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United States Court of Appeals
for the
First Circuit

Case No. 09-1090

IN RE: SONY BMG MUSIC ENTERTAINMENT; WARNER BROS. RECORDS, INC.; ATLANTIC RECORDING CORPORATION; ARISTA RECORDS, LLC; and UMG RECORDINGS, INC.,

Petitioners.

Before
Torruella, Selya and Lipez
Circuit Judges.

ON PETITION FOR EXTRAORDINARY WRIT TO THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

DISTRICT COURT CASE NO. 07-11446-NG (D. MASS.) HON. NANCY GERTNER, UNITED STATES DISTRICT JUDGE, PRESIDING

AMICUS CURIAE BRIEF OF THE ASSOCIATED PRESS, COURTROOM TELEVISION NETWORK LLC, DOW JONES & CO., INC., GANNETT CO., INC., THE HEARST CORPORATION, INCISIVE MEDIA, LLC, NATIONAL PUBLIC RADIO, INC., NBC UNIVERSAL, INC., THE NEW YORK TIMES COMPANY, RADIO-TELEVISION NEWS DIRECTORS ASSOCIATION, THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS, E.W. SCRIPPS COMPANY, TRIBUNE COMPANY AND WASHINGTON POST DIGITAL IN OPPOSITION TO THE PETITION

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IDENTITY AND INTERESTS OF AMICI AND AUTHORITY TO FILE

Amici are news organizations and associations of journalists who gather and publish the news, including news about this Nation's courts.[1] To carry out this task, Press Amici rely upon the right of public access to court proceedings in order to obtain information that is often unavailable elsewhere. Press Amici also frequently are granted "camera access" so that they may provide audiovisual coverage of proceedings. Camera access puts important information into the hands of a public that now seeks out news 24 hours a day on the Internet. It also allows journalists beyond the jurisdiction to report on proceedings, and the Internet availability of an audiovisual webcast improves the accuracy of reporting on the courts. The Press Amici thus have a vital interest in seeing that rules governing camera access are properly construed in this proceeding.

Respondent consents to the filing of this brief; Petitioners take no position.

ARGUMENT

To obtain extraordinary mandamus relief, Petitioners must establish (1) an irreparable injury (2) caused by a plainly erroneous order (3) under "particularly

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[1] This brief is submitted by The Associated Press, Courtroom Television Network LLC, Dow Jones & Co., Inc., Gannett Co., Inc., The Hearst Corporation, Incisive Media, LLC, National Public Radio, NBC Universal, Inc., The New York Times Company, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, E.W. Scripps Company, Tribune Company, and Washington Post Digital (hereafter, the "Press Amici").

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compelling" circumstances, where an appeal will not suffice. *Christopher v. Stanley-Bostitch*, 240 F.3d 95, 99-100 (1st Cir. 2001); *In re Cargill, Inc.*, 66 F.3d 1256, 1259-60 (1st Cir. 1995). This is a heavy burden that Petitioners fail to meet.

The Petition establishes no injury—let alone an irreparable one—because the order permitting a motions hearing to be observed over the Internet will neither impair due process nor interfere with the administration of justice. Nor does the Petition demonstrate "plain error" in the district court's reasonable reading of Local Rule 83.3 to grant discretion to permit audiovisual coverage in appropriate circumstances. The district court properly found it appropriate to permit Internet access to a motions hearing that will address issues of significance to litigants throughout the country. No proper ground for mandamus exists.

I.
ALLOWING PUBLIC ACCESS TO A HEARING THROUGH THE INTERNET ADVANCES SUBSTANTIAL PUBLIC INTERESTS WITHOUT ANY HARM TO THE FAIR ADMINISTRATION OF JUSTICE

A. Camera Access Significantly Promotes The Public Interest

"One of the demands of a democratic society is that the public should know what goes on in courts… ." *Maryland v. Baltimore Radio Show, Inc.*, 338 U.S. 912, 920 (1950) (*denying cert. to* 67 A.2d 497 (Md. 1949)). The Supreme Court thus has instructed that "[w]hat transpires in the court room is public property," *Craig v. Harney*, 331 U.S. 367, 374 (1947), and has held—repeatedly—that the

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First Amendment embodies an affirmative, enforceable right of public access to court proceedings. *E.g., Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980); *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986); *see also In re Globe Newspaper Co.*, 729 F.2d 47, 51 (1st Cir. 1984).

Public access to judicial proceedings, including specifically access by the press, advances the public interest because "publicity" is the most powerful check on misconduct or abuse— "[w]ithout publicity, all other checks are insufficient." *Richmond Newspapers*, 448 U.S. at 569 (quoting 1 J. Bentham, *Rationale of Judicial Evidence* 524 (1827)). The right of access advances a number of other interests that are central to a healthy democracy: It (1) "'affords citizens a form of legal education,'" (2) "'promotes confidence in the fair administration of justice,'" (3) enhances "the performance of all involved," (4) protects judges and litigants from imputations of dishonesty, and (5) provides an outlet for community hostility and emotion. *Id.* at 569-73. *See also Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) (explaining public interest in court access).

Each of these important interests is directly advanced by enabling the public and press to observe court proceedings first-hand, electronically. In addition, camera access uniquely facilitates public acceptance of unexpected or unpopular results. This was amply demonstrated a few years ago during the emotionally-

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charged prosecution of four New York police officers who fired 41 shots at an unarmed African immigrant. Televised coverage of the trial was credited by then-Mayor Giuliani with "chang[ing] the minds of a lot of people" and avoiding a violent reaction when the officers were acquitted. H. Schleiff, *Cameras in the Courtroom: A View in Support of More Access*, HUMAN RIGHTS 14, 15 (Fall 2001). Further still, camera access makes it possible for journalists to follow distant proceedings, and facilitates more accurate and comprehensive reporting.

For all these reasons, courts have recognized that the public and the press

> should be permitted and encouraged to observe the operation of its courts *in the most convenient manner possible,* so long as there is no interference with the due process, the dignity of litigants, jurors and witnesses, or with other appropriate aspects of the administration of justice.

Hamilton v. Accu-Tek, 942 F. Supp. 136, 137-38 (E.D.N.Y. 1996) (emphasis added); *In re Zyprexa Prods. Liab. Litig.,* 2008 WL 1809659, at *1 (E.D.N.Y. Mar. 4, 2008) (same); *see also Pokaski*, 868 F.2d at 504 (recognizing that the press should not be "restricted to report on only those judicial proceedings that it has sufficient personnel to cover contemporaneously"). Indeed, the policies promoted by camera access are uniquely advanced by access over the Internet, where the absence of space constraints allows the public to access, at any time, full gavel-to-gavel coverage. As the *Hamilton* court further observed (942 F. Supp. at 138):

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> Information received by direct observation is often more useful than that strained through the media. Actually seeing and hearing court proceedings, combined with commentary of informed members of the press and academia, provides a powerful device for monitoring the courts.

B. There Is Nothing Inherently Harmful About Camera Access to Judicial Proceedings

The camera access authorized by the district court utilizes modern technology for maximum public benefit, and does so without impeding in any way the fair administration of justice or compromising the dignity of the court. Significant advances in technology since the era of *Estes v. Texas*, 381 U.S. 532 (1965), have convinced the vast majority of states to routinely permit cameras in the courtroom—Massachusetts, for example, has authorized cameras in its courts since 1980. *See* J. Connolly, *Cameras in the Courtrooms of Massachusetts,* 66 MASS. L. REV. 187, 190 (1981) ("Connolly"). With the subsequent imprimatur of the Supreme Court in *Chandler v. Florida,* 449 U.S. 560 (1981), forty-three states currently permit cameras in their trial courts as a matter of course. *See RTNDA, Cameras in the Court: A State-By-State Guide*, http://www.rtnda.org/pages/media_items/cameras-in-the-court-a-state-by-state-guide55.php.

Over the last forty years, multiple studies have demonstrated that televised coverage of trial court proceedings has no greater impact on the participants than traditional press coverage. In the federal courts, a pilot program permitted cameras

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to cover civil trials in various venues from 1991 to 1994, and more than 50 trials were televised with no discernible adverse consequences. *See* M. Johnson and C. Krafka, Federal Judicial Center, *Electronic Media Coverage of Federal Civil Proceedings: An Evaluation of the Pilot Program in Six District Courts and Two Courts of Appeals* (July 1994). To the contrary, the pilot program produced an overwhelmingly positive response: Attitudes of judges toward televised proceedings became more favorable after actual experience, and both judges and attorneys reported no adverse impact from cameras on trial participants, courtroom decorum, or the administration of justice. *Id.* at 7, 25. Based on these results, the Case Management Committee recommended that camera access be made available in all federal civil proceedings. *Id.* at 43; *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 586 (S.D.N.Y. 1996).[2]

Many state studies have reached the same conclusion. The State of New York, for one, permitted cameras in its courts on an experimental basis, and over a ten year period nearly 1700 *trials*—both civil and criminal—were televised, without a single instance of a verdict being overturned or vacated due to the

[2] Although the Judicial Conference ultimately recommended against presumptive camera access due to its concern over the impact on trial participants, that recommendation is not binding on the district courts. *See, e.g., Hamilton,* 942 F. Supp. at 137; *Armster v. U. S. Dist. Court,* 806 F.2d 1347, 1349 n.1 (9th Cir. 1986) (except for disciplinary proceedings, "the Judicial Conference does not have binding or adjudicatory authority").

