

UNITED STATES DISTRICT COURT  
CENTRAL DISTRICT OF CALIFORNIA

Priority  
Send  
Clsd  
Enter  
JS-5/JS-6  
JS-2/JS-3

CIVIL MINUTES - GENERAL

Case No. SA CV 03-950 DOC (JTLx)

Date: January 17, 2007

Title: ECHOSTAR SATELLITE CORP., et al. v. NDS GROUP PLC, et al.

DOCKET ENTRY

[I hereby certify that this document was served by first class mail or Government messenger service, postage prepaid, to all counsel (or parties) at their respective most recent address of record in this action on this date.]

Date: \_\_\_\_\_ Deputy Clerk: \_\_\_\_\_

PRESENT:

THE HONORABLE DAVID O. CARTER, JUDGE

Kristee Hopkins  
Courtroom Clerk

Not Present  
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS: ATTORNEYS PRESENT FOR DEFENDANTS:

NONE PRESENT

NONE PRESENT

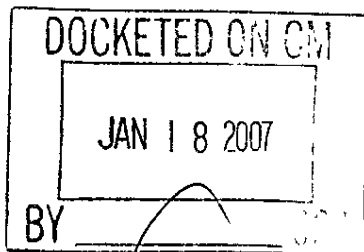
PROCEEDING (IN CHAMBERS): ORDER GRANTING DEFENDANTS' MOTION TO  
VIDEOTAPE THE DEPOSITION OF MARTIN CLEMENT  
MULLEN

Before the Court is Defendants NDS Group PLC and NDS Americas, Inc.'s ("NDS") Motion Videotape the Deposition of Martin Clement Mullen (a/k/a Martin Paul Stewart) ("Motion"), a witness for Plaintiff EchoStar Satellite Corp. ("EchoStar"). The Court finds the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; Local R. 7-15. Accordingly, the hearing set for January 22, 2007 is removed from the Court's calendar. After considering the moving, responding, and replying papers, the Court hereby GRANTS NDS's Motion.

**I. BACKGROUND**

EchoStar sought, and Magistrate Judge Lum issued, an order granting leave to take the deposition of incarcerated third-party Martin Clement Mullen ("Mullen"). The order instructed that "the deposition of Mullen be taken by oral examination, be recorded stenographically, at a time and

MINUTES FORM 11 DOC  
CIVIL - GEN



Initials of Deputy Clerk [signature]  
Page 1 of 4

344

place to be designated by the Warden of the Federal Correctional Institution in Fort Dix, New Jersey.” Order RE Pl.’s Mot. for Leave to Take the Dep. of Incarcerated Third-Party Martin Clement Mullen.

## II. LEGAL STANDARD

“With prior notice to the deponent and other parties, any party may designate another method to record the deponent’s testimony in addition to the method specified by the person taking the deposition.” Fed. R. Civ. P. 30(b)(3). The videotaping of depositions is common practice, especially in cases where a witness’s veracity is important. *Marbled Murrelet v. Pacific Lumber Co.*, 163 F.R.D. 308, 329 (N.D. Cal. 1995).

## III. DISCUSSION

### A. NDS’s Motion

NDS would like to videotape Mullen’s deposition pursuant to Fed. R. Civ. P. 30(b)(3). NDS asserts that Mullen’s credibility is important because he has reasons to be biased against NDS. He was convicted by the U.S. District Court for the Middle District of Florida for his role in hacking thousands of smart cards equipped with NDS’s conditional access system. The court ordered Mullen to pay NDS and DirecTV \$24 million in restitution and sentenced him to 7 years, the maximum allowed under the law. NDS asserts that videotaping the deposition will most accurately capture and preserve Mullen’s body language, demeanor, and responses in order to enable a more accurate assessment of his credibility.

### B. EchoStar’s Position

EchoStar does not object to the videotaping of Mullen’s deposition. However, EchoStar requests that the Court impose certain restrictions on the videotaping to avoid unfairly prejudicing the jury. Specifically, EchoStar requests an order (1) limiting the videotaped image to Mullen’s person in front of a portable backdrop, (2) permitting Mullen to dress professionally for the deposition, and (3) permitting Mullen to give his testimony without handcuffs or any other signs of restraint or confinement that might be captured on the videotape.

### C. The Warden’s Position

NDS originally filed the motion because the Warden of the Federal Correctional Institution at Fort Dix, Charles Samuels, Jr. denied NDS’s request to videotape Mullen’s deposition. However, in its Reply, NDS informs the Court that the Warden has withdrawn his initial objections and agreed to permit NDS to videotape Mullen’s deposition. NDS further informs the Court that it will conduct Mullen’s deposition in the manner represented to, and agreed to by, the Warden: only Mullen and a portable backdrop, absent any other portions of the correctional facility will be captured on tape.

