United States Court of Appeals

for the

Third Circuit

Case No. 16-2431

NORTH JERSEY MEDIA GROUP INC., BLOOMBERG L.P., NBC UNIVERSAL MEDIA, LLC, THE NEW YORK TIMES COMPANY, NEW JERSEY ADVANCED MEDIA, DOW JONES & COMPANY, INC., THE ASSOCIATED PRESS, PUBLIC MEDIA NJ, INC., NEW YORK PUBLIC RADIO, AMERICAN BROADCASTING COMPANIES, INC., PHILADELPHIA MEDIA NETWORK, PBC, and POLITICO,

Plaintiffs/Appellees,

v.

UNITED STATES OF AMERICA, WILLIAM E. BARONI, JR., and BRIDGET ANNE KELLY,

Defendants/Appellees,

THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY,

Defendant/Appellee,

JOHN DOE,

Intervenor/Appellant.

ON APPEAL FROM OPINIONS AND ORDERS ENTERED IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, NEWARK AT NO. 2:16-CV-00267, THE HONORABLE SUSAN D. WIGENTON, U.S.D.J.

BRIEF AND APPENDIX VOLUME I OF II (Pages A1-A35) ON BEHALF OF APPELLANT JOHN DOE

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JURISDICTIONAL STATEMENT

The district court had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331. (A36 (listing the case under "Federal Question" jurisdiction).) *See also N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 204 (3d Cir. 2002) (noting the district court's "jurisdiction pursuant to 28 U.S.C. § 1331" to resolve the media's First Amendment right-of-access claims to deportation proceedings); *Smith v. United States Dist. Court Officers*, 203 F.3d 440, 441 (7th Cir. 2000) ("[T]here is a federal common law right to access to federal judicial records which can be enforced by means of an ordinary suit under 28 U.S.C. sec. 1331").

This Court has jurisdiction over the May 10, 2016 Order (the "May 10 Order") pursuant to 28 U.S.C. § 1291. *See Reyes v. Freebery*, 192 F. App'x 120, 123 (3d Cir. 2006) ("An order either granting or denying access to portions of a trial record is appealable as a final order under 28 U.S.C. § 1291.") (citing *United States v. Smith*, 123 F.3d 140, 145 (3d Cir. 1997) and *United States v. Antar*, 38 F.3d 1348, 1355-56 (3d Cir. 1994)); *N. Jersey Media Group*, 308 F.3d at 204 (asserting jurisdiction under 28 U.S.C. § 1291 to review the district court's order granting the media access to deportation proceedings); *United States v. Smith*, 776 F.2d 1104, 1105 n.1 (3d Cir. 1985) (asserting jurisdiction under 28 U.S.C. § 1291 to review order denying press access to a portion of a bill of particulars); *United States v. Criden*, 675 F.2d 550, 552 (3d Cir. 1982) (asserting jurisdiction under 28 U.S.C. § 1291 to review the

district court's denial of the media's motion for access to the transcript of a pretrial hearing).

This Court has jurisdiction over the May 13, 2016 Letter Order (the "May 13 Order") pursuant to 28 U.S.C. § 1291. *See United States v. Stuler*, 396 F. App'x 798, 799, 801 (3d Cir. 2010) (reviewing the district court's denial of a motion to stay proceedings pending disposition of a motion seeking post-judgment relief); *see generally In re Diet Drugs Prods. Liab. Litig.*, 418 F.3d 372, 376 (3d Cir. 2005) ("Generally, a decision of the district court is 'final' under § 1291 if it 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'"). This Court may also exercise pendent appellate jurisdiction over the May 13 Order because the basis for its denial of Doe's motion to stay execution of the judgment is "inextricably intertwined" with the merits of the May 10 Order. *E.I. Dupont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 203 (3d Cir. 2001).

John Doe ("Doe") filed a timely notice of appeal from the May 10 and May 13 Orders on May 13, 2016 (A1-20), fewer than 60 days after the orders were entered. *See* Fed. R. App. P. 4(a)(1)(B) (authorizing appeal within 60 days after entry of appealable order in cases in which the United States is a party).

STATEMENT OF THE ISSUES

1. Whether the district court erred in concluding that a letter naming the unindicted co-conspirators referred to in the Indictment in *United States v. Baroni*, No. 15-cr-193 (the "Conspirator Letter"), which was never filed with the court and which the Government characterized as a non-public document that had "no adjudicatory significance," was a bill of particulars that triggered a First Amendment and common-law right of access? Proposed answer: Yes. (This issue was raised below at A186-90, A193-200 and ruled upon in the May 10, 2016 Opinion at A26.)

2. Whether the district court erred in failing to recognize that public disclosure of the Conspirator Letter would violate Doe's constitutional right not to be branded a criminal without due process of law? Proposed answer: Yes. (This issue was raised below at A150-52, A189, A192, but was overlooked by the district court in its May 10, 2016 Opinion; it was raised again at A43 (Doc. #37-1, at 1, 9-11), and ruled upon in the May 13, 2016 Letter Order at A34-35.)

3. Whether the district court erred in failing to recognize that the serious and irreparable harm that would befall the individuals named in the Conspirator Letter from its public disclosure outweighed the media's interest in accessing it? Proposed answer: Yes. (This issue was raised below at A189-90, A193-200 and ruled upon in the May 10, 2016 Opinion at A26-28.)

4. Whether the district court abused its discretion in denying Doe's

request to stay the May 10 Order to enable him to move for post-judgment relief by ruling that Doe did not have a reasonable likelihood of demonstrating that the court committed the three legal errors described above? Proposed answer: Yes. (Raised below at A43 (Doc. #37-1, at 1, 9-11), and ruled upon in the May 13, 2016 Letter Order at A34-35.)

STATEMENT OF RELATED CASES AND PROCEEDINGS PURSUANT TO LOCAL RULE 28.1(A)(2)

The proceeding giving rise to this appeal is related to the criminal action captioned *United States v. Baroni, et al.*, No. 15-cr-193 (D.N.J.). This case has not previously been before this Court.

STATEMENT OF THE CASE

A. The Indictment Against Baroni And Kelly And Its Charges Of Criminality Against An Unidentified Group Of "Others."

On April 23, 2015, a federal grand jury returned a nine-count indictment (the "Indictment") against William Baroni ("Baroni") and Bridget Anne Kelly ("Kelly") relating to an alleged scheme to close access lanes to the George Washington Bridge ("GWB") as a form of political retribution. (A60-97.) The Indictment charged them with conspiracy to misapply and misapplication of government property (Counts 1-2), conspiracy to commit and the commission of wire fraud (Counts 3-7), and conspiracy against and deprivation of civil rights (Counts 8-9). (*Id*.)

With the exception of a single count (Count 9), the Indictment leveled the same charges against David Wildstein[1] and an unidentified group of "others." (A60-94 (Count 1 ¶¶ 2, 4-8, 28, Count 2 ¶ 2, Count 3 ¶¶ 2, 4, Counts 4-7 ¶ 2, Count 8 ¶¶ 2, 4).) Thus, for example, the Indictment charged that these "others" "decided to punish Mayor Sokolich" as a form of political retribution—in violation of the civil rights of Fort Lee residents—by closing access lanes to the GWB on the first day of school, ignoring "pleas for help, requests for information, and repeated warnings about the increased risks to public safety," and thereafter "concoct[ing] and promot[ing] a sham story" to conceal their misconduct. (A64-65 (Count 1 ¶¶ 4-7);

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[1] On May 1, 2015, Wildstein agreed to plead guilty to the charges brought against him. *See United States v. Wildstein*, No. 15-cr-00209 (D.N.J.), Doc. ## 3-5.

