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STATE OF MINNESOTA DISTRICT COURT

COUNTY OF RAMSEY SECOND JUDICIAL DISTRICT
Case Type: Civil/Misc.

In the Matter of the Denial of Contested Case Hearing Requests and Issuance of National Pollutant Discharge Elimination System/State Disposal System Permit No. MN0071013 for the Proposed NorthMet Project St. Louis County Hoyt Lakes and Babbitt Minnesota	Case No. 62-cv-19-4626 **RESPONSE OF STAR TRIBUNE MEDIA COMPANY LLC AND MINNPOST TO POLY MET MINING, INC.'S OBJECTION TO VIDEO/AUDIO REQUEST**

Pursuant to Rule 4 of the Minnesota General Rules of Practice, Star Tribune Media Company LLC and MinnPost (collectively, the "Media") submitted notices on January 6 and 9, 2020, respectively, of their plans to use visual and audio recording equipment in covering an evidentiary hearing in the above-captioned case. Rule 4.02 makes clear that the Court may authorize such visual and audio recording even if the parties do not consent.

On January 15, 2020, Poly Met Mining, Inc. ("PolyMet") objected to these requests. Its objection is based entirely on speculative, conclusory—even illogical—assertions that could be made in every case. Those assertions fly in the face of the Supreme Court's policy determination that allowing visual and audio coverage of court proceedings advances the interests of democracy and judicial administration and, if widely accepted, PolyMet's assertions would render Rule 4.02(c) a dead letter.

PolyMet has not identified a single, legitimate reason why it or this matter deserve special treatment. Indeed, the only exceptional thing about the upcoming evidentiary hearing is that it will address a matter of significant public interest and concern—alleged collusion between state and federal agencies to suppress concerns over PolyMet's water pollution permit. This is the reason to allow enhanced coverage, not prohibit it. This Court should overrule PolyMet's objection.

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ARGUMENT

I. Rule 4.02 Permits This Court to Allow Visual and Audio Recording of the Evidentiary Hearing.

Under the Minnesota General Rules of Practice, this Court "may authorize, without the consent of all parties, the visual or audio recording" of a civil proceeding. Minn. Gen. R. Prac. 4.02(c). The plain wording of Rule 4.02(c) thus gives this Court authority to allow visual or audio recording of the evidentiary hearing for news reporting purposes, subject to the conditions set forth in the Rule. PolyMet's initial argument is to obliquely suggest that the evidentiary hearing is not a "civil proceeding. *See* Obj. at 2 ("Even if the exception governing 'civil proceedings' applies …"); *id.* at 3 (same). But saying that doesn't make it so. This is a civil case and the evidentiary hearing is a civil proceeding and, as a result, this Court "may authorize" members of the public and the media to record the proceedings subject to the discrete conditions set forth in the Rule.[1]

II. PolyMet's objection lacks any basis in law or fact and is contrary to the policies underlying Rule 4.02(c).

PolyMet raises three arguments why the Court should deny the Media's requests. First it argues that media coverage "would likely adversely affect the behavior of the lawyers and witnesses, thereby inhibiting the Court's ability to expeditiously conduct the hearing and focus on the limited issues remanded by the court of appeals." Obj. at 3. Second, it argues that "[a]llowing audio and visual recordings would also increase the chance that the proceedings of the evidentiary hearing will be misconstrued by the media and in front of the court of appeals" because "snippets of audio recordings can easily be cherry-picked and publicized without context." *Id.* Third, it argues that neither the public nor the Media "will be prejudiced by not

[1] The Media note that witnesses Brad Moore and Christie Kearney have objected to being recorded and acknowledge that they must abide by their wishes. *See* Minn. R. Gen. Prac. 4.02(c)(ii); Obj. at 3, n.4.

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having audio and visual recordings of the hearing" because there will be a written transcript of the evidentiary hearing that is "accurate" and "non-biased." *Id.* None of these arguments deserve credence.