Finally, according to NDS, the Warden will prohibit Mullen from appearing in civilian attire at his deposition. Counsel for Fort Dix informed NDS that the institution enforces strict guidelines regarding prisoners' attire and that the Warden refuses to depart from those guidelines for the deposition due to security concerns.

#### D. Mullen's Attire

NDS objects to EchoStar's request that Mullen be permitted to dress professionally at his deposition. NDS argues that a protective order is required to impose limitations on Mullen's deposition and EchoStar cannot establish any right to an order allowing Mullen to wear civilian clothes during the deposition. Rule 26(c) requires that EchoStar demonstrate good cause for a protective order that "discovery may be had only on specified terms and conditions." Fed. R. Civ. P. 26(c). For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted. *Phillips v. GMC*, 307 F.3d 1206, 1210-1211 (9th Cir. 2002).

Although the 14th Amendment protects against the government compelling an accused criminal defendant to stand trial dressed in prison clothes, *Estelle v. Williams*, 425 U.S. 501, 504-06, 96 S. Ct. 1691 (1976),<sup>1</sup> courts have not found an analogous right for witnesses. The Eleventh Circuit upheld the convictions of defendants whose co-conspirators appeared in prison clothes at trial as witnesses against the defendants. *United States v. Adams*, 1 F.3d 1566, 1584 (11th Cir. 1993). In that case, the government called five co-conspirators as witnesses, noted that each wore prison garb and asked if each were incarcerated. *Id.* The Eleventh Circuit concluded that no prejudice resulted, reasoning that "[t]he inference to be drawn from prison clothing is that the witnesses were in prison, a fact that is not inadmissible." *Id.* Similarly, the Eastern District of Washington denied a prisoner's habeas petition for ineffective assistance of counsel based in part on counsel permitting defense witnesses to appear in prison clothes during trial where their credibility was crucial. *Johnson v. Spalding*, 510 F. Supp. 164, 170-71 (E.D. Wash. 1981). The court noted that it was the witnesses, and not the defendant, who appeared in prison clothes and observed that with or without the prison clothes,

---

<sup>1</sup> EchoStar also cites an unpublished case from the District of New Hampshire, *McElwain v. Harris*, No. CV 05-93 JAW, 2006 WL 1049935, at \*4 (D.N.H. April 18, 2006), granting a motion in limine to permit a civil defendant to attend her civil trial in civilian clothes. The defendant was serving a criminal sentence for the underlying conduct at issue in the civil case. The Court found that she had a right to attend the civil trial and that she should not be required to attend in prison garb because it might prejudice the jury against her. (The Court had previously excluded her guilty plea and conviction for negligent homicide.) The court reasoned that her appearance in prison attire would lead the jury to speculate as to why she was jail and serve as a daily reminder of her incarceration. This case does not address the present situation as to whether an incarcerated witness may be videotaped at his deposition in prison attire.

the jury knew that the witnesses were prisoners. *Id.* at 171. Although the petitioner did not allege that the state compelled the witnesses' appearance in prison clothes, the court concluded that, even had it done so, the court "would be at a loss to find what prejudice resulted." *Id.* NDS argues that the fact that Mullen is a convicted felon, currently serving a seven year sentence, is admissible evidence relevant to the jury's determination of his credibility and, therefore, videotaping him in prison clothes at his deposition will not result in unfair prejudice.

NDS refers the Court to an order from the Northern District of California granting the plaintiffs' motion for leave to take the videotape deposition of a prisoner at USP Lompoc. Like EchoStar, the defendants in that case requested that the court allow the prisoner to be deposed in street clothes. The plaintiffs responded that the warden enforces strict regulations regarding prisoners' apparel and thus, the prisoner would be required to wear his prison garb during the deposition. In its order granting the request to videotape the deposition, the court did not impose any conditions allowing the prisoner to wear street clothes; instead the order provided that the deposition shall "comply with the regulations of USP Lompoc." Order Granting Non-Class Plaintiffs' Mot. for Leave to Take the Videotape Dep. of Wolfgang Koch at USP Lompoc 3:25-4:2, Decl. of David R. Eberhart, Ex. A.

#### **IV. DISPOSITION**

For the reasons set forth above, NDS's Motion to Videotape the Deposition of Martin Clement Mullen is hereby GRANTED under the following conditions: (1) only Mullen and a portable backdrop shall be captured on the videotape; (2) the videotape shall record Mullen from the chest up to ensure that handcuffs, manacles, or any other signs of restraint are not captured on tape; and (3) the deposition and videotaping shall comply with the regulations of the Federal Correctional Institution in Fort Dix, New Jersey. EchoStar's request that Mullen be permitted to dress professionally for the deposition is hereby DENIED.

The Clerk shall serve this minute order on all parties to the action.