

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF VIRGINIA  
Charlottesville Division**

ELIZABETH SINES, SETH WISPELWEY,  
MARISSA BLAIR, TYLER MAGILL, APRIL  
MUNIZ, HANNAH PEARCE, MARCUS  
MARTIN, JOHN DOE, JANE DOE 1, JANE  
DOE 2, and JANE DOE 3,

Plaintiffs,

v.

JASON KESSLER, RICHARD SPENCER,  
CHRISTOPHER CANTWELL, JAMES  
ALEX FIELDS, JR., VANGUARD  
AMERICA, ANDREW ANGLIN,  
MOONBASE HOLDINGS, LLC, ROBERT  
“AZZMADOR” RAY, NATHAN DAMIGO,  
ELLIOT KLINE a/k/a/ ELI MOSELY,  
IDENTITY EVROPA, MATTHEW  
HEIMBACH, MATTHEW PARROTT a/k/a  
DAVID MATTHEW PARROTT,  
TRADITIONALIST WORKER PARTY,  
MICHAEL HILL, MICHAEL TUBBS,  
LEAGUE OF THE SOUTH, JEFF SCHOEP,  
NATIONAL SOCIALIST MOVEMENT,  
NATIONALIST FRONT, AUGUSTUS SOL  
INVICTUS, FRATERNAL ORDER OF THE  
ALT-KNIGHTS, MICHAEL “ENoch”  
PEINOVICH, LOYAL WHITE KNIGHTS OF  
THE KU KLUX KLAN, and EAST COAST  
KNIGHTS OF THE KU KLUX KLAN a/k/a  
EAST COAST KNIGHTS OF THE TRUE  
INVISIBLE EMPIRE,

Defendants.

**Civil Action No. 3:17-cv-00072-NKM**

**JURY TRIAL DEMANDED**

**PLAINTIFFS’ MOTION TO PRECLUDE DEFENDANT MICHAEL PEINOVICH  
FROM RECORDING PARTIES’ DISCOVERY NEGOTIATIONS**

## PRELIMINARY STATEMENT

Since this Court entered the parties' consent motion setting forth a briefing schedule for the motions to dismiss and a November 29, 2017 deadline to conduct a Rule 26(f) conference, Plaintiffs and certain Defendants have reached agreement concerning the time and manner of parties' Rule 26(f) conference. However, one Defendant has refused to participate in the Rule 26(f) conference unless he is permitted to record the conference call, in apparent violation of state law. Although Plaintiffs have offered accommodations aimed at addressing the professed concerns of Mr. Michael Peinovich, a key figure in the events surrounding and including the August 12 rally in Charlottesville, he has steadfastly refused to accept such accommodations. Plaintiffs now respectfully request that the Court prohibit Mr. Peinovich from recording parties' Rule 26(f) conference, or in the alternative, permit the conference to be held in open court or before a court reporter.

## FACTS

At the close of a telephonic conversation yesterday, November 28, between Michael Peinovich, a Defendant proceeding *pro se* in this action, and Christopher B. Greene, counsel for Plaintiffs, Mr. Peinovich stated that he records all his phone conversations, including the discussion that had already taken place. Following that phone conversation, counsel for Plaintiffs wrote Mr. Peinovich to request that he confirm that he would not record the parties' upcoming Rule 26(f) conference and noted Plaintiffs' objection to his recording the call. Mr. Peinovich refused to do so, indicating that he would "not promise not to record until I am sure the law requires me to." (Ex. A.) Mr. Peinovich further responded by expressing his "belief as a pro-se defendant [that] I have the right to record hearings that are relevant to my case." (*Id.*) However, Mr. Peinovich indicated that "[if] the judge tells me that recording is against the rules, then I won't." (*Id.*)

In response to Mr. Peinovich's insistence that he would take the unusual step of unilaterally recording parties' Rule 26(f) conference, and in light of Mr. Peinovich's professed interest in having a record of his case, Plaintiffs proposed to Mr. Peinovich that the conference instead proceed by email. Mr. Peinovich refused, stating that he'd like "to record [the call] for my own records or whatever use I may see fit." (*Id.*) Plaintiffs again informed Mr. Peinovich of their preference to proceed by email and advised him that one of Plaintiffs' counsel would be joining the call from Connecticut, a state in which "two-party consent" is required for the recording of phone conversations. Plaintiffs further advised Mr. Peinovich that if he continued to insist upon recording the Rule 26(f) conference, Plaintiffs would raise the issue with the Court. At 11:41 a.m. EST, Mr. Peinovich indicated he would not consent to our proposal. (*Id.*)

