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Friday, July 25, 2008

By U.S. mail and by Electronic Mail
The Honorable Socrates Peter Manoukian
Santa Clara County Superior Court, Department 7
Email: smanoukian@scscourt.org
191 N 1st St
San Jose CA 95113

Re: ***Eclipse Aviation Corp. v. Doe et al.*, No. 1-08-CV-110380**,
Personal Recording request for August 1, 2008, 10:00 A.M. hearing

Dear Judge Manoukian:

This letter is an **unopposed** request (a "Personal Recording" request) for permission to make a sound recording of the August 1, 2008 hearing for use "as personal notes," pursuant to CRC 1.150(***d***). This is a distinct request from my Media Request, pursuant to CRC 1.150(***e***), which I separately submitted today.

I have confirmed, with counsel for all parties that have appeared in the case, that there are no objections to this Personal Recording request.[1]

All I am seeking to do is to publicly post a complete record of what was said in oral arguments at an open hearing. This would be an entirely unremarkable feat in most courts, including California appellate courts and all federal courts (both trial and appellate), where any member of the public can easily accomplish it without having to seek any discretionary order from a judge. One simply purchases a transcript or a sound recording (whichever one is available from the court) and then posts it wherever one wishes to post it.

[1]Per telephone conversation on July 24 with Angela Storey, counsel for Plaintiff, and email dated July 25 from Norman Malinski, counsel for Defendants.

At the June 6 hearing, immediately after denying my Personal Recording request for that hearing, the Court stated, as its only comment on the matter, "The Reporter has copies of the transcript that can be obtained."[2] This is certainly true, and I have obtained such a copy of the transcript, at the cost of $81.00.[3] However, as this department's court reporter writes at the top of every page of her transcripts: "Copying [is] Prohibited Pursuant to GC 69954(d)."[4] The referenced statute states:

> Any court, party, or person who has purchased a transcript may, without paying a further fee to the reporter, reproduce a copy or portion thereof as an exhibit pursuant to court order or rule, or for internal use, but shall not otherwise provide or sell a copy or copies to any other party or person.

(Cal. Gov. Code §69954(d), Stats. 1993 Ch. 1016 §2). Thus, I cannot post that purchased transcript to a public website.

Federal law, in contrast, has no such provision, and for years I have been purchasing and publishing transcripts of federal proceedings[5]. In California's appellate courts, GC §69954(d) is also not a problem, because those courts ordinarily make sound recordings of oral arguments and provide unrestricted copies of those recordings to any member of the public who pays $20. I have purchased and published recordings of the oral arguments in *Eagle Broadband v. Doe*, No. H030169, Cal. Ct. App. (2007) (reversed Judge Elfving's denial of an anonymous speaker's anti-SLAPP motion)[6] and in *Krinsky v. Doe 6*,

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[2]June 6, 2008 transcript at 2:21-22. Excerpt is attached as Exhibit 1. The official transcript mistakenly attributes this line to me (as well as the next page and a half of dialogue, at 2:23-4:8), but I trust the Court will recall that these were its words, not mine.

[3]Or $2.70 per page, which was the total cost of (1) paying the reporter to transcribe her original notes to create the official transcript for the court, per CCP §269(b), and then (2) purchasing a copy of it for myself. Rates are per GC §69950 ($0.85 and $0.15 per 100 words) and the practice in Santa Clara County of assuming that the number of words in a transcript is the same as the result of multiplying the number of pages by 2.7, rounding up, and then multiplying by 100. The statutorily unauthorized practice of "folio multipliers" is explained in *Reporting of the Record Task Force Final Report*, at 30-31 (Judicial Council of California, February 18, 2005), `http://www.courtinfo.ca.gov/jc/documents/reports/0205item7.pdf`

[4]See Exhibit 1, a representative excerpt of the transcript.

[5]See, e.g., the numerous federal court transcripts, from *SCO Group v. IBM*, No. 2:03-cv-294, D. Utah, *SCO Group v. Autozone*, No. 2:04-cv-237, D. Nev., and others, which I have published on the following web page since 2004:
`http://scofacts.org/courtroom.html`

[6]Published at:
`http://eagle.petrofsky.org/Eagle-appeal-2007-09-20-argument.html`

159 Cal.App.4th 1154 (2008) (reversed this Court's denial of an anonymous speaker's motion to quash; this precedent has been discussed extensively in the present case by both of the parties and the Court)[7].

It has long been recognized that transcripts do not merit copyright protection. See *Lipman v. Commonwealth of Massachusetts*, 475 F.2d 565 (1st Cir. 1973). Nevertheless, GC §69954(d) provides California reporters with an *unlimited* pseudo-royalty stream (at $0.54/page[8] for every copy), after they have already been paid both: (a) a regular salary to attend hearings and take stenographic notes[9]; and (b) a $2.70/page fee[10] to transcribe the stenography into a finished transcript. It is extraordinary and perverse that California, at the trial-court level, invests its court reporters with monopoly control over the publication of what was said at public proceedings. It serves no legitimate purpose to insist that each and every one of the hundreds of people who may wish to know what was said at a public hearing must go to the time and expense of purchasing his or her own copy of the transcript,[11] when there is someone willing and able to make the information conveniently available to everyone for free.

The detrimental effect of Cal. Gov. Code §69954(d) on the public's constitutional right of access could be avoided if the Court would grant me permission, as a media agency, to make a sound recording of the proceeding and then publish it. However, both the Court and one of the parties appear to be opposed to that idea.[12] Thus, I am also making this lesser, alternative request for permission to make a "personal" recording under CRC 1.150(d). Under this rule, relief is available to any person, not just media agencies:

> The judge may permit inconspicuous personal recording devices to be used by persons in a courtroom to make sound recordings as personal notes of the proceedings. A person proposing to use a recording device must obtain advance permission from the judge. The recordings must not be used for any purpose other than as

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[7]Published at:
`http://eclipse-vs-does.blogspot.com/2008/05/transcripts-of-hb-fuller-and-krinsky.html`

[8]Statutory rate is $0.20 per 100 words, per GC §69950, but see footnote 3, *ante*.

[9]Per GC §70046.1, paid by the county

[10]Statutory rate is $1.00 ($0.85 plus $0.15) per 100 words, paid by the first person to obtain a copy. See footnote 3, *ante*.

[11]At a cost of $16.20 per person, in the case of the June 6 hearing (30 pages at $0.54/page).

[12]I have not been able to discern any particular reason for this. The Court's June 3 order denying my earlier media request did not include any findings, and the Plaintiff's opposition to that request (also dated June 3) did not contend that granting the request would have harmed the Plaintiff in any way.

personal notes.

(CRC 1.150(d)) I would not be able to publish such a recording, but I am volunteering to use it to create a publishable transcript.[13]

I thank the Court for its consideration of this request.

Yours truly,

Alan P. Petrofsky

cc: by electronic mail, to: Norman Malinski <nmpa@att.net>, counsel for Defendant John Doe; and David T. Thuma <dthuma@jtwlawfirm.com> and Angela F. Storey <astorey@millermorton.com>, counsel for Plaintiff Eclipse Aviation Corporation.

[13] If I were sufficiently skilled at shorthand, I would be able to create and publish a transcript from my written "personal notes". Thus, I believe that using the sound recording to make that same task easier (without allowing anyone else to listen to the recording) would be a permissible use under the "personal notes" restriction.

