, No. 13-cv-7789, 2022 WL 15033005, at *2 (S.D.N.Y. Oct. 25, 2022) (denying motions to seal "to the extent that any of the instant ten motions seeks to seal documents that ultimately were admitted into evidence at trial"). It is exceedingly difficult to understand why the videos cannot "be possessed or maintained in an

unsupervised manner," Def.'s Opp. 7, when Mr. Byars intentionally displayed them to the public in an open courtroom. Having failed to meet his burden, he may not have any restrictions imposed upon the trial exhibits.

4. As the Court recognized in its briefing schedule, the compounding First Amendment violation (and looming possibility of settlement) requires dispatch.

Lastly, Mr. Byars objects to being made to state his opposition on a short schedule close to year's end.[5] But he cites no authority at all in that argument, let alone any showing that the ACLU's rights are lesser than those "of immediate public access" as our Court of Appeals has emphasized, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006), and thus do not merit "expedited consideration" by the Court. D. Conn. Local R. 7(a)(6) (mandating that such requests use the word "emergency"). *Cf. id.* R. 57.1(f) ("Motions for leave to intervene for purposes of opposing sealing . . . must be decided expeditiously by the court.").

Mr. Byars also elides a key fact: he had at least 108 days to object to regular public access before the ACLU was forced to seek intervention. On August 30th, Mr. Byars signed the parties' first joint pretrial memo. In that document, Mr. Mustafa revealed that he would introduce one video at trial, ECF # 84 at 12, and Mr. Byars told the Court that he would introduce four videos. *Id.* 14. On September 16th—ninety-one days before the ACLU's motion—Mr. Byars again signed a joint pretrial memorandum.

[5] Def. Opp. 2-3. The ACLU attempted to obtain copies of the trial exhibit videos forty-one days before Christmas, just as a member of the public might obtain a manually filed exhibit to a complaint, by approaching the clerk's office. The ACLU did not believe that obtaining completely unrestricted court records would take more than a month and require litigation.

This one confirmed that the plaintiff would introduce one video and the defendant four, and that Mr. Byars had no objection to any of them. ECF # 88-1 at 2, 8-9.

For Mr. Byars, then, the clock on restricting public access started ticking on August 30th, when he first announced his intention to show the videos at trial. Whether he spent the intervening three and a half months serene in his decision not to seek any restriction on the videos, or he spent those fifteen weeks whistling past the graveyard hoping that no member of the public would ask to see them, he cannot now be heard to ask for 133 days to formulate an objection instead of 108. He is represented by counsel, and therefore charged with knowing what *NBC* meant for the videos to be played in open court.

Finally, Mr. Byars cites the parties' upcoming settlement conference as a reason why he ought to have the full 133 days to state an objection.[6] He is correct that the possibility of settlement is noteworthy, but not because it indicates that he deserves yet more time to consider what he should have in August. Settlement is noteworthy because it would increase the Court's workload on the ACLU's motion were the Court to leave the records access issue until after the case resolves (if it does).

While it is absolutely clear that closing a case does not alter the public's access to its judicial documents, *Bernstein v. Bernstein Litowitz Berger & Grossmann LLP*, 814 F.3d 132, 140 (2d Cir. 2016), were *Mustafa v. Byars* to close without the Court retaking custody of the exhibits, Mr. Byars could be expected to contend that the Court may not then order their return, citing *Littlejohn v. Bic Corp.*, 851 F.2d 673, 683 (3d Cir. 1988) ("[T]rial exhibits that were restored to their owner after a case has been completely

[6] Def.'s Opp. 2 n.1.

terminated and which were properly subject to destruction by the clerk of court are no longer judicial records within the 'supervisory power' of the district court."). That argument would be wrong, of course, because the ACLU tendered its request while the Court had unquestioned control over the trial exhibit videos in this open case, but the Court may save itself the work of refereeing that contention by immediately ordering Mr. Byars to return copies of the exhibits to the Court.

5. Conclusion

Because the Court has inherent authority over the trial exhibits, there is no order restricting public access to them, Mr. Byars has failed to demonstrate entitlement to any restrictions on that access, and the public's right to access is contemporaneous, the Court should grant the ACLU's unopposed motion for limited intervention,[7] re-take custody of the videos, and permit the ACLU to copy them.

/s/ Dan Barrett
Dan Barrett
Jaclyn Blickley
ACLU Foundation of Connecticut
765 Asylum Avenue
Hartford, CT 06105
(860) 471-8471
e-filings@acluct.org

[7] Byars makes no mention of intervention in his opposition, thus waiving any objection to it. *E.g.*, *Collins v. Fed. Express Corp.*, 731 F. Supp. 3d 368, 381 (D. Conn. 2024).