First, PolyMet provides no support for its speculative, conclusory assertion that the presence of recording devices will affect the behavior of lawyers and witnesses, much less adversely so or in a way that slows the administration of justice. Moreover, this concern theoretically exists in every case, yet was not sufficient to dissuade the Supreme Court from adopting Rule 4.02—rather the Court concluded that the benefits of visual and audio recording outweigh its potential pitfalls. Further, other courts, in equally high-profile matters have allowed cameras despite the possibility that it will affect the behavior of trial participants. *See, e.g.*, Order Regarding Audio/Video Coverage of Sentencing, *State v. Noor*, 27-CR-18-6859 (June 3, 2019) (allowing visual and audio recording at sentencing of former police officer Mohamed Noor, who was convicted of third-degree murder arising from an on-duty shooting), *available at* http://www.mncourts.gov/mncourtsgov/media/High-Profile-Cases/27-CR-18-6859/OrderReAVCoverageofSentencing060319.pdf. PolyMet has not and cannot identify anything unique about this case that might cause attorneys or witnesses to be especially affected by the presence of recording equipment.

Second, PolyMet's argument that visual and audio recordings will cause the proceedings to be "misconstrued" and "cherry-picked" not only is speculative but also is so illogical that, coming from PolyMet's sophisticated counsel, strikes the Media as unconscionable. Reporters are fast writers and good note takers. But obviously a complete, incontrovertible recording of the proceedings is the best way to ensure accurate reports about them. As Star Tribune's managing editor put it in a news report about of PolyMet's objection, "I am befuddled by the company's

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argument that recordings could lead to inaccurate coverage. Our experience is that recorded coverage actually helps us more accurately convey the evidence and arguments being presented and discussed in court."[2] PolyMet gives no explanation for how news coverage based on video and audio recordings is *more* likely to be misconstrued than coverage based on the recollection of reporters hurriedly scribbling and attempting to paraphrase witnesses' statements and counsels' arguments.

As for "cherry-picking," using this derogatory term suggests PolyMet and its counsel not only disrespect the press but fundamentally misunderstand their role in helping the public understand issues of public interest and concern. Obviously, the Media need to summarize the days-long hearing for its readers and to focus on the most salient points. Not *everything* the hearing participants say will make it into the Media's final news reports, but that is true whether the Media rely on their notes, a transcript, or a recording. As the Supreme Court recently explained in approving a pilot program for electronic recording at criminal sentencings, "the potential for prejudicial media coverage is *not* eliminated simply because electronic coverage is excluded from the courtroom," and "limiting electronic coverage . . . to the images captured and the statements delivered *outside* the courtroom" is no way to "foster public confidence in the sound and fair administration of justice." *See Order Promulgating Amendments to the Minn. Gen. Rules of Practice*, 2015 WL 6467107 ("Promulgating Order"), at *23 (Minn. 2015) (emphasis added).

Third and finally, PolyMet's conclusory argument that the Media will not be prejudiced because—at some point (it does not say when)—a transcript of the proceedings will be made

[2] Jennifer Bjorhus, *PolyMet objects to cameras and recording at permit hearing, fearing 'viral media moments,'* Star Tribune (Jan. 16, 2020), http://www.startribune.com/polymet-objects-to-cameras-and-recording-at-permit-hearing-fearing-viral-media-moments/567022972/.