## **ARGUMENT**

### **I. MR. PEINOVICH SHOULD BE PROHIBITED FROM RECORDING PARTIES' NEGOTIATIONS AND DISCUSSION**

Plaintiffs object to Mr. Peinovich's insistence that he record the Rule 26(f) conference over their objection. Meet and confer obligations "promote a frank exchange between counsel to resolve issues by agreement or to at least narrow and focus matters in controversy before judicial resolution is sought." *Nevada Power v. Monsanto*, 151 F.R.D. 118, 120 (D.Nev.1993).<sup>1</sup> Such a frank exchange is threatened when one party seeks to unilaterally record a discovery negotiation, particularly when that party has been offered a way of proceeding that protects both parties' ability to preserve and consult the record. This is particularly true when the party attempting to

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<sup>1</sup> Moreover, this Court's Local Rules recognize the deleterious effect that recording may have on judicial proceedings. Local Rule 5 prohibits the audio or video recording of any "session of court," in order to "insulate[] . . . all court personnel, lawyers, and litigants *from all prejudicial influences.*" (L.R. 5 (emphasis added).)

record the conversation wants to record it so that he may use the recording for “whatever use [he] may see fit.” (Ex. A.)

The uses to which Mr. Peinovich could put these recordings are neither trivial nor hypothetical. Mr. Peinovich hosts a podcast entitled The Daily Shoah—an apparent play on the Comedy Central news show and the Hebrew term for the Holocaust. On that podcast, he hosts guests who, among other things, occasionally do what’s described as a “Hebrew dump” in which the guest describes in a German accent the minutes from his “Death Camp.” The podcast also frequently utilizes a jarring audio reverb effect to identify for Mr. Peinovich’s listeners which individuals being discussed on the podcast are Jewish. Among other things, Plaintiffs are concerned that recordings of counsel—who during the frank exchange of information required to avoid dispute may disclose information about their clients that they otherwise would not want widely publicized—would become the subject of Mr. Peinovich’s hateful podcast or otherwise be publicized by Mr. Peinovich. This concern is particularly heightened at this stage of the litigation, where the Court has not yet entered a confidentiality order, which will be a subject of discussion at the Rule 26(f) conference.

Moreover, at least one of Plaintiffs' counsel who will be participating in today's Rule 26(f) conference will be taking the call from Connecticut, a state in which the recording of a phone conversation is prohibited unless "given prior authority by all parties to such communication." Conn. Gen. Stat. Ann. § 53a-187 (West). Courts have previously prohibited parties from recording meet and confer sessions where an applicable state law, like this one, precluded the recording of conversations without all parties' consent. Order Re: Motion to Stay, *Capital Records, Inc. et al v. Alaujan*, No. 03 Civ. 11661, ECF No. 759 (Feb. 23, 2009); compare Conn. Gen. Stat. Ann. § 53a-187 (West) and Mass. Gen. Laws Ann. ch. 272, § 99 (West) (the statute applied in *Capital Records*). Mr. Peinovich was advised of this fact and was offered another opportunity to proceed by email, but insisted upon recording the call anyway. (Ex. A.)

Finally, there is no need for Mr. Peinovich to record the call for his own defense. Any agreements reached at the Rule 26(f) conference will be memorialized in writing in a filing for the Court. If Mr. Peinovich disagrees with anything contained in the proposed filing, he can submit his objection to the Court in writing and raise any concerns with the Court at the Rule 16 Conference.

We raise this issue with the Court now because the scope of Mr. Peinovich's expressed intent does not appear limited to today's Rule 26(f) conference. Rather, his stated practice is to record every phone conversation he has with anyone, regardless of the state in which his counterparty is located. (*See* Ex. A.) Plaintiffs therefore respectfully request that the Court issue an order prohibiting Mr. Peinovich from making unilateral, non-consensual, recordings of today's Rule 26(f) conference and provide guidance concerning the recording of any future interactions with Plaintiffs and Plaintiffs' counsel.

**II. IN THE ALTERNATIVE, THE RULE 26 CONFERENCE SHOULD BE HELD IN OPEN COURT OR BEFORE A COURT REPORTER**

Permitting one party to possess, and potentially distribute or alter, a version of a recording of discovery negotiations to which Plaintiffs lack access would be unnecessary, counter-productive, and inconsistent with the Federal Rules. Should the Court credit Mr. Peinovich's request for a recording, Plaintiffs submit that a more appropriate resolution would be to conduct the Rule 26(f) conference in open Court or otherwise before a court reporter whose transcript would be made available to all participating parties. Although this may require a brief extension of parties' deadline to complete their Rule 26(f) conference, it would address Mr. Peinovich's professed concerns regarding transcription of the conference. Proceeding in this manner, or by email as Plaintiffs have proposed, would allow Mr. Peinovich to maintain a record of parties' communication while maintaining the ability of counsel and the parties to have a frank exchange of information and views without the risk that one party would use a "record" of such negotiations for "whatever use [he] may see fit," including by altering or otherwise misusing the recording.

## CONCLUSION

For the foregoing reasons, the Court should prohibit Mr. Peinovich from recording parties' Rule 26(f) conference or, in the alternative, permit parties to conduct the Rule 26(f) conference in open Court or otherwise before a court reporter whose transcript would be made available to all participating parties, and prohibit future recording of interactions among counsel or pro se parties without consent.

Dated: November 29, 2017

Respectfully submitted,

s/ Robert T. Cahill

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*Counsel for Plaintiffs*

## CERTIFICATE OF SERVICE

I hereby certify that on November 29, 2017, I filed the foregoing with the Clerk of Court through the CM/ECF system, which will send a notice of electronic filing to:

Justin Saunders Gravatt  
David L. Hauck  
David L. Campbell  
Duane, Hauck, Davis & Gravatt, P.C.  
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*Counsel for Defendants Jeff Schoep, Nationalist Front, National Socialist Movement, Matthew Parrott, Matthew Heimbach, Robert Ray, Traditionalist Worker Party, Elliot Kline, Jason Kessler, Vanguard America, Nathan Damigo, Identity Europa, Inc., and Christopher Cantwell*

I further hereby certify that on November 29, 2017, I also served the following non-ECF participant, via e-mail:

Michael Peinovich (*pro se*)  
a/k/a Michael "Enoch" Peinovich  
519 E. 82nd Street, Apt 2C  
New York, NY 10028  
mpeinovich@gmail.com

I further hereby certify that on November 29, 2017, I also served the following non-ECF participant, via U.S. mail, First Class and postage prepaid, addressed as follows:

Loyal White Knights of the Ku Klux Klan  
a/k/a Loyal White Knights Church of Invisible Empire Inc.  
c/o Registered Agent  
United States Corporation Agents, Inc.  
6135 Park South Drive  
Charlotte, NC 28210

*s/ Robert T. Cahill*  
Robert T. Cahill (VSB 38562)  
COOLEY LLP  
11951 Freedom Drive, 14th Floor  
Reston, VA 20190-5656  
Telephone: (703) 456-8000  
Fax: (703) 456-8100  
Email: rcahill@cooley.com

*Counsel for Plaintiffs*

155622013

## Christopher Greene

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**From:** Mike Peinovich <mpeinovich@gmail.com>  
**Sent:** Wednesday, November 29, 2017 12:28 PM  
**To:** Christopher Greene  
**Subject:** Re: Sines v. Kessler, et al.

OK, so you're filing for a motion to block my ability to record? Ok, go ahead. Tell me how it turns out. I'll abide by the court's decision.

On Wed, Nov 29, 2017 at 12:25 PM, Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

The judge does not join a Rule 26(f) conference. In this circumstance, the only way to obtain the Court's opinion on your position is to file a motion, which we will be doing momentarily.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:(929)294-2528)

**From:** Mike Peinovich [mailto:[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)]

**Sent:** Wednesday, November 29, 2017 12:07 PM

**To:** Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)>

**Subject:** Re: Sines v. Kessler, et al.

Here's what I'll do, we start the call and I won't be recording. your guy can ask the judge, or I can do it, if he will allow me to record. If he says it's OK, then I'll turn on the recording. It's not that I want to give you a hard time, but I genuinely believe that the plaintiff here does not have the legal or moral right to tell me as a defendant not to keep records relevant to my own defense.

On Wed, Nov 29, 2017 at 11:41 AM, Mike Peinovich <[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)> wrote:

I would like to record the call because I feel this is necessary for my defense and I feel that an attorney for the plaintiff refusing to allow me to record is an attempt on his part to harm my defense. Raise the issue with the judge and if he says I may not record, then I will not. I have no intention of breaking the law, but I do not feel that the plaintiffs here have the moral or legal right to prevent me from doing what I need to defend myself.

On Wed, Nov 29, 2017 at 9:43 AM, Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

One of Plaintiff's counsel participating in today's Rule 26(f) conference will be calling from the State of Connecticut, which I understand to be a state in which both parties to a conversation must consent to any recording. See Conn. Gen. Stat. Ann. § 53a-187 (West). I can advise you that the Connecticut counsel will not consent to any recording of today's call. Please let us know if you nonetheless intend to record the call, or if instead you would prefer to proceed by email. If you insist upon participating by phone, and recording the conversation, we intend to raise the issue with the Court this morning.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:9292942528)

**From:** Mike Peinovich [mailto:[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)]

**Sent:** Tuesday, November 28, 2017 11:32 PM

**To:** Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)>

**Cc:** Julie Fink <[jfink@kaplanandcompany.com](mailto:jfink@kaplanandcompany.com)>; Philip Bowman <[pbowman@bsflp.com](mailto:pbowman@bsflp.com)>

**Subject:** Re: Sines v. Kessler, et al.

I've thought about it and I don't consent to doing the conference by email. It seems like it would just be cumbersome and unnecessary. I wish to do it by phone, and I wish to record it for my own records or whatever use I may see fit. If the judge tells me that recording is against the rules, then I won't.

On Tue, Nov 28, 2017 at 10:55 PM, Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

Plaintiffs would send to you tomorrow afternoon our proposal for discovery, and you would be able to respond to our proposal by email. Please let us know if you agree to conduct the conference by email.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:(929)294-2528)

**From:** Mike Peinovich [mailto:[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)]

**Sent:** Tuesday, November 28, 2017 10:18 PM

**To:** Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)>

**Cc:** Julie Fink <[jfink@kaplanandcompany.com](mailto:jfink@kaplanandcompany.com)>; Philip Bowman <[pbowman@bsfllp.com](mailto:pbowman@bsfllp.com)>

**Subject:** Re: Sines v. Kessler, et al.

Why object to me recording the conference at all? If we do it by email I will retain a record of the conference anyway, so if their purpose is to harm my ability to defend myself, which I don't see any other reason for their insistence here, then the email conference defeats the purpose anyway. How would this even work?

On Tue, Nov 28, 2017 at 10:13 PM, Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

I am writing to make clear that Plaintiffs object to your recording of the conference tomorrow, but are willing to conduct the conference by email. Let us know if you agree to conducting the conference by email.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:9292942528)

**From:** Mike Peinovich [mailto:[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)]

**Sent:** Tuesday, November 28, 2017 10:01 PM

**To:** Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)>

**Subject:** Re: Sines v. Kessler, et al.

Again, I'm not sure that your clients have the right to deny me the right to participate without recording. It seems like they are again trying to interfere with my rights and put me in a situation that hurts my own defense. I can't see why it is that they would object to this simple request for any reason that isn't pure malice. I will participate and record. If they object, then they can do the email thing or whatever. If the judge tells me not to record, then I won't. But I do not believe it is up to your clients.

thanks, and have a nice night.

Mike

On Tue, Nov 28, 2017 at 9:48 PM, Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

As I explained on the phone, we cannot provide legal advice to you in connection with this matter. Plaintiffs object to your recording of the Rule 26(f) conference. If you refuse to participate in the Rule 26(f) conference telephonically without recording it, we can conduct the conference by email tomorrow afternoon. If you wish to proceed telephonically, please confirm that you will not record the conversation.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:9292942528)

**From:** Mike Peinovich [mailto:[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)]  
**Sent:** Tuesday, November 28, 2017 8:17 PM  
**To:** Christopher Greene <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)>  
**Subject:** Re: Sines v. Kessler, et al.

I have done some research and it looks like the rules surrounding the recording of this type of hearing are ambiguous, but it is my belief as a pro-se defendant I have the right to record hearings that are relevant to my case. I may need the recording for my records or to show to an attorney should I obtain one at a later date to represent me. I believe it is burdensome and oppressive to me to not allow me to record this hearing and I do not believe whether I can record it is up to your clients. I further believe that much like this entire case, your clients insistence that I not record this hearing is an attempt by them to oppress me and stifle my rights as a citizen, and that their request that I not record is malicious. So as of now I will attend the call and I will be recording the call. I will not record if and only if I am ordered not to by the judge.

Thanks,

Mike

On Tue, Nov 28, 2017 at 6:21 PM, Mike Peinovich <[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)> wrote:

I understand that you are in dicey territory given that you are not my attorney and can't give me legal advice. But I am not going to promise to not record until I am sure that the law requires me not to.

On Tue, Nov 28, 2017 at 6:18 PM, Mike Peinovich <[mpeinovich@gmail.com](mailto:mpeinovich@gmail.com)> wrote:

Is their consent required? I am a pro-se defendant and may need the recording for my records.

On Nov 28, 2017 6:17 PM, "Christopher Greene" <[cgreene@kaplanandcompany.com](mailto:cgreene@kaplanandcompany.com)> wrote:

Mr. Peinovich,

As discussed on our call, attached is the order setting forth certain deadlines for the briefing on the motions to dismiss.

During our call, you indicated that you would participate in tomorrow's Rule 26(f) conference, which will be held at 2pm ET. At the end of our conversation, you said that you record all of your phone calls. Plaintiffs do not consent to you recording the parties' Rule 26(f) conference. Please confirm that you will not record tomorrow's call.

Regards,

Christopher B. Greene

Kaplan & Company, LLP

[\(929\) 294-2528](tel:(929)294-2528)

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