A92-93 (Count 8 ¶¶ 2-3).) The Indictment thereby alleged that these "others" were equally culpable for the alleged misconduct at the heart of the Indictment, and that they were guilty of committing eight federal felonies as a result.

B. The Discovery Motion Filed By the Defendants In The Criminal Action And The Government's Production Of The Conspirator Letter.

In November 2015, Baroni and Kelly filed omnibus motions seeking discovery of various types of information and demanding a bill of particulars as to, among other things, the identity of the unindicted co-conspirators referred to in the Indictment. (A98-129; A136.)

The Government opposed that motion and expressly objected to Baroni and Kelly's request for a bill of particulars. The Government explained that a bill of particulars is only required when an indictment is so vague that it would """significantly impair[] the defendant's ability to prepare his defense or is likely to lead to prejudicial surprise at trial."""" (A137 (quoting *United States v. Urban*, 404 F.3d 754, 771-72 (3d Cir. 2005)).) It further objected that producing a bill of particulars would "'unduly freeze [the Government] to its proofs at trial'" because it would "'unfairly define and limit the government's case due to the fact that the evidence at trial must conform to the allegations in a bill of particulars.'" (A138.) Finally, the Government argued that a bill of particulars was especially inappropriate because the Government had already "supplement[ed] [the] detailed charging document with substantial discovery." (*Id.*) It therefore requested that the

"[d]efendants' request for a bill of particulars should be denied." (A140.) Instead, the Government agreed to provide a number of "responses" to the defendants' motion, and stated that it "w[ould], in a document to be filed under seal, identify any other individual about whom the Government has sufficient evidence to designate as having joined the conspiracy." (A141.)

On January 11, 2016, the Government produced the Conspirator Letter to the defendants. (A150.) At the same time, it apparently submitted a letter to the Court that enclosed the Conspirator Letter and requested that it be maintained under seal.[2] (*Id.*; A148-49.) The Government did not file the Conspirator Letter with the Clerk's Office or file a motion to seal it. (A149 (quoting the Government's representation that it was "'not filing [the Conspirator Letter] with the Clerk's Office.'").) Instead, the Government requested that the court keep the Conspirator Letter under seal in accordance with the guidance provided by Section 9-27.760 of the U.S. Attorneys' Manual ("USAM"). (A150-52.) The Government specifically noted that, in addition to the Third Circuit's decision in *Smith*, 776 F.2d 1104, multiple decisions "have approved sealing to avoid the public allegations of wrongdoing by uncharged third parties." (A150-51 (1-2 & n.2) (citing, *inter alia*, *United States v. Briggs*, 513

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[2] It is not clear whether the Government submitted a letter enclosing the Conspirator Letter or whether the Conspirator Letter itself contained this sealing request. Any enclosing letter, like the Conspirator Letter itself, is available from the United States upon request.

F.2d 794, 805-08 (5th Cir. 1975) and *United States v. Anderson*, 55 F. Supp. 2d 1163, 1168-69 (D. Kan. 1999)).)

Baroni objected to the Government's treatment of the Conspirator Letter, arguing that the Government's failure to file it impacted his right to a "full and fair trial." (A149.) The Government rejected that assertion, explaining that it had "provided Baroni with precisely the coconspirator information he sought in his discovery motion, which he can use to prepare for trial." (A151.) The Government further contended that its informal sealing request "appropriately le[ft] it to the Court . . . to determine whether, and, if so, when unindicted coconspirator information that has been ***provided in discovery*** should be made public." (*Id.* (emphasis added).)

The court never entered an order directing the Government to file a bill of particulars, and the Government never did so. Rather, on February 5, 2016, the court granted the defendants' motion for permission to issue subpoenas pursuant to Fed. R. Crim. P. 17(c) and ordered "that the remainder of Defendants' Discovery Motions are DISMISSED AS MOOT as per counsels' representations and the discussion on the record." (A184.) In none of those representations or discussions was the Conspirator Letter referred to as a bill of particulars. (A155-183.) To the contrary, the court made clear that the parties had "produced and [had] exchanged" numerous materials and that it would not "need to rule" on those exchanges "unless [the parties] ha[d] an issue going forward." (A165 (11:10-23).)

C. The Media's Motion For Disclosure Of The Conspirator Letter And The Court's May 10 Opinion And Order.

Shortly after the Government represented that it would produce the Conspirator Letter to the defendants, the media began reporting about the existence and import of such a list. On December 31, 2015, for example, the media website NJ.com reported that this list would reveal those individuals "that a grand jury determined were involved in the plan to retaliate against Fort Lee Mayor Mark Sokolich in September 2013 by blocking traffic lanes into the George Washington Bridge." Tim Darragh, *Bridgegate co-conspirators to be ID'ed in sealed list*, Dec. 31, 2015.[3]

On January 13, 2016, a consortium of news organizations (the "Media") filed a motion, based on the First Amendment and federal common law, for access to the Conspirator Letter.[4] (A40 (Doc. # 1).) The Government opposed the motion on several grounds. First, it argued that the Media was "not entitled to disclosure of the Coconspirator Letter" because it "contain[ed] information that ha[d] no adjudicatory significance at this point" and was "communicated to Defendants only for purposes of trial preparation." (A193.) The Government stressed that it did ***not*** have

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[3] *Available at* http://www.nj.com/news/index.ssf/2015/12/bridgegate_co-conspirators_to_be_ ided_in_sealed_li.html.

[4] This motion was originally filed in the criminal action, but was subsequently designated as a separate civil action with a civil docket number. (A54 (Doc. # 63 & 1/15/16 Clerk's Note).)

sufficient information to label the individuals on the Letter as conspirators—let alone charge them—and that the letter therefore had no "legal significance." (A195.) Rather, the Government explained that its designation may only have significance at trial for purposes of introducing the statements or actions of the defendants or other declarants:

> Here, as in *Smith*, the Government made its coconspirator designation well in advance of trial and not as a prelude to any formal ruling by the Court on whether the designated individuals fit the legal definition of coconspirators. Indeed, the Government's designation likely will have legal significance only if this prosecution proceeds to trial. For example, if the Government moves for the admission of statements made in furtherance of the conspiracy by an unindicted coconspirator under Federal Rule of Evidence 801(d)(2)(E), the Court would have to "'find by a preponderance of the evidence that: (1) a conspiracy existed; (2) the declarant and the party against whom the statement is offered were members of the conspiracy; (3) the statement was made in the course of the conspiracy; and (4) the statement was made in furtherance of the conspiracy.'" . . .
>
> But that assessment would happen at or just before trial. Until then, the coconspirator information the Media seek is "unaccompanied by any facts providing a context for evaluating" the Government's designation. *Smith*, 776 F.2d at 1113. And while the Government makes such designations only upon careful consideration of the facts, the absence of such important factual context underscores that the Coconspirator Letter is not now part of any request for judicial decision making.

(A195.) The Government therefore made clear that, unlike a bill of particulars, the Conspirator Letter did ***not*** commit it to a particular position at trial—or even to identifying individuals for purposes of Fed. R. Evid. 801(d)(2)(E)—because its

prosecution was "a fluid endeavor" in which "any number of developments might lessen or eliminate the need for the admission of a statement made by an unindicted coconspirator." (A196-97.) The Government further observed that the Media failed to "point to a tradition of access to the information that it s[ought]," (A200), and contrasted the Media's request with those for requests "relevant to an adjudication during a criminal proceeding." (A197 (n.10).)

Second, the Government contended—as it did when it requested that the Conspirator Letter be maintained under seal—that maintaining the identity of un-indicted co-conspirators was essential because these individuals "ha[d] no opportunity to challenge that potentially injurious designation in court." (A189.) "For that reason," the Government explained, "Department of Justice Policy directs federal prosecutors to avoid unnecessary public references to wrongdoing by uncharged third parties." (*Id.*) The Government again informed the Court, as it did when requesting that the letter be maintained under seal in the first instance, that this policy was embodied in Section 9-27.760 of the USAM, (A192), which follows the guidance of those courts that have "preclude[d] the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings." USAM § 9-27.760 (citing, *inter alia*, *Briggs*, 513 F.2d 794, and *Anderson*, 55 F. Supp. 2d 1163).

Third, the Government argued that, even assuming the Conspirator Letter constituted a judicial filing to which a First Amendment and common-law right of access attached, the balancing test laid out by this Court in *Smith*, 776 F.2d 1104, demanded that the Conspirator Letter not be released to the public. The Government argued that disclosure of the Letter would unjustifiably expose the listed individuals to "public opprobrium" and "'serious injury'" without any "good reason." (A200.) That harm, the Government explained, was exacerbated by the fact that the letter included innocent individuals that the Government did not have enough evidence to charge:

> In cases charging a criminal conspiracy, the Government often does not charge every individual about whom there is some evidence to suggest that the individual was a member of the conspiracy. Such decisions may be made for any number of proper reasons, including, for example, the assessment that there is not enough evidence to prove guilt beyond a reasonable doubt. . . .
>
> Unindicted coconspirators designated at this phase of prosecution have a status before the law that is no different than other individuals who were subjects of an investigation that yielded either no evidence of their wrongdoing or some such evidence, but not enough to warrant their being charged.

(A187-88, A200.) By contrast, the interest asserted by the Media—that of knowing the identities of what are presumed (based on no evidence whatsoever) to be public figures—was "not a determining or even an important factor" in the *Smith* balancing test. (A198.) This was especially so when the Media would learn the identity of

individuals who took any action relevant to the Government's case at trial, where their conduct could be evaluated in proper "'context.'" (A195.)

By order and opinion dated May 10, 2016, the court below granted the Media's motion for discovery of the Conspirator Letter. (A21-30.) The court did not address the Government's contention that the Conspirator Letter "ha[d] no adjudicatory significance at this point" and was "communicated to Defendants only for purposes of trial preparation." (A193.) Rather, without any explanation, it assumed that the Conspirator Letter was a judicial filing—rather than a discovery letter—thereby triggering a First Amendment and common-law right of access because it was "produced in response to a demand for a bill of particulars." (A26.)

Nor did the court address the authority in the USAM making clear that courts must "preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings." USAM § 9-27.760. Rather, it focused exclusively on the Media's interest in obtaining these documents under the First Amendment and common law. In doing so, beyond ignoring the inherent due process violation addressed in *Briggs* and its progeny, the court failed to recognize the serious reputational harm that would be caused to the individuals named on the Conspirator Letter from its disclosure—*i.e.*, the "privacy" interest protected in *Smith*. It reasoned, instead, that individuals identified in the Conspirator Letter had a diminished or non-existent right of privacy because the

media had extensively covered the "Bridgegate" affair and because they were current or former public employees or officials. (A27-28.) The court further ignored the Government's representations that it either had "no evidence" or insufficient evidence to charge the individuals named in the Conspirator Letter as conspirators, (A200), because the Government had previously represented—for the entirely different purpose of presenting evidence at trial—that the individuals identified in the Conspirator Letter were those for whom the Government had "'sufficient evidence to designate as having joined the conspiracy.'" (A28.)

D. Doe's Intervention Motion, The May 13 Order And Opinion, And The Instant Appeal.

Prior to entry of the May 10 Order, Doe relied on the Government and its obligation under the USAM to vindicate his constitutional and reputational rights against being publicly branded a criminal without a forum to contest those accusations. Only after the court entered the May 10 Order did it become clear that the Government was no longer adequately representing his rights, especially in light of its apparent intention not to appeal the court's order. *See, e.g.*, *Dow Jones & Co. v. United States Dep't of Justice*, 161 F.R.D. 247, 252-53 (S.D.N.Y. 1995) (Sotomayor, J.) (granting Vince Foster's widow post-judgment intervention in FOIA action where Mrs. Foster "believed the government would adequately represent her interest in this matter, and that only with the adverse Order did she realize that the government might not fully exercise its right to appeal.").

Thus, immediately after the May 10 Order issued, Doe—who, as the Government acknowledged, is named in the Conspirator Letter,[5] *see* May 20, 2016 Letter of the United States, Doc # 003112302799, at 1 ("John Doe has standing for purposes of this appeal because the Government's letter to defense counsel in the criminal case identifies him as an unindicted coconspirator")—moved *ex parte* before the district court for permission to augment the legal arguments and factual record before the court to demonstrate, in particular, that his constitutional rights would be violated should the court insist that the letter be released to the Media. (A34.) Doe subsequently filed a formal motion seeking (i) permission to proceed anonymously; (ii) post-judgment intervention; and (iii) a stay of the court's order pending a hearing on the propriety of releasing the Conspirator Letter (or, in the alternative, a stay pending appeal). (A43 (Doc. # 37-1).) In his motion, Doe demonstrated that he was likely to succeed on the merits because, among other things, the court failed to consider—and its analysis could not be squared with—decades of caselaw holding that the government's unjustified identification of an individual as an unindicted co-conspirator violated that individual's constitutional

[5] Doe has not seen and does not have access to the Conspirator Letter. Upon request, the United States stands ready to provide the letter to this Court in a sealed submission. *See* May 20, 2016 Letter of the United States, at 2.

right to due process. (A43 (Doc. # 37-1, at 6 (citing, *inter alia*, *Briggs*, 514 F.2d at 803, and *Anderson*, 55 F. Supp. 2d at 1167)).)

In its May 13 Order, the court granted Doe's request to proceed anonymously and intervene in the action, but denied his request to stay release of the Conspirator Letter. (A32-34.) The court reasoned that Doe had not shown a likelihood of success on the merits because the Conspirator Letter was a "judicial record." (A34.) The court also rejected Doe's due-process argument on the ground that the authority he cited was not "binding" and because Doe's "privacy rights were considered in this Court's May 10th Opinion in its application of the *Smith* balancing test and in *in camera* proceedings before this Court during which time Doe was given the opportunity to be heard orally and in writing." (*Id.*)

The court observed in passing—again, contrary to *Smith*—that Doe "ha[d] not articulated any irreparable harm other than possible 'stigma' in being named an unindicted co-conspirator." (A35 (n.1).) That observation ignored the self-evident fact that, because the individuals named in the Conspirator Letter had no forum to vindicate themselves, "the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable." *Smith*, 776 F.2d at 1113-14. It also ignored the reality that the Media had and were continuing to characterize the undisclosed individuals named in the Conspirator Letter as criminal "accomplice[s]" who conspired "to orchestrate a New Jersey traffic jam." David Voreacos, *New Jersey*

Bridge Judge Is Asked to Keep Co-Conspirator Names Secret, Bloomberg.com, May 13, 2016[6]; Joe DeLessio, *Judge Rules That Names of Bridgegate Co-conspirators Must Be Released*, New York Magazine, May 10, 2016.[7] *See also* Newsmax, *Release of NJ Bridge-gate Conspirator List Temporarily Blocked*, May 18, 2016 ("Prosecutors say the people [on the list] plotted to gridlock traffic near the bridge in 2013.").[8] Or, as a New Jersey Legislator aptly told the New York Times:

> "When people hear the phrase 'unindicted co-conspirator,' the implication is no longer, unfortunately, O.K. you didn't commit a crime; it is, you very probably did something criminal and somehow you skated," Ms. Schepisi said. "It's like having a big scarlet letter put across your chest for the rest of your life."

Patrick McGeehan, *Push by 'John Doe' to Block Release of List Adds Mystery in New Jersey Bridge Scandal*, N.Y. Times, May 18, 2016, at A17.[9]

On May 13, 2016, Doe filed a notice of appeal from the May 10 and May 13 Orders. (A1-20.) On May 16, 2016, Doe filed an emergent motion for a stay pending appeal, which this Court granted on May 17, 2016.

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[6] *Available at* http://www.bloomberg.com/politics/articles/2016-05-13/n-j-bridge-judge-asked-to-keep-secret-co-conspirator-names.

[7] *Available at* http://nymag.com/daily/intelligencer/2016/05/judge-bridgegate-co-conspirators-must-be-named.html.

[8] *Available at* http://www.newsmax.com/Newsfront/Bridge-gate-conspirator-list-release/2016/05/18/id/729348/.

[9] *Available at* http://www.nytimes.com/2016/05/18/nyregion/john-does-fight-against-list-adds-mystery-in-new-jersey-bridge-scandal.html?_r=0.

STANDARD OF REVIEW

This Court reviews *de novo* the legal principles applied by the district court. *United States v. Smith*, 787 F.2d 111, 113 (3d Cir. 1986) ("[O]ur review of the legal principles applied by the district court is always plenary."); *see also N. Jersey Media Group*, 308 F.3d at 204 (exercising "plenary review over the District Court's legal conclusion that the First Amendment guarantees a right of access to deportation proceedings."); *Byrd v. Aaron's Inc.*, 784 F.3d 154, 161 (3d Cir. 2015) ("We review de novo a legal standard applied by a district court.").

This Court reviews the district court's First Amendment rulings under a "broad[] review" standard that "includes independent consideration of the district court's order and the factual findings inferred from the evidence before it." *In re Capital Cities/ABC, Inc.'s Application*, 913 F.2d 89, 92 (3d Cir. 1990); *see also Free Speech Coal., Inc. v. AG United States*, 787 F.3d 142, 151 (3d Cir. 2015) ("In the First Amendment context, reviewing courts have a duty to engage in a searching, independent factual review of the full record to the extent any factual findings are relevant to the First Amendment constitutional standard." (internal quotation marks and citations omitted)); *Smith*, 787 F.2d at 113 n.1 ("In the First Amendment context, reviewing courts have a special obligation that in certain circumstances may require independent review of even factual findings.").

The district court's rulings concerning the media's common-law right of access are reviewed under a modified abuse-of-discretion standard under which this Court "'consider[s] the relevance and weight of the factors considered.'" *Smith*, 787 F.2d at 113 ("[A] district court's decision to give access to judicial records pursuant to the common law right to inspect and copy judicial records is less dependent on the trial court's familiarity with the proceedings, and hence deserves less deferential review, although it is still denominated a discretionary decision."); *United States v. Wecht*, 484 F.3d 194, 208 (3d Cir. 2007) ("We review decisions relating to the common law right of access generally for abuse of discretion, though our review of the legal principles applied is plenary.").

This Court reviews the denial of a motion to stay for abuse of discretion, "which may be found where [the district court's] conclusion includes the commission of a serious error of law or a mistake in considering the facts." *Jackson v. Danberg*, 656 F.3d 157, 162 (3d Cir. 2011); *Revel AC, Inc. v. IDEA Boardwalk LLC*, 802 F.3d 558, 567 (3d Cir. 2015) (noting that, although this Court "generally review[s] appeals from a denial of a stay for abuse of discretion," it "review[s] *de novo* the District Court's decision on the likelihood of success, for it involves a purely legal determination.").

SUMMARY OF ARGUMENT

The May 10 Order must be reversed because it is infected by three errors of law. First, the district court mistakenly concluded that because the Government produced the Conspirator Letter ***in response to*** a request for a bill of particulars, it ***was*** a bill of particulars—rather than a mere discovery letter—triggering a First Amendment and common-law right of access. That conclusion was erroneous because (i) the Conspirator Letter bears no resemblance to a bill of particulars, which is a formal pleading that modifies and limits the Government to its terms, and the Government objected to issuing a bill of particulars and repeatedly and correctly objected to the Media's characterization of the Conspirator Letter as one; (ii) the Government was never ordered to produce a bill of particulars; (iii) the Government never filed the Conspirator Letter; and (iv) the Government repeatedly and correctly characterized it as a document that "ha[d] no adjudicatory significance" and was "communicated to Defendants only for purposes of trial preparation." (A193.)

Second, the district court's opinion is irreconcilable with decades of caselaw holding that the Government violates an individual's right to due process when it publicly brands him a criminal without any compelling governmental justification for doing so. Here, the Conspirator Letter would invariably be read to fill in the blanks of an Indictment that charges the commission of ***eight federal felonies*** for plotting, executing, and then covering up a deliberate deprivation of the civil rights

of Fort Lee residents for purposes of exacting political retribution. No governmental interest justifies—or could ever justify—such a public branding and the irreparable reputational injury it would cause. In fact, the Government has repeatedly admitted that it has ***no*** interest at this stage of the criminal proceeding in publicly naming anyone as an unindicted co-conspirator. Rather, the Government has asserted that its only interest in publicly designating anyone a co-conspirator would arise, if at all, ***at trial***, where it may seek to introduce the statements of certain declarants under the co-conspirator exception to the hearsay rule. But that purpose—gaining the ability to introduce, under Fed. R. Evid. 801(d)(2)(E), an absent declarant's statement that would otherwise be inadmissible hearsay—does not justify falsely communicating to the public that the Government has sufficient evidence to charge these individuals with a crime. Doe's due process right to prevent that false and misleading communication outweighs the Media's right of access, whether grounded in the common law or the First Amendment.

Third, even had the Government identified Doe as an unindicted coconspirator in a bill of particulars, to which a presumptive right of access would have attached, the district court would have erred by failing to recognize the serious and well-recognized reputational harm that would befall the individuals named in the Conspirator Letter, which also outweighed any interest the media had in gaining access to it. Critically, the Government admitted that the Conspirator Letter was an

overly broad designation of individuals whom it ***may*** designate as co-conspirators for purposes of Fed. R. Evid. 801(d)(2)(E), and that these individuals currently "have a status before the law that is no different than other individuals who were subjects of an investigation that yielded either no evidence of their wrongdoing or some such evidence, but not enough to warrant their being charged." (A200.) Thus, as in *Smith*, it is "virtually certain that serious injury will be inflicted upon innocent individuals," 776 F.2d at 1114, if the Conspirator Letter is made public.

The district court disregarded this critical fact by reasoning that the individuals named in the Conspirator Letter had a diminished or non-existent right of privacy because of their public status and the media's extensive coverage of Bridgegate. But that reasoning simply misunderstands the nature of the "privacy" right at issue, which is the right not to have one's reputation and career needlessly ruined.

Finally, the May 13 Order constitutes an abuse of discretion because it was based solely on the district court's erroneous conclusion that Doe failed to show that he had a reasonable likelihood of success in demonstrating the three legal errors discussed above in a motion for post-judgment relief. In light of those errors, the May 13 Order must be reversed.

ARGUMENT

I. THE DISTRICT COURT ERRED IN CONCLUDING THAT THE CONSPIRATOR LETTER WAS A BILL OF PARTICULARS THAT TRIGGERED A PRESUMPTIVE FIRST AMENDMENT AND COMMON-LAW RIGHT OF PUBLIC ACCESS.

A. *Neither The First Amendment Nor The Common Law Right Of Access Extends To Criminal Discovery Materials.*

1. The First Amendment Right Of Access Does Not Extend To Materials Produced As Part of Criminal Discovery.

It is well established that "a right of First Amendment access requires a two-prong evaluation of 'whether the place and process have historically been open to the press' and 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *PG Publ. Co. v. Aichele*, 705 F.3d 91, 104 (3d Cir. 2013) (quoting *Press-Enterprise Co. v. Superior Court of California for Riverside County*, 478 U.S. 1, 8 (1986)); *see also Wecht*, 537 F.3d at 235-39 (applying this two-pronged test to determine whether the media had a First Amendment right to discover the identity of jurors).

The first prong of this test—the "experience" prong—requires a court to "consider whether a place and process have historically been open to the press and general public." *PG Publ.*, 705 F.3d at 108 (internal quotation marks and citation omitted). Indeed, "[i]t has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally." *Branzburg v. Hayes*, 408 U.S. 665, 684 (1972).

"For example, the press and the public have historically been excluded from sensitive governmental activities such as grand jury proceedings, judicial conferences, and *in camera* inspections of evidence." *United States v. Gurney*, 558 F.2d 1202, 1209 (5th Cir. 1977) (citing *Branzburg*, 408 U.S. at 684).

The second prong—the "logic" prong—"tasks [a court] with considering 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *PG Publ.*, 705 F.3d at 110 (quoting *N. Jersey Media Group*, 308 F.3d at 209). This consideration encompasses "six broad 'values' that are typically served by openness":

> [1] promotion of informed discussion of governmental affairs by providing the public with the more complete understanding of the [proceeding]; [2] promotion of the public perception of fairness which can be achieved only by permitting full public view of the proceedings; [3] providing a significant community therapeutic value as an outlet for community concern, hostility and emotion; [4] serving as a check on corrupt practices by exposing the [proceeding] to public scrutiny; [5] enhancement of the performance of all involved; and [6] discouragement of [fraud].

PG Publ., 705 F.3d at 110-11 (quoting *United States v. Simone*, 14 F.3d 833, 839 (3d Cir. 1994)). It is only when "both prongs of the test are satisfied" that "'a qualified First Amendment right of public access attaches.'" *PG Publ.*, 705 F.3d at 104.

Under this test, the public has a First Amendment right of access to a genuine bill of particulars because, "[h]istorically and functionally, the bill of particulars is

closely related to the indictment." *Smith*, 776 F.2d at 1111. The directive that a bill of particulars be "filed" with the Court pursuant to Fed. R. Crim. P. 7(f), rather than merely "furnished" to the defendant," provides some evidence that bills of particulars were regarded by the drafters of the rules [of criminal procedure] as supplements to the indictment rather than as pretrial discovery." *Smith*, 776 F.2d at 1111. And, "unlike discovery," a bill of particulars "is not intended to provide the defendant with the fruits of the government's investigation"; rather, "it is intended to give the defendant only that minimum amount of information necessary to permit the defendant to conduct his own investigation." *Id.* "More importantly, a bill of particulars, like the indictment, is designed to define and limit the government's case," and, "[a]s with the indictment, there can be no variance between the notice given in a bill of particulars and the evidence at trial." *Id.* "Because bills of particulars thus set the parameters of the government's case, . . . public access to them serves the same societal interests served by access to the charging documents." *Id.*

But, as *Smith* recognizes, "pretrial discovery" is entirely different from a bill of particulars. *Smith*, 776 F.2d at 1111. Unlike an indictment, "there is no tradition of access to criminal discovery." *United States v. Kravetz*, 706 F.3d 47, 54 (1st Cir. 2013); *see also United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986) ("Discovery is neither a public process nor typically a matter of public record.

Historically, discovery materials were not available to the public or press.") (citing *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33 (1984), and *Gannett Co. v. DePasquale*, 443 U.S. 368, 396 (1979) (Burger, C.J., concurring)). "To the contrary, '[d]iscovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation.'" *Kravetz*, 706 F.3d at 54 (quoting *Anderson*, 799 F.2d at 1441); *see also United States v. Benzer*, No. 13-cr-00018, 2015 U.S. Dist. LEXIS 169109, at *11 (D. Nev. Dec. 15, 2015) ("'In general, courts have found no traditional right of access to pretrial discovery information or documents that are never introduced into the case[,]' and . . . '[n]umerous courts have reached the same conclusion under the First Amendment in both civil and criminal cases.'") (quoting *Tacoma News, Inc. v. Cayce*, 256 P.3d 1179, 1188 (Wash. 2010) and collecting authority); *United States v. Smith*, 985 F. Supp. 2d 506, 519 (S.D.N.Y. 2013) ("Because discovery is a private process between the parties to an action (even if governed by specific rules and managed by trial judges), courts generally view the documents or materials shared between them as outside the judicial function and therefore not presumptively accessible.").

Moreover, "public access" to criminal discovery "has little positive role in the criminal discovery process." *Kravetz*, 706 F.3d at 54. To the contrary, public access actually has a "deleterious effect . . . on the parties' search for and exchange of

information in the discovery process." *Id.*; *see also Anderson*, 799 F.2d at 1441 ("If . . . [criminal] discovery information and discovery orders were readily available to the public and the press, the consequences to the smooth functioning of the discovery process would be severe."). This is so for numerous reasons:

> With respect to logic, the courts have recognized the pitfalls in allowing unfettered public access to discovery materials. For one, the purpose of the discovery rules—to encourage the disclosure of information and materials to avoid unnecessary surprise and to level the playing field—might be undermined. . . . For another, there is the risk that disclosure of some of the discovery materials could taint a trial. . . . And, because the discovery rules are reciprocal, there is the risk that unfettered public access could jeopardize a defendant's trial strategy.

Smith, 985 F. Supp. 2d at 520.

Even where the public has a First Amendment right of access, if that access concerns the identification of unindicted co-conspirators, it must yield to the superior interest of ensuring that public disclosure does not "unnecessarily jeopardize the privacy and reputational interests of the named individuals." *Smith*, 776 F.2d at 1114 (footnote omitted). *See also Simone*, 14 F.3d at 840 (explaining that the presumption of access is overcome when "'closure is essential to preserve higher values and is narrowly tailored to serve that interest.'").

2. There Is No Common Law Right Of Access To Criminal Discovery Materials.

Whether the common law affords a right of access to documents turns on whether they are "judicial records." *Wecht*, 484 F.3d at 208; *see also Kravetz*, 706

F.3d at 54 ("When considering whether the common law right of access applies, the cases turn on whether the documents that are sought constitute 'judicial records."). A document is only considered a "judicial record" when it has "'been filed with, placed under seal, interpreted or enforced by the district court.'" *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 781 (3d Cir. 1994); *accord Pichler v. UNITE*, 585 F.3d 741, 746 n.5 (3d Cir. 2009); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001).

Unless they are filed with a court, "discovery materials . . . cannot be subject to the common law right of access." *Wecht*, 484 F.3d at 208 (accepting this assertion by the government and citing, *inter alia*, *Seattle Times*, 467 U.S. at 33 and Anderson, 799 F.2d at 1441); *Smith*, 776 F.2d at 1111 (distinguishing bills of particulars, to which a common-law right of access attaches, from "civil discovery"). Indeed, "the courts of appeals have uniformly held that the public has no common law . . . right of access to materials that are gained through civil discovery." *Kravetz*, 706 F.3d at 55 (collecting authority); *see also Bond v. Utreras*, 585 F.3d 1061, 1073 (7th Cir. 2009) ("[W]hile the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute 'judicial records,' the same is not true of materials produced during discovery but not filed with the court. Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to unfiled discovery.").

Even when a common-law right of access attaches, that interest must yield to superior privacy and reputational interests. *See Smith*, 776 F.2d at 1113 ("[W]hether appellant's right of access is grounded on the First Amendment right of access to judicial proceedings or on the common law right of access to judicial documents, privacy rights may outweigh the public's interest in disclosure."); *see also Capital Cities*, 913 F.2d at 94 ("[A]n individual's privacy or reputational interests may, in some circumstances, rise to the level of a compelling governmental interest and defeat a media organization's constitutional right of access as well as the public's common law right of access to charging documents in a criminal proceeding.").

B. ***The Conspirator Letter Is Not A Bill Of Particulars, And It Has Not Been Filed With The Court.***

Here, the district court concluded that because the Conspirator Letter was "produced in response to a demand for a bill of particulars," it necessarily triggered both a First Amendment and common-law right of access. (A26.) But that conclusion does not follow; a letter submitted "***in response to*** a demand for a bill of particulars" is ***not*** the same as a bill of particulars.

The district court based its conclusion entirely on *Smith*, 776 F.2d at 1111. But neither this Court nor the parties in *Smith* questioned whether the list of co-conspirators in that case was in fact a bill of particulars; that was undisputed. Rather, the sole question was whether a bill of particulars triggered a First Amendment and common-law right of access. *See id.* at 1105 ("This is an appeal from a final order

denying the press access to a portion of a bill of particulars under seal pursuant to court order."); *id.* at 1116-17 (Mansmann, J., concurring) (noting the Government's repeated admissions that the list at issue was a "bill of particulars"). Nor were the facts in *Smith* comparable to those in this case. The district court in *Smith* specifically ordered the Government to disclose to the defendants a list of unindicted co-conspirators in response to the defendants' motion for a bill of particulars. *Id.* at 1105-06. The Government then formally "filed [that] list of names in response to this order and the Clerk placed the document under seal." *Id.* at 1106.

That was not the case here. First, to describe the Conspirator Letter as a bill of particulars is to completely misapprehend the term. It is not jargon, to be loosely tossed about to describe any letter or other document that provides specifics about a criminal charge. It is a formal pleading that amends the indictment returned by the grand jury and limits the Government to proving the charges so amended. *Anderson*, 799 F.2d at 1441. Bills of particulars were prevalent years ago, when the typical indictment was a bare-bones instrument that did little more than track the language of the charged statute, and a supplemental pleading was needed to inform the defendant of the time, place, manner, and means of his alleged offense. Fed. R. Crim

P. 58, app. of forms (1982).[10] While defendants still routinely include a motion for a bill of particulars in their omnibus pretrial filings—as Baroni and Kelly did here—to secure as much discovery as possible, they are not generally needed given the specificity of today's speaking indictments, of which the indictment in this case is a good example. (A60.) As a result, the Government generally opposes such motions, and courts rarely grant them. Instead, as here, the court typically encourages the parties to resolve such motions as they would other discovery requests—and, as here, the parties typically comply.

Here, per the norm, the Government strenuously objected to the defendants' motion for a bill of particulars in its entirety—including their request for a list of unindicted co-conspirators—on the usual ground: that they were improperly

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[10] Although form indictments were at one time included as an appendix to the Federal Rules of Criminal Procedure, *United States v. Rabinowitz*, 176 F.2d 732, 734 (2d Cir. 1949), *rev'd* 339 U.S. 56 (1950) ("The first ten 'forms,' incorporated into Rule 58 of the Criminal Rules, 18 U.S.C.A., are examples of the general terms now permissible."), the Appendix of Forms has since been abrogated, Notes of Advisory Committee of Rules (Apr. 28, 1983) ("Rule 58 and the Appendix of Forms are unnecessary and have been abrogated. Forms of indictment and information are made available to United States Attorneys' offices by the Department of Justice. Forms used by the courts are made available by the Director of the Administrative Office of the United States Courts."). Because they may not be readily available, we have attached for the Court's convenience several form indictments, Fed. R. Crim. P. 58, app. of forms, Forms 1-11 (1982) (Addendum A); and a form Bill of Particulars, 1 Theodore W. Housel & Guy O. Walser, *Defending and Prosecuting Federal Criminal Cases* 1046-47, 1107 (2d ed. 1946) (Form No. 77) (Addendum B).

attempting to use that device as a means of obtaining discovery. (A136-40.) And, as the foregoing discussion suggests, the Government was right: "Generalized discovery . . . is not an appropriate function of a bill of particulars and is not a proper purpose in seeking the bill." *Anderson*, 799 F.2d at 1443. "Rule 7(c) of the Federal Rules of Criminal Procedure requires an indictment to be 'concise' and contain 'essential facts,' but does not require the indictment to include every fact to be alleged by the government." *United States v. Moyer*, 674 F.3d 192, 203 (3d Cir. 2012). It is only when an "'indictment itself is too vague and indefinite for such purposes'" that a "bill of particulars is warranted." *Id.* The indictment in this case hardly fit that description.

Second, unlike in *Smith*, the Government was never ordered to file a bill of particulars. *Compare Smith*, 776 F.3d at 1105 (noting that the district court had "ordered identification of the unindicted co-conspirators" in response to a request for a bill of particulars). To the contrary, the court below characterized the entirety of the defendants' omnibus discovery motions—including their requests for a bill of particulars—as "Discovery Motions," and dismissed them as moot in light of "counsels' representations and the discussions on the record" during the February 5, 2016 hearing. (A184; *see also* A195 (n.9) (noting that the Government had never "been ordered by the Court to identify unindicted coconspirators.").)

Third, consistent with the parties' "representations and discussions," the Government never treated the Conspirator Letter as a bill of particulars. It consistently took the position, as shown above, that the Conspirator Letter contained "unindicted coconspirator information that has been ***provided in discovery***." (A151 (emphasis added).) Thus, as the Government explained to the district court, the Conspirator Letter was "communicated to Defendants only for purposes of trial preparation" and "contain[ed] information that ***ha[d] no adjudicatory significance***." (A193 (emphasis added).) This lack of "adjudicatory significance" was critical to the Government, because it did not want to be constrained by a bill of particulars to present its case and proofs in a manner that conformed strictly to it. (A138.) Since then, the Government has consistently described the Conspirator Letter as a "nonpublic" letter sent "to defense counsel." United States Letter to this Court, May 16, 2016, Doc. # 003112296236, at n.1; United States Letter to this Court, May 20, 2016, Doc. # 003112302799, at 1.

Fourth, unlike the bill of particulars in *Smith*, the Conspirator Letter was never "filed with the Clerk." *Smith*, 776 F.2d at 1106. Fed. R. Crim. P. 49(d) states that filings in a criminal action (which is the type of action in which the Government issued the Conspirator Letter) are governed by the Federal Rules of Civil Procedure. Fed. R. Civ. P. 5(d)(2) states, "[a] paper is filed by delivering it: (A) to the clerk; or (B) to a judge who agrees to accept it for filing, and who must then note the filing

date on the paper and promptly send it to the clerk." That did not happen here. To the contrary, when it issued the Conspirator Letter, the Government specifically stated that it was "'not filing [it] with the Clerk's Office.'" (A149.) This undisputed fact proves not only that the Conspirator Letter was not a "judicial record," but also that the Government never viewed or treated it as a bill of particulars. *See Smith*, 776 F.2d at 1111 (distinguishing a bill of particulars from pretrial discovery on the basis that the Federal Rules of Criminal Procedure "'direct the *filing* of a bill of particulars,'" while they only require the government to "'*furnish to the defendant*' certain specified items of discovery." (emphasis in original)). Thus, although the Government chose to send a copy of that discovery letter to the court, there was no reason for it to do so. That voluntary act certainly did not trigger the presumptive public right of access that applies to indictments, bills of particulars, and other valid judicial filings. Were a party's courtesy letters to the court sufficient to trigger public access, any party to a criminal case (prosecution or defense) could freely defame third parties—in the same manner in which Doe would be defamed here—by the libelous *per se* act of accusing such absent parties of crimes based on the unilateral determination of that party. The presumptive right of public access was surely not intended to extend to such letters.

The record in this case thus makes unmistakably clear that the Conspirator Letter was a discovery response rather than a bill of particulars. In fact, as the

Eleventh Circuit held in *Anderson*, the defendants' discovery motion and the Government's response were so far removed from the proper functioning of a bill of particulars that the Conspirator Letter would not have lost its character as pretrial discovery even had it been labeled a bill of particulars:

> Fed. R. Crim. P. 16(b)(2) states that the rule "does not authorize the discovery or inspection of . . . statements made . . . by government . . . witnesses, or by prospective government . . . witnesses." A defendant who desires a list of government witnesses—or "unindicted co-conspirators"—could thus bypass the Rule 16(b) restriction on discovery by asking for and receiving a "bill of particulars" pursuant to Fed. R. Crim. P. 7(f), which simply provides that "the court may direct the filing of a bill of particulars." Because a defendant has no right to obtain a list of witnesses by simply calling his request a "bill of particulars," we decline to apply a mechanical rule whereby a bill of particulars is automatically accorded the status of a supplement to an indictment.

Anderson, 799 F.2d at 1441-42 (internal citations omitted).

Because the Conspirator Letter was a pretrial discovery response rather than a bill of particulars, no First Amendment or common-law right of access attached to that document. The district court erred in concluding otherwise.

II. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY FAILING TO RECOGNIZE THAT DISCLOSURE OF THE CONSPIRATOR LETTER WOULD VIOLATE DOE'S RIGHT TO DUE PROCESS.

A. *Publicly Naming An Unindicted Co-Conspirator Without A Compelling Governmental Justification Violates That Individual's Right To Due Process.*

The Fifth Amendment provides that "[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury . . . nor be deprived of life, liberty, or property, without due process of law." In *Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971), the Supreme Court observed that "where the state attaches a 'badge of infamy' to the citizen, due process comes into play." Five years later, in *Paul v. Davis*, 424 U.S. 693 (1976), the Supreme Court distilled from *Constantineau* and related caselaw the principle that an individual's right to due process is triggered when he is subject to governmental stigmatization in conjunction with the "distinct[] alter[ation] or extinguish[ment]" of a cognizable "right or status." *Id.* at 711. *See also Hill v. Borough of Kutztown*, 455 F.3d 225, 236 (3d Cir. 2006) ("[T]o make out a due process claim for deprivation of a liberty interest in reputation, a plaintiff must show a stigma to his reputation plus deprivation of some additional right or interest. . . . . We have referred to this as the 'stigma-plus' test."); *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 10 (1st Cir. 2011) ("A party who claims a violation of her procedural due process rights based on reputational harm must show that the challenged governmental

action adversely impacted some right or status previously enjoyed by her under substantive state or federal law."); *Tebo v. Tebo*, 550 F.3d 492, 504 (5th Cir. 2008) (explaining that the "stigma plus" test is satisfied by showing stigmatization combined with the deprivation of a "right previously existing under state law or the U.S. Constitution.").

In *Briggs*, the Fifth Circuit held that the government violates the due-process rights of unindicted co-conspirators when it charges them with criminal conduct in an indictment without indicting them. 514 F.2d at 796, 806. The court explained that when the government procures an indictment in this way, it causes the grand jury to "exceed[] its power and authority." *Id.* It reasoned that "[t]he grand jury that returns an indictment naming a person as an unindicted conspirator does not perform its shielding function but does exactly the reverse." *Id.* at 803 ("If the charges are baseless, the named person should not be subjected to public branding, and if supported by probable cause he should not be denied a forum."); *see also id.* at 801 (rejecting the argument that "a federal grand jury is empowered to accuse a named private person of crime by means of an indictment which does not make him a defendant."); *id.* at 802 ("The courts have struck down with strong language efforts by grand juries to accuse persons of crime while affording them no forum in which to vindicate themselves.").

The *Briggs* court further found that the grand jury's unlawful accusation impacted the "good names and reputations" of the unindicted co-conspirators and impaired "their ability to obtain employment," which represented "substantial and legally cognizable interests entitled to constitutional protection against official government action." *Id.* at 797; *see also id.* at 798 (observing that "[i]t would be unrealistic to deny that an accusation, even if unfounded, that one has committed a serious felony may impinge upon employment opportunities.").

In order to protect the constitutional rights of an unindicted co-conspirator, the *Briggs* court established a balancing test under which it weighed the "legitimate interests of the government" in publicly naming unindicted co-conspirators against "the harm to the citizen who is accused but not indicted." *Id.* at 804. The court explained that, because the harm to the citizen is significant, the dispositive inquiry is whether the government has a "substantial interest" in "stigmatizing private citizens as criminals while not naming them as defendants." *Id.* The court found that the government simply had no interest in publicly naming unindicted co-conspirators in the indictment. *Id.* at 804-05. It explained that if there were probable cause to indict the co-conspirator then the government should have done so; and if not, then "[o]bviously . . . they should not have been named as conspirators—indicted or unindicted." *Id.*at 805.

Numerous cases have adopted the reasoning of *Briggs* in the decades since it was decided. Two years after *Briggs*, the court in *Application of Jordan*, 439 F. Supp. 199 (S.D. W. Va. 1977), affirmed its continued vitality in light of *Paul*. It explained, as an initial matter, that a grand jury "violates its duty to serve as protector of all those whom it investigates but chooses not to put to trial." *Jordan*, 439 F. Supp. at 202. It further explained that a grand jury that charges a citizen with a crime but does not indict him also violates its duty to maintain the secrecy of its proceedings. *Id.* at 202 ("If the citizen is *indicted*, the reason for secrecy ends. If no indictment is issued, the cloak of secrecy remains in place." (internal citation omitted; emphasis in original)). *See also Finn v. Schiller*, 72 F.3d 1182, 1189 (4th Cir. 1996) (observing that "compromising grand jury secrecy is a serious matter" and explaining that Fed. R. Crim. P. 6 forbids a prosecutor from "fil[ing] sweeping statements of fact alleging violations of various laws by unindicted individuals.").

Applying these principles, the court concluded that the government violated an individual's right to due process by causing the grand jury to name him as a co-conspirator in an indictment without indicting him. *Jordan*, 439 F. Supp. at 201-02, 208. The court explained that this conclusion was fully consistent with *Paul v. Davis* because the due-process violation was based not only on the reputational harm inflicted on the individual, but also on the impairment of his constitutional and federal rights to a properly functioning grand jury:

> The petition before this Court . . . is based squarely upon federal law concerning federal juries and upon the Fifth Amendment clauses which relate to the grand jury and to due process. . . . The protections of the indictment procedure and the concept of the indictment as a shield for those whom a federal grand jury does not elect to accuse on probable cause and who therefore need not "stand to answer" by public disclosure of the accusations of the grand jury have been documented in the federal case law. There is no reason to believe that it would come as a "great surprise to those who drafted and shepherded the adoption" of the Fifth Amendment to learn that it worked the result of holding the federal grand jury to the proper exercise of its accusatorial powers. . . .
>
> Naming [the movant] as an unindicted co-conspirator thus deprived him of his due process right to be permitted the protection of the federal indictment process as it is secured to him under the Fifth Amendment and the Federal Rules of Criminal Procedure.

Id. at 208.

The same year *Jordan* was decided, the Ninth Circuit followed *Briggs* to conclude that "charging [a citizen] with [a crime] without making him a defendant was beyond the authority of the grand jury and a denial of due process." *United States v. Chadwick*, 556 F.2d 450, 450 (9th Cir. 1977). The court, applying the balancing test set forth in *Briggs*, rejected the government's professed need to name an unindicted individual in the indictment because "[o]ther methods less injurious to [the individual] were available." *Id.*

Six years after *Briggs*, the Fifth Circuit decided *In re Smith*, 656 F.2d 1101 (5th Cir. 1981), in which it held that the government violated a citizen's due-process

rights by charging him with a crime in publicly filed court documents. *Id.* at 1107. Applying the balancing test set forth in *Briggs*, the court found that "no legitimate governmental interest [was] served by an official public smear of an individual when that individual has not been provided a forum in which to vindicate his rights." *Id.* at 1106. *See also id.* at 1106-07 ("[T]he Assistant United States Attorney in preparing the factual resumes required by the Court decided to include in such resumes a statement accusing the Petitioner of criminal conduct. Why? What possible legitimate purpose could have been served by these official condemnations?").

The principles announced in *Briggs* and *Smith* continue to resonate today. In *United States v. Anderson*, 55 F. Supp. 2d 1163 (D. Kan. 1999), the court followed this line of cases to explain that, to determine whether the government's naming of an individual as an unindicted co-conspirator is consistent with due process, "the court must undertake a due process balancing inquiry, balancing the interests of the government in naming unindicted co-conspirators against the individual harm that stems from being accused without having a forum in which to obtain vindication." *Id.* at 1167. Applying that test, the court concluded that "[t]he very real stigmatization suffered by the movants from this government action far outweighs the nonexistent government interest in publicly naming them [in court filings] as coconspirators." *Id.* at 1168. The court also noted the critical difference between

naming an unindicted co-conspirator for legitimate trial purposes, such as to render it admissible under Fed. R. Evid. 801(d)(2)(E), and naming a co-conspirator outside that context:

> The mere fact that the government eventually needed legitimately to let the cat out of the bag at trial, however, does not alter the court's conclusion that the movants' pretrial public identification was a violation of due process because there is an important distinction between being unqualifiedly identified in a pretrial document as an "unindicted coconspirator" and being identified as a coconspirator at trial for purposes of 801(d)(2)(E). ***Pursuant to the court's rulings, an 801(d)(2)(E) coconspirator is not necessarily a criminal.*** All that is required is that he or she be a "joint venture" in a common plan.

Id. at 1169 (emphasis supplied).

Without exception, every court in the nation to consider the issue has endorsed the reasoning of *Briggs* and its progeny that naming one an unindicted coconspirator violates due process. *See United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 691-92 (5th Cir. 2010) (applying *Briggs* and *Smith*); *United States v. Gray*, No. 94-5776, 1996 U.S. App. LEXIS 17523, at *13 (4th Cir. July 17, 1996) (applying the Fifth Circuit's holding "that it is a denial of due process to name an unindicted co-conspirator in an indictment or factual summary."); *United States v. Henderson*, No. 10-cr-117, 2012 U.S. Dist. LEXIS 31870, at *5 (N.D. Okla. Mar. 8, 2012) ("It cannot be doubted that identification by the Government of an unindicted co-conspirator is a serious matter that may implicate due-process concerns." (citing *Smith* and *Anderson*)); *United States v. Ferguson*, No. 06-cr-137, 2008 U.S. Dist.

LEXIS 550, at *5 (D. Conn. Jan. 5, 2008) ("[A]n unindicted co-conspirator has a constitutional due process right to remain unidentified in advance of trial") (citing *Briggs*); *Doe v. Hammond*, 502 F. Supp. 2d 94 (D.D.C. 2007) (observing that "revealing [one's] identity as an unindicted co-conspirator" has generally been found "to violate the due process rights of the person revealed." (citing *Briggs*, *Chadwick*, *Smith*, and *Anderson*)); *United States v. Crompton Corp.*, 399 F. Supp. 2d 1047, 1049 (N.D. Cal. 2005) ("District courts cannot refuse to expunge the name of an unindicted coconspirator from an indictment because no government interest is sufficient to justify 'stigmatizing private citizens as criminals' without affording them 'access to any forum for vindication.'" (quoting *Briggs* and citing *Chadwick*, *Smith*, *Jordan*, and *Anderson*)).

So too have academics and commentators. *See* Raeed N. Tayeh, *Implicated But Not Charged: Improving Due Process For Unindicted Co-Conspirators*, 47 Akron L. Rev. 551, 552 (2014) (concluding, based on a survey of existing caselaw and scholarly commentary, "that the practice of publicly naming unindicted co-conspirators before trial violates due process and that unless preventative measures are adopted to halt this practice, such due process violations will continue."); Ira P. Robbins, *Guilty Without Charge: Assessing the Due Process Rights of Unindicted Co-Conspirators*, 2004 Fed. Cts. L. Rev. 1, 8 (2004) (cataloguing the "legion" "constitutional problems faced by an unindicted, but named, co-conspirator" and

observing that "[m]any courts have held that these consequences deny the unindicted person the due process of law to which he or she is entitled by the Fifth Amendment and violate the grand jury's traditional shielding function.").

The Department of Justice has also embraced this caselaw. The USAM, which guides the conduct of United States Attorneys throughout the country, expressly states that "there is ordinarily 'no legitimate governmental interest served' by the government's public allegation of wrongdoing by an uncharged party, and this is true '[r]egardless of what criminal charges may . . . b[e] contemplated by the Assistant United States Attorney against the [third-party] for the future.'" USAM § 9-27.760 (quoting *Smith*, 656 F.2d at 1106-07). It supports that statement by observing that "[c]ourts have applied this reasoning to preclude the public identification of unindicted third-party wrongdoers in plea hