

RICHARD D. EMERY
ANDREW G. CELLI
MATTHEW D. BRINCKERHOFF
JONATHAN S. ABADY
ILANN M. MAAZEL
ERIC HECKER
MARIANN MEIER WANG
SARAH NETBURN
KATHERINE ROSENFELD
O. ANDREW F. WILSON
ELIZABETH S. SAYLOR
KENNISHA A. AUSTIN
DEBRA L. GREENBERGER
ELORA MUKHERJEE

EMERY CELLI BRINCKERHOFF & ABADY LLP

ATTORNEYS AT LAW
75 ROCKEFELLER PLAZA
NEW YORK, NEW YORK 10019

TELEPHONE
(212) 763-5000
FACSIMILE
(212) 763-5001
WEB ADDRESS
www.ecbalaw.com

February 20, 2009

By ECF

Honorable Ramon E. Reyes, Jr.
United States Magistrate Judge
U. S. District Court
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201

Re: *Nicholas R. Kamparosyan, Telemak E. Kamparosyan v. The City of New York, et al.*, 07 Civ. 2691 (CBA)(RER)

Dear Magistrate Judge Reyes,

We represent plaintiffs Nicholas and Telemak Kamparosyan. We write pursuant to the Court's order at the January 27 court conference, directing the parties to submit simultaneous letter briefs on the timing for production of audio and video recordings in this case. Pursuant to Federal Rule of Civil Procedure 26(c)(2), plaintiffs respectfully request that the Court grant a Protective Order, permitting Plaintiffs to delay disclose the videotape recordings in their possession until *after* the deposition of witnesses to the events it captures.

Background

This is a civil rights action pursuant to 42 U.S.C. § 1983. On July 4, 2006, plaintiffs – two brothers – attended an early afternoon New York Mets baseball game at Shea Stadium accompanied by two other friends. While watching the game, plaintiffs took some photographs of each other with their personal camera, prompting a nearby Shea Stadium security guard – an employee of Defendant Sterling Mets L.P. (“Sterling”) – to begin harassing plaintiffs. Ultimately, plaintiffs asked to see a supervisor in order to complain about the security guard’s harassing behavior. In response to plaintiffs’ request, other security personnel arrived and indicated that they would like to discuss the plaintiffs’ complaint away from the seating area in the stadium. Plaintiffs accompanied security personnel to the concession area to discuss the inappropriate behavior of the security guard that had been haranguing them. Once there, however, security personnel made it clear that they had no interest in plaintiffs’ complaint, and instead proceeded to physically assault plaintiffs, while New York City Police Officers passively watched. After the assault, plaintiffs were taken to a third location where New York City Police Officers searched and arrested plaintiffs in a transparent attempt to cover up the misconduct by

Sterling security. Nicholas Kamparosyan was taken to the hospital for treatment following this incident.

Plaintiffs' digital camera was on intermittently throughout the incident and captured discrete portions of the incident on video. Plaintiffs have those video segments in their possession and it is our understanding, based on Sterling's representations at the conference, that defendants have an audio recording of the incident as well. Recognizing that these recordings are subject to disclosure in discovery, at the conference, plaintiffs made an oral application to the Court that the timing of that disclosure occur *after* the individuals captured on tape have been deposed so that their testimony not be altered to conform to the recording. We now renew that application here and request a protective order staying production of the video recordings until after those depositions.

Argument

As the Court recognized during the January 27 conference, this case will turn on the issue of credibility and plaintiffs should be allowed the opportunity to test defendants' credibility through their present, unrefreshed and unaltered recollections of the events that transpired on July 4, 2006. *See Palisi v. Jewelewicz*, No. 96 Civ. 9756, 1997 WL 282218, at *1 (S.D.N.Y. May 27, 1997) ("I find that the plaintiffs' interest in obtaining Jewelewicz's present unrefreshed recollection outweighs any prejudice to Jewelewicz from not having access to the tapes prior to his deposition.); *Gariulo et al. v. Client Services, Inc.*, No. 04 Civ. 5410 (Order at Docket Entry 14) (E.D.N.Y. May 12, 2005) ("Defendants' motion to compel is denied as moot, because plaintiff is willing to disclose the tape subject to certain timing restrictions. Plaintiff's motion for a protective order allowing plaintiff to withhold production of the tape until the completion of defendants' deposition is granted.").

The law is clear that this Court may order the production of the videotape recording of the incident *after* defendants' depositions have been taken. *See Poppo v. Aon Risk Services, Inc.*, No. 00 Civ. 4165, 2000 WL 1800746, at *1 (S.D.N.Y. Dec. 6, 2000). This makes sense as Judge Baer noted in *Poppo*, "[s]ince biblical times the prospect of tailoring testimony and its ramifications has been understood and condemned." *Id.* As a result, the *Poppo* court reasoned "Second Circuit courts have delayed the production of audio or video tapes prior to one or more depositions in order to prevent the defendant or its witnesses from tailoring their testimony to conform with their prior recorded statements or actions." *Id.* (citing *Tribune Co. v. Purcigliotti*, No. 93 CV 7222, 1997 WL 540810, at *3 (S.D.N.Y.1997) (ordering a production of audio and video tapes after the risk of altering testimony was over); *Weinhold v. Witte Heavy Lift, Inc.*, No. 90 CIV 2096, 1994 WL 132392, at *1 (S.D.N.Y. April 11, 1994) (surveillance video tape in a products liability action withheld until after plaintiff's deposition in order to avoid temptation to alter testimony in light of what the films or tapes show); *Daniels v. Nat'l R.R. Passenger Corp.*, 110 F.R.D. 160, 161 (S.D.N.Y.1986) (same); *Erie Conduit Corp. v. Metro. Asphalt Paving Assoc.*, 106 F.R.D. 451, 457 (E.D.N.Y.1985) (stating that the Court had denied the defendants access to plaintiff's secretly recorded tapes until after depositions); *Sherrell Perfumes Inc. v. Revlon, Inc.*, 77 F.R.D. 705, 707 (S.D.N.Y.1977) (delaying the production of surreptitiously tape recorded conversations in an antitrust action until after depositions)).

Therefore, while there are cases that require immediate production of video and audio recordings, delayed production – as the *Poppo* court observed – is “the consensus on this issue within this circuit.” *Id.* at *1; *see e.g.*, *Palisi*, 1997 WL 282218, at *1 (approving post-deposition production of statement); *Tribune Co.*, 1997 WL 540810 at *3 (same); *Sherrell Perfumes Inc.*, 77 F.R.D. at 707 (same); *Daniels*, 110 F.R.D. at 161 (same); *see also Hendrick v. Avis Rent A Car System, Inc.*, 916 F.Supp. 256, 260 (W.D.N.Y. 1996) (same); *Boyce v. Allied Interstate*, No. 05 Civ.1596, 2005 WL 2160204, at *1 (W.D.N.Y. 2005) (same).

In this case, plaintiffs have brought civil rights claims against numerous individual defendants and they have a vital interest in receiving those defendants’ unrefreshed recollections. To the extent that defendants’ argue that the video recording should be produced sooner because (i) it is not limited to impeachment evidence; (ii) such production is contrary to the policy of liberal discovery; or (iii) that they will be prejudiced by testifying inconsistently with the recording, those concerns do not outweigh plaintiffs’ interest in delayed production.

There is no prejudice to defendants by delaying production of the videotape until after their depositions. First, plaintiffs do not seek to withhold the video recordings indefinitely, but instead will produce them immediately after the pertinent depositions have been taken. Second, defendants have the audio recordings of these events, so they have the benefit of access to those recordings to refresh their recollection insofar as they argue that the video recordings are needed for that purpose. Moreover, the audio recordings substantially mitigate any risk that defendants will be materially surprised by the contents of the video recording. Third, given that discovery does not close until October 30, 2009 – more than 8 months from now – defendants will have more than ample opportunity to review the video well before the close of discovery. Finally, delayed production will incentivize witnesses to be truthful in a way that an oath alone (sadly) will not. The likelihood of scrupulously truthful testimony will increase because all witnesses will testify without knowing what, if any, portions of their testimony may be tested by documentary video evidence. *Everyone* gains from truthful testimony – the parties, the court and future fact-finders. No one can legitimately claim prejudice from being incentivized to tell the truth.

In light of the relevant case law and for all of the reasons set forth above, plaintiffs respectfully request a protective order delaying disclosure of plaintiffs be permitted to disclose the video recordings following the deposition of the individual defendants.

Respectfully submitted,

/s/

Kennisha A. Austin (KA-1269)

c: Jarrett L. Warner, Hawkins Rosenfeld Ritzert & Varriale, *Attorneys for Sterling Mets LLP (by ECF)*
Afsaan Saleem, Assistant Corporation Counsel, *Attorneys for the City Defendants (by ECF)*