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presence of cameras. A blue-ribbon committee that authored the last of three reports analyzing New York's experience found no evidence that cameras interfered with the administration of justice, intimidated witnesses or gave rise to often-voiced fears about "the impact of cameras on trial participants." *See* New York State Committee to Review Audio-Visual Coverage of Court Proceedings, *An Open Courtroom: Cameras in New York Courts 1995-1997*, 1, 68, 71, 73 (April 4, 1997). Rather, because "few people ever attend court proceedings," the study found that camera access "exposes greater numbers of citizens to our justice system," and "engenders a deeper understanding of legal principles and processes." *Id.* at 86. Cameras increased the ability of the public to monitor whether "justice is handed out fairly and impartially" and, not insignificantly, enabled "more accurate and comprehensive" coverage of trials by journalists. *Id.* at 90-91.

This New York study is in accord with many other state studies, which consistently have concluded that technology now makes it possible for cameras to enter courtrooms without disturbing the proceedings. Studies in Arizona, Hawaii, Kansas, Maine, Massachusetts, Nevada, New Jersey, Ohio and Virginia all found "that there was virtually no negative impact on courtroom proceedings" from camera access, and that "fears about witness distraction, nervousness, distortion or modification of testimony, fear of harm and reluctance to testify with electronic media present were for the most part unfounded." S. Harding, Note, *Cameras and*

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the Need for Unrestricted Electronic Media Access to Federal Courtrooms, 69 S. CAL. L. REV. 827, 843 (1996).[3]

II.
PETITIONERS FAIL TO ESTABLISH ANY PROPER BASIS FOR A WRIT OF MANDAMUS

A. No Irreparable Injury Flows From the Limited Camera Access Permitted by the District Court

This Nation's experience demonstrates that the presence of cameras in a courtroom does not inherently pose any risk of harm, and nothing presented by Petitioners establishes any specific risk of harm from using cameras to provide contemporaneous Internet access to a significant hearing. Far from establishing "irreparable harm," the Petition offers only generalities about possible risks, none of which can withstand scrutiny.

1. The possibility of future requests for camera access. Petitioners first assert that the district court's order presents a question "likely of significant repetition prior to effective review" (Pet. at 20), but fail to demonstrate how this is

[3] *See also, e.g.,* Judicial Council of California, *Report from the Task Force on Photographing, Recording and Broadcasting in the Courtroom* (May 10, 1996) (concluding that cameras serve a positive role and should remain in California courtrooms notwithstanding the O.J. Simpson experience); M. Johnson, *Supplemental Report to the Federal Judicial Center, Electronic Media Coverage of Courtroom Proceedings: Effects on Witnesses and Jurors*, 4 (Jan. 18, 1994) (discussing 12 state studies finding no significant negative consequences); Connolly, 66 MASS. L. REV. at 192, 197 (discussing Massachusetts' successful experience).

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so. They simply speculate that the narrow, fact-specific ruling by the district court might possibly "open the doors to a flood of applications" to broadcast other proceedings. *Id*. Even if a factual basis for this concern existed (and at this point, it does not), an appeal provides an effective avenue for review. *United States v. Horn*, 29 F.3d 754 (1st Cir. 1994), relied upon by Petitioners, presented a vastly different situation, where the imposition of sanctions on a prosecutor "might perpetually evade review" because the government has no general right to appellate review in a criminal case. *Id.* at 770.

2. Harm allegedly flowing from the use of the court's own cameras. Petitioners are equally misdirected in asserting that "irreparable harm" is inherently caused by allowing cameras already installed in the courtroom to be used to provide public access over the Internet. As shown above (pp. 5 – 8), there is no factual support for this claim, and the Supreme Court has flatly rejected it. In reviewing a criminal prosecution in *Chandler v. Florida*, the Court found no "empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect" on the judicial process. 449 U.S. at 578. The *Chandler* Court instructed that a party challenging the fairness of cameras in the courtroom must come forward with *specific* evidence supporting its claims of

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prejudice. Petitioners offer none.[4] This Court should "not lightly second-guess the district judge's essential role as trial administrator when he or she makes reasonable practical decisions balancing . . . competing considerations." *In re Globe Newspaper Co.*, 920 F.2d 88, 98 (1st Cir. 1990).