Exhibit 1: Excerpt (first three and last three pages of proceedings) of Reporter's Transcript of Proceedings Held on June 6, 2008

IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SANTA CLARA

BEFORE THE HONORABLE SOCRATES PETER MANOUKIAN, JUDGE

DEPARTMENT NO. 7

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ECLIPSE AVIATION CORPORATION, Petitioner, VS. JOHN DOE, et al., Defendants.	)	CASE NO. 1-08-CV110380

REPORTER'S TRANSCRIPT OF PROCEEDINGS

HELD ON JUNE 6, 2008

A P P E A R A N C E S:

FOR THE PETITIONER: ANGELA G. STOREY
DAVID THUMA
ATTORNEYS AT LAW

FOR THE DEFENDANTS: NORMAN MALINSKI
ATTORNEY AT LAW

OFFICIAL COURT REPORTER: GEORGEANN M. WILES, CSR
LICENSE NO. 10339

SAN JOSE, CALIFORNIA JUNE 6, 2008

PROCEEDINGS:

THE COURT: Matter of Eclipse Aviation versus John Doe.

MS. STOREY: Good morning, Your Honor. Angela Storey for Eclipse Aviation.

MR. THUMA: David Thuma, co-counsel for Eclipse Aviation.

THE COURT: Hang on. Mr. Thuma, please spell your name for the Reporter.

MR. THUMA: T-h-u-m-a.

MR. MALINSKI: Norman Malinski on behalf of the John Does.

MR. PETROFSKY: Alan Petrofsky. I filed a media request last week.

THE COURT: I denied that. Thank you.

MR. PETROFSKY: I filed an alternative request on Wednesday.

THE COURT: That's denied, too.

MR. PETROFSKY: Okay. Thank you.

The Reporter has copies of the transcript that can be obtained.

Okay. I have a few questions on this. Extensive reference has been made to the *Krinsky* matter and to the *H.B. Fuller* matter, both of which I have intimate knowledge. And let me point out, I also am intimately familiar with the *O'Grady* case, which was Judge Kleinberg's case. I also want to point out four things that the *Krinsky* case did not

mention. A couple of them were addressed in my written order, a couple. I just assumed was common knowledge or were common knowledge.

First of all, the *Krinsky* case did not mention that I specifically found that there was some economic damage to Dr. Krinsky because the e-mails or postings, rather, led to a devaluation of the publicly traded stock in her company by two-thirds in a period about a month or two, drove down her stock price 60, 67, 68 percent.

Secondly, *Krinsky* did not mention that the commission was signed by a judge in Florida, and just as *H.B. Fuller* was, and as was signed in this case, the commission was signed by Judge Linda Vanzi, V-a-n-z-i, of the Second Judicial District in New Mexico.

Thirdly, the *Krinsky* case did not discuss the well-accepted doctrine that relevancy of the subject matter does not depend on a legally sufficient pleading, nor is it restricted to the issues formally raised in the pleadings, and that relevancy of the subject matter is determined by the potential as well as the actual issues in the case. That goes back to at least 1908 in California.

And finally, the epithets in the *Krinsky* case include the term "cockroach." Justice Rushing -- Presiding Justice Rushing has a class, teaches a class in law and literature, which I've taken twice, and one of the discussions involves John Joseph Kafka, *The Metamorphosis*, which is the book where Gregor Samsa awakes one morning and he's on his back as a cockroach. And, actually, the term

cockroach was not probably not what Kafka intended because of an inability to precisely translate German into English. What he probably meant was something of an utterly monstrous vermin beyond contempt. That's irrelevant for this purpose. But that was something I noted.

Mr. Malinski, you offered for me to review the names of the bloggers in camera. What would be gained by that?

MR. MALINSKI: Nothing based on ensuing events.

THE COURT: Okay.

MR. MALINSKI: The opposition to the motion to quash relieves a number of the John Does from the subpoena. Characterizes the subpoena as released and unreleased posters. The unreleased posters I now can report to the Court with one exception I represented.

THE COURT: So you represent all unreleased posters?

MR. MALINSKI: With one exception, yes. So the offer is still there, Your Honor, however, I believe it's necessary based on that information --

THE COURT: And can you tell me whether that unreleased poster that you don't represent has notice of these proceedings?

MR. MALINSKI: Yes, he does.

THE COURT: Or she?

MR. MALINSKI: Yes.

THE COURT: He or she?

MR. MALINSKI: It does.

(pages 5 through 27 omitted)

the prima facie case that is required to be analyzed in the *Krinsky* -- everybody knew that we alleged breach of the INDA. And we attempted to establish a prima facie case, a breach of the INDA by employees or former employees.

THE COURT: I thought that *Krinsky* stated a valid cause of action under Florida law, and I thought she could have stated a good cause of action under federal security law, and the court of appeal said it doesn't matter. So...

MS. STOREY: I mean, I think in New Mexico and in California, the essential elements of a cause of action for breach of contract are the same, and we have shown that we have met those elements in our opposition. We've shown that there was information subject to a confidentiality agreement. We've shown that the agreement appears to have been breached and that it was breached by someone who is most likely a party to that agreement.

I don't think the elements or the allegations in the Complaint, particularly where we don't know the names of the people, is going to be particularly helpful or relevant.

THE COURT: Well, look at *Krinsky,* page 1172:

"We therefore agree with those courts that have compelled the plaintiff to make a prima facie showing of the elements of libel in order to overcome a defendant's motion to quash a subpoena seeking his or her identity."

MS. STOREY: Correct. We have made a prima facie case of breach of contract in regards to the non-disclosure agreement.

THE COURT: You may have, but I haven't seen it, and I haven't heard Mr. Malinski say he had an opportunity to squawk about it, since he just saw the Complaint right now. He says that it isn't that hard to allege that, that the real issue is in the affirmative defenses, but *Krinsky* doesn't talk about affirmative defenses. Just talks about a prima facie showing. And they say here that I'm correct that when I said that it was a, prima facie burden must have been made, and Ms. -- Dr. *Krinsky* said that she demonstrated that the postings were libelous per se, and the court of appeal said that saying she had a fake medical degree or she had fat thighs or poor hygiene was not libelous. That's what the case was. And overlooked completely was the fact that the stock price got driven down so much. Not important because it wasn't plead, is what *Krinsky* case said. So there's where I'm stuck.

Okay. I'll give you a 60-day continuance on that. Can I have a Friday in 60 days, please?

August 1st. Friday, August 1st.

MS. STOREY: 10 o'clock.

THE COURT: 10 o'clock. What I want to see happen -- I'm just continuing this hearing, and I will be impressed by some motion practice on the validity of the Complaint and specific objections, Mr. Malinski, to the postings to say that this isn't a trade secret. Tell me why. You file those papers first per code, 21 -- 16 court days before the hearing. Opposition per code. And the reply, if any, per code.

But I think you know where I'm coming from on this, that there has to be a valid -- prima facie showing of a valid claim, that these are indeed trade secrets. And like I said, I don't think you can do anything anonymously that you can't do face to face, whether it's breaking a contract or stealing property or ideas or whatever. So...

Anything further, Mr. Malinski?

MR. MALINSKI: No. Thank you very much.

THE COURT: Mr. Thuma?

MR. THUMA: Nothing further.

THE COURT: Ms. Storey?

MS. STOREY: No, thank you.

THE COURT: We'll be in recess.

(Whereupon, the matter was adjourned.)

REPORTER'S CERTIFICATE

STATE OF CALIFORNIA)
) SS.
COUNTY OF SANTA CLARA)

I, GEORGEANN M. WILES do hereby certify that the foregoing is a full true and correct transcript of the proceedings had in the above-entitled action held on the 6th day of June, 2008;

That I reported the same in stenotype to the best of my ability being the qualified and acting Official Court Reporter of the Superior Court of the State of California, in and for the County of Santa Clara, appointed to said court, and thereafter had the same transcribed into typewriting as herein appears.

I further certify that I have complied with CCP 237(a)(2) and that all personal juror identifying information has been redacted, if applicable.

Dated this 25th day of June, 2008.

GEORGEANN M. WILES, CSR
License No. 10339