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**Via NYSCEF**

August 10, 2020

The Honorable Jerry Garguilo
John P. Cohalan, Jr., Courthouse
400 Carleton Avenue
Courtroom S-33
Central Islip, NY 11722

**Re: *In Re Opioid Litigation*, Index No. 400000/2017**

Dear Justice Garguilo:

The undersigned Defendants write in response to Plaintiffs' supplemental submission concerning Plaintiffs' request that trial and all upcoming hearings (including the *Frye* hearings starting in four days) be livestreamed—*i.e.* broadcast live via the internet. NYSCEF 7327.

The thrust of Plaintiffs' request is the assertion that livestreaming is the only appropriate way to ensure public and press access to the courthouse during the COVID-19 pandemic. But one incontrovertible fact belies Plaintiffs' entire claim: in the four months since New York courts first transitioned to remote virtual proceedings due to COVID-19,[1] not a single New York court has resorted to livestreaming to ensure public or press access. Other alternatives have been used. *See, e.g.*, NYSCEF 7303, at 1-2 & n. 1 (noting the options in the Third, Fourth, and Ninth Judicial Districts). And as always, transcripts of open court proceedings remain available to the press and public.

Plaintiffs point to a parenthetical contained in the last page of a recently issued report from the advisory Commission to Reimagine the Future of New York's Courts. All the Commission recommended, however, was that courts "consider" livestreaming.[2] The Commission did not indicate that livestreaming must occur to ensure public or press access, or

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[1] *See* Press Release, "Virtual Courts Up and Running Statewide," New York State Unified Court System (Apr. 6, 2020), at 2, *available at* https://www.nycourts.gov/LegacyPDFS/press/PDFs/PR20_14virtualcourtsstatewide.pdf ("As of today, all essential and emergency court matters . . . will be heard virtually, with all interactions taking place by video or telephone.")

[2] *See* Goals and Checklist for Restarting In-Person Grand Juries, Jury Trials and Related Proceedings, at 8, *available at* https://www.nycourts.gov/LegacyPDFS/press/pdfs/Commission-on-Future-Report.pdf (hereinafter "Commission Report")

that courts should ignore existing New York laws, which typically "forbid" public broadcasting. *See, e.g.*, 22 N.Y.C.R.R § 29.1.

Even Plaintiffs' own legal authority is against livestreaming. Plaintiffs note that 22 N.Y.C.R.R. § 131.1 seeks to "'facilitate the audio-visual coverage of court proceedings' to 'the fullest extent permitted' by law." NYSCEF 7327, at 2 (quoting 22. N.Y.C.R.R. § 131.1(a)). But Section 131.1 also expressly provides that "[a]udio-visual coverage of party or witness testimony in any court proceeding (other than a plea at an arraignment) is prohibited." 22 NYCRR 131.1(d) (emphasis added). That means that Section 131.1 prohibits livestreaming any portion of the upcoming *Frye* hearings, and nearly all portions of trial.

Plaintiffs also cite *Westchester Rockland Newspapers v. Leggett*, 48 N.Y.2d 430 (1979) to claim that the public availability of *Frye* hearing and trial transcripts still "pose[s] significant public access barriers." NYSCEF 7327, at 4-5. Plaintiffs do not explain how the additional time needed to create transcripts meaningfully burdens public access. Indeed, the *Westchester* court specifically stated that "it should not be assumed that the public interest which reporting fosters cannot be preserved by making the transcript available to the media" later—"as soon as the danger of prejudice to the defendant has passed." 48 N.Y.2d at 444. Where, as here, public broadcasting threatens Defendants' rights to a fair trial, the Court of Appeals has agreed that "any true public interest could be fully satisfied, consonant with constitutional free press guarantees, by affording the media access to transcripts," even "redacted" ones. *Gannett Co. v. De Pasquale*, 43 N.Y.2d 370, 381 (1977) (discussing pretrial suppression hearings).

*Westchester*'s principles also support limiting access to the *Frye* hearings to protect Defendants' rights to a fair trial. In *Westchester*, the Court of Appeals recognized that "publicity does not always insure the defendant a fair trial and, in fact, extensive publicity often has the opposite effect of endangering the defendant's right to a fair trial in the community." 48 N.Y.2d at 438. In particular, if a pretrial evidentiary hearing concerning the admissibility of potentially highly prejudicial material "were open to the public and the press in a well-publicized case, it is most likely that the substance of the evidence would be disclosed to the community from which the jurors would be drawn, even though the court may ultimately rule that the evidence should not be submitted to the jury at trial." *Id.*, at 439 (discussing pretrial suppression hearings). Indeed, the Court of Appeals previously noted that "where press commentary on those hearings would threaten the impaneling of a constitutionally impartial jury in the county of venue, pretrial evidentiary hearings in this State are presumptively to be closed to the public." *Gannett*, 43 N.Y.2d at 380.

Livestreaming the *Frye* hearings here creates the risks described in *Westchester*. According to Plaintiffs, "there is intense public interest" in this case already, and Plaintiffs concede that livestreaming via YouTube could result in 665,000 live viewers—about half the population of Suffolk County—at any one time. NYSCEF 7327 at 3-4 & n.4. Highly prejudicial material that may be deemed inadmissible at trial most likely will be disclosed at the *Frye* hearings. For example, according to Plaintiffs' pre-hearing statement, Plaintiffs intend to elicit testimony from their challenged experts that defendants "contribut[ed] to a public health crisis," and "will likely utilize several examples of specific underlying factual evidence" to show that their experts' "opinions are connected to the facts." NYSCEF 7328 at 4. The parties also may use ultimately inadmissible documents, because all evidentiary objections have been reserved

until trial. NYSCEF 7297 at 4. Thus, allowing anyone with an internet connection to view the *Frye* hearings live "would not only destroy the purpose for which the hearing was held, but would, perversely, have the very opposite effect of that intended and desired. Instead of shielding the jurors from evidence they should not hear, the public airing at the pretrial [*Frye*] hearing would serve to broadcast the evidence to most, if not all potential jurors." *Westchester*, 48 N.Y.2d at 439. This "would virtually eliminate the possibility that the accused would receive a fair trial in a highly publicized case" like this one. *Id*. at 438.

Plaintiffs' argument that livestreaming satisfies the criteria of 22 NYCRR § 29.1 and 22 N.Y.C.R.R. § 131.3 too narrowly focuses on the "passive" nature of cameras in the courthouse. According to the United States Supreme Court, "we know that distractions are not caused solely by the physical presence of the camera and its telltale red lights." *Estes v. State of Texas*, 381 U.S. 532, 546 (1965), Rather, "it is the "awareness of the fact of telecasting that is felt by the juror throughout the trial" that renders jurors "preoccupied with the telecasting rather than with the testimony." *Id*. By expanding live viewership to those beyond courtroom walls, public broadcasting also broadens jurors' exposure to "the pressures of knowing that friends and neighbors have their eyes upon them" and "the broadest commentary and criticism and perhaps the well-meant advice of friends, relatives and inquiring strangers who recognized them on the streets." *Id.*, at 545-46. Each of these threaten to color jurors' ability to base their verdict on trial evidence instead of public perception and community pressure. *See id.*, at 545 (noting that "experience indicates that it is not only possible but highly probable that it will have a direct bearing on his vote as to guilt or innocence.").

Public livestreaming also subjects fact and expert witnesses alike to the "intimidating effect of cameras." *Hollingsworth v. Perry*, 558 U.S. 183, 193 (2010). According to the United States Supreme Court, "[t]he impact upon a witness of the knowledge that he is being viewed by a vast audience is simply incalculable." *Estes*, 381 U.S. at 547. "Some may be demoralized and frightened, some cocky and given to overstatement; memories may falter, as with anyone speaking publicly, and accuracy of statement may be severely undermined. Embarrassment may impede the search for the truth, as may a natural tendency toward overdramatization." *Id*. And as Defendants have previously detailed, these impacts are particularly acute here, where Plaintiffs' trial witness lists contain scores of Defendants' rank-and-file employees. *See, e.g.*, NYSCEF 3278, at 2.

Relevant to the upcoming *Frye* hearings—and pooh-poohed by Plaintiffs as "miscellaneous"—is the reality that "[t]hese concerns are not diminished by the fact that some of [the] witnesses are compensated expert witnesses." *Hollingsworth*, 558 U.S. at 195. "There are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country." *Id*. While Plaintiffs seek to minimize livestreaming's impact on expert and lay witness testimony by labeling it "unclear," courts have recognized the detrimental effect of public broadcasting for decades. *See, e.g.*, *id.*; *Estes*, 381 U.S. 532. As have New York's legislators. *See, e.g.*, Section 131.1(d) (prohibiting audio-visual coverage of "party or witness testimony in any court proceeding (other than a plea at an arraignment)").

Plaintiffs dismiss as "hyperbolic brooding" Defendants' concern that livestreaming will exacerbate the dangers that public broadcasting poses to fair and orderly courtroom

proceedings. Certainly, Defendants do not expect all of YouTube's "2+ billion" users to livestream the *Frye* hearings or trial in this case. But that is not the point. Livestreaming allows anyone with an internet connection to view (and potentially even record without court authorization) proceedings live, regardless of location.[3] Thus, instead of opening courtroom doors to those who would have attended the proceedings but for COVID-19, livestreaming removes all boundaries from the courtroom. Even Plaintiffs' own example of "only" 665,000 viewers in a livestream audience well exceeds the ceremonial courtroom's normal, non-pandemic capacity. Defendants are "entitled to [their] day in court, not in a stadium, or a city or nationwide arena." *Estes*, 381 U.S. at 549.

The fundamental flaw in Plaintiffs' analysis is their efforts to equate public broadcasting with the right of public access during COVID-19. Plaintiffs do not deny that well-settled New York law treats public access and broadcasting differently; even the Court of Appeals has held there is no constitutional right to public broadcasting even though there is a right to public access. *Courtroom TV Network, LLC v. State*, 800 N.Y.S.2d 522, 524 (2005); *see also Santiago v. Bristol*, 273 A.D.2d 813, 813 (4th Dep't 2000) ("The right of access, however, is not the right to broadcast the proceedings."). Plaintiffs' only response is to claim this New York law does not apply here because of COVID-19. NYSCEF 7327, at 4. But the proposition that COVID-19 creates a new constitutional right to publicly broadcast courtroom proceedings is remarkable and completely unsupported. And again, the undisputable fact that not a single New York court publicly livestreamed any proceedings during the pandemic—even when all proceedings were held remotely—eviscerates Plaintiffs' claim that "the public's safe access to court proceedings is dependent on a livestream or broadcast of those proceedings."

Simply put, livestreaming the *Frye* hearings and trial is inappropriate based not only on 22 N.Y.C.R.R. § 29.1's five criteria as defendants previously have explained (*see, e.g.*, NYSCEF 3278, 7303), but also under 22 N.Y.C.R.R. § 131.3 because it "would interfere with the fair administration of justice, the advancement of a fair trial, or the rights of the parties," 22 N.Y.C.R.R. § 131.3(d)(3).[4] Indeed, the Court of Appeals has held that "[t]he governmental interests of the right of a defendant to have a fair trial and for the trial court to maintain the integrity of the courtroom outweigh any absolute First Amendment or article I, § 8 right of the press or the public to have access to trials." *Courtroom Television Network*, 5 N.Y.3d at 232.

Sincerely,

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|---|---|
| /s/ *Robert A. Nicholas* | /s/ *Christopher Y. L. Yeung* |
| Robert A. Nicholas | Christopher Y. L. Yeung |

[3] Additionally, as Defendants previously explained, livestreaming also increases the danger that confidential information subject to the Protective Order is instantly widely disseminated. *See* NYSCEF 7303 at 2. Remote recording would make such improper dissemination permanent.

[4] Plaintiffs also elide the fact that 22 N.Y.C.R.R. § 131.3(d)(6) requires this Court to consider as a "relevant factor" "the objections of any of the parties"—*i.e.*, Defendants.

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