3. The "risk of manipulation" in news reporting. Petitioners' further objection that providing Internet access will allow "editing and manipulation" of the recording by journalists is a true red-herring. (Pet. at 21-22.) The potential to edit a video recording is no different from the potential to edit a transcript or to select facts from a reporter's own notes. If the Petitioners' argument carried any weight, it would logically require courts to exclude reporters and bloggers from *every* judicial proceeding, lest subsequent reports include "statements . . . taken out of context." (Pet. at 22.) The openness protected by the First Amendment necessarily carries with it the right to speak or present court proceedings *or portions of them*. *Katzman*, 923 F. Supp. at 587, and the mere potential to edit the recording is no basis to block it altogether. Indeed, it is because some news outlets can provide only partial coverage of a proceeding, and pundits may provide biased commentary, that the public is benefitted by access to the actual words, sounds,

[4] Notably, the countervailing interests in a fair trial for the accused at stake in *Chandler* were constitutionally protected under the Sixth Amendment; in the present civil case, no similar constitutional rights of the Petitioners are implicated. *See, e.g.*, *United States v. Ward*, 448 U.S. 242, 248 (1980) (Sixth Amendment protections are available "only in criminal [proceedings]").

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gestures and facial expressions of the hearing participants that can uniquely be made available through the use of Internet technology.

4. Potential unfair advantage for the defendant. Petitioners are equally off-base in suggesting that the district court's order unfairly "promot[es] the defendant's position" by allowing the hearing to be viewed on the Berkman Center website run by defendant's counsel. (Pet. at 22.) The permission granted to CVN effectively establishes a pooling arrangement, whereby one press entity operates the cameras in the courtroom and makes a "feed" available to other journalists. Such pooling is the norm for audiovisual coverage of a judicial proceeding.[5] In this case, the district court's order allows the "feed" to be made accessible over multiple Internet sites, and it will also be accessible for the use of traditional broadcast journalists. (*See* 1/20/09 Order at 3.)

Petitioners' complaint that the order has already "provoked a rash of publicity" for the Berkman Center website (Pet. at 24), appears more than slightly disingenuous given that Petitioners themselves have repeatedly sought out publicity for this and hundreds of similar cases.[6] Petitioners' alternative argument

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[5] State court rules generally mandate a single set of cameras available to all news outlets. *See*, *e.g.*, Mass. Sup. Jud. Ct. R. 1:19(d); Ariz. Sup. Ct. R. 122(n); Colo. Code Jud. Conduct, Canon 3A(8)(e)(II); W. Va. Ct. R. 8.08.

[6] *See, e.g.,* David Kravets, *File Sharing Lawsuits at a Crossroads, After 5 years of RIAA Litigation*, Sept. 4, 2008, http://blog.wired.com/27bstroke6/2008/09/proving-file-sh.html. For five years Petitioners' trade group has issued almost monthly

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that "[t]he public interest will not be served by broadcasting a single snippet of these proceedings" (Pet. at 26-27), suggests that the public exposure will be too little rather than too much—a concern properly addressed by increasing access, not limiting it. *E.g.*, *Meese v. Keene*, 481 U.S. 465, 481 (1987) ("best remedy" for potentially misleading speech is greater access to accurate speech). The best way to ensure the public has accurate information about this important lawsuit is to provide unfiltered, direct access to the actual proceeding, as the district court has done.

This is particularly so given the significance of the arguments at the February 24 hearing to others around the country: the motions will determine whether defendants are permitted to challenge the constitutionality of the statute upon which Petitioners have pursued thousands of similar lawsuits. *See* R. Ngowi, *Law Professor Fires Back at Song-Swapping Lawsuits,* ASSOCIATED PRESS, Nov. 16, 2008. It is hard to imagine a hearing more deserving of public scrutiny through the same technological medium that is at the heart of this litigation.

5. The potential for prejudice to the jury pool. Petitioners finally speculate that web-based monitoring of the motions hearing may prejudice the potential jury pool for the trial in this case, but this same risk of prejudice exists

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press releases regarding enforcement lawsuits. *See* www.riaa.com/news_room.php (press releases issued from January 2004 through February 2008).

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when any case receives widespread publicity. As the Supreme Court has recognized, "courts have developed a range of curative devices to prevent publicity about a trial from infecting jury deliberations," *Chandler*, 449 U.S. at 574; *see also Wash. Post Co. v. Hughes,* 923 F.2d 324, 329 (4th Cir. 1991) ("there are ways to minimize prejudice to defendants without withholding information from public view"). There is no reason to believe these devices are inadequate in this instance, and the Petition presents none.

B. The District Court's Order Authorizing Camera Access Is Not "Plainly Erroneous"

Rule 83.3(a) prohibits recording and broadcasting of civil proceedings "*[e]xcept* as specifically provided in these rules ***or*** *by order of the court*." *Id.* (emphasis added). Beyond their failure to demonstrate any irreparable injury, Petitioners do not—and cannot—demonstrate that the district court's construction of this exception as a grant of discretion to allow camera access to a non-evidentiary hearing is "plainly erroneous." In fact, it is their contrary reading of the Rule that makes no sense.

The district court reasonably interpreted Rule 83.3 as establishing a presumption against audiovisual coverage of civil proceedings, but not as imposing an absolute prohibition. To read the Rule as an absolute ban, the court reasoned, would render nugatory the limiting phrase "[e]xcept as specifically provided…by order of the court." (*See* 1/14/09 Order at 5.) Petitioners argue that the

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discretionary authority plainly granted in this phrase should be constrained to the two situations where camera access is expressly permitted in subsection (c)—to preserve evidence or to broadcast "investigative, ceremonial, or naturalization proceedings." But this reading would render the phrase "***or*** by order of the court" completely superfluous, because Rule 83.3(a) separately permits recording and broadcasting "as specifically provided in these rules," *i.e.,* as authorized by subsection (c).

At a minimum, the District Court's conclusion that "or by order of the court" means something other than " as specifically provided in these rules" is a reasonable one, even if it were not the reading this Court might give the Rule if a *de novo* review were permissible. *See In re Bushkin Assocs., Inc.,* 864 F.2d 241, 245 (1st Cir. 1989) ("ordinary mistakes which may attend exercises of discretion are not grist for the mandamus mill"). The district court's order cannot fairly be characterized as "plainly erroneous."[7]

Nor was it plainly erroneous for the district court to apply the discretion it found in the Rule by taking into account the circumstances of the proceeding for which camera access was sought—a motions hearing in a widely-followed case,

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[7] Petitioners separately assert that the order violates Fed. R. Civ. P. 83(a)(1), because it "effectively overturned Local Rule 83.3" without the requisite vote by the majority of the district court judges. (Pet. at 18-19.) Of course, this bootstrap simply presumes that Petitioners' own convoluted construction of Local Rule 83.3 is correct.

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where counsel will present purely legal arguments[8]—and to conclude that the public interest is served by permitting audiovisual coverage of that proceeding on the Internet. Such a careful balancing of rights and interests of the parties and of the public's rights of access to judicial proceedings cannot possibly be deemed an abuse of discretion, much less "plain error." *See In re Bushkin Assocs., Inc.,* 864 F.2d at 244 (mandamus is "an inappropriate prism through which to inspect exercises of judicial discretion").

CONCLUSION

For each of these reasons, the request for mandamus should be denied.

Dated: January 28, 2009

Respectfully submitted,

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[8] Given the nature of the proceeding, Judge Gertner's order does not even raise the concerns with witnesses that animated the non-binding recommendation of the Judicial Conference to preclude camera access to civil proceedings. *See, e.g.*, *Cameras in the Courtroom*, Hearing Before the S. Comm. on the Judiciary (Nov. 9, 2005) (statement of Hon. Jan E. Dubois, U.S. Dist. Ct. J., E. D. Pa.), available at http://judiciary.senate.gov/hearings/testimony.cfm?id=1672&wit_id=4800 (explaining Judicial Conference concern that cameras made witnesses more nervous and less willing to appear in court).

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STATE OF NEW YORK	)		**AFFIDAVIT OF SERVICE**
	)	ss.:	**BY OVERNIGHT FEDERAL**
COUNTY OF NEW YORK	)		**EXPRESS NEXT DAY AIR**

I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On January 28, 2009

deponent served the within: **Amicus Curiae Brief of The Associated Press, Courtroom Television Network LLC, Dow Jones & Co., Inc., Gannett Co., Inc., The Hearst Corporation, Incisive Media, LLC, National Public Radio, Inc., NBC Universal, Inc., The New York Times Company, Radio-Television News Directors Association, The Reporters Committee for Freedom of the Press, E.W. Scripps Company, Tribune Company and Washington Post Digital in Opposition to the Petition**

upon:

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the address(es) designated by said attorney(s) for that purpose by depositing **2** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on January 28, 2009

____

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