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available defies law and logic. A picture, so the saying goes, is worth a thousand words, and a transcript is no replacement for the tone of voice, body language, and facial expressions that only in-person observation or recording equipment can fully capture. Surely PolyMet understands this—after all, it is planning to call live witnesses, not rely on deposition transcripts. Further, same-day transcripts of the proceedings likely will not be available the Media—at least not without significant cost—and the suggestion that delayed transcripts are somehow equivalent to contemporaneous recording ignores well-established law. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 592 (1980) (Brennan, J., concurring) ("contemporaneous review in the forum of public opinion is an effective restraint on the possible abuse of judicial power"); *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 560-61 (1976) (recognizing that "[d]elays imposed by governmental authority" are inconsistent with the press' "traditional function of bringing news to the public promptly"); *Grove Fresh Distribs., Inc. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994) (access to court documents "should be immediate and contemporaneous"); *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 664 (3d Cir. 1991) ("the public interest encompasses the public's ability to make a contemporaneous review of the basis of an important decision of the district court"); *Washington Post v. Robinson*, 935 F.2d 282, 287 (D.C. Cir. 1991) (recognizing "the critical importance of *contemporaneous* access . . . to the public's role as overseer of the criminal justice process"); *Valley Broad. Co. v. United States Dist. Ct.*, 798 F.2d 1289, 1292 (9th Cir. 1986) (noting that because the media "seeks to obtain the tapes for contemporaneous broadcast when presumably they will pack the greatest punch, delay will prejudice its application in a way not correctable on appeal" (internal marks omitted)); *In re Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1310 (7th Cir. 1984) ("[T]he presumption of access [to court records] normally involves a right of *contemporaneous* access.");

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In re Application of Nat'l Broad. Co. (Myers), 635 F.2d 945, 952 (2d Cir. 1980) ("there is a significant public interest in affording [opportunity to scrutinize evidence] contemporaneously . . . when public attention is alerted to the ongoing trial").

III. The Court should not restrict the Media's use of visual and audio recording beyond the conditions set forth in Rule 4.02(c).

Finally, PolyMet urges the Court to only allow visual and audio recording during "witness testimony, not during arguments of attorneys or during the Court's administration of the hearing or non-dispositive pre-hearing matters." Obj. at 4. In support of this argument it cites Rule 4.02(c)(v), which states that "during a jury trial, there shall be no visual or audio coverage of hearings that take place outside the presence of the jury" and also that "[t]his provision does not prohibit visual or audio coverage of appropriate pretrial hearings in civil proceedings, such as hearings on dispositive motions."

This argument turns Rule 4.02 on its head.

On its face, Rule 4.02 is *more* protective of witnesses than attorneys or judges: it allows witnesses to opt out of being recorded (an option two of PolyMet's witnesses have chosen to exercise), but does not offer a similar choice to the attorneys or the judge. And for good reason, as to judges in particular: "what transpires in the courtroom is public property" and the public is entitled to know how publicly employed judges handle the administration of justice. *Minneapolis Star & Tribune Co. v. Schumacher*, 392 N.W.2d 197, 202 (Minn. 1986) (quoting *Craig v. Harney*, 331 U.S. 367, 374 (1947). In any event, under the interpretive canon *expressio unius est exclusio alterius*, the Supreme Court's decision to include a carve-out for witnesses but not for attorneys and judges disposes of PolyMet's argument. *See State v. Caldwell*, 803 N.W.2d 373, 383 (Minn. 2011) (applying an inference that any omissions in a statute are intentional).

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Likewise, PolyMet's reliance on Rule 4.02(c)(v) is misguided. That condition was presumably adopted to protect the venire from learning about inadmissible evidence. However, this is not a jury trial, as PolyMet acknowledges, and the Court is surely more than capable of focusing on the official record and not what the Media reports. Indeed, even in a jury trial, in a civil case, the Rule allows visual or audio coverage of pretrial hearings.

CONCLUSION

The public has an inherent interest in how controversies—even purely private disputes—are resolved by taxpayer-funded courts. That interest is at its zenith where the controversy involves broad public concerns that could have lasting effects on the local environment and population, such as whether water pollution permits were mishandled in approving a mining permit. In such matters, "[t]he crucial prophylactic aspects of the administration of justice cannot function in the dark; no community catharsis can occur if justice is done in a corner [or] in any covert manner." *Richmond Newspapers*, 448 U.S. at 571 (internal quotation and citation omitted); *accord Schumacher*, 392 N.W.2d at 204. The use of visual and audio recording equipment in the courtroom, including during civil proceedings under Rule 4.02(c), serves a vital democratic function by enhancing the transparency of judicial administration. PolyMet has failed to advance any legitimate argument why the Media's requests to use such equipment here should be denied and the Court should therefore overrule its objection to those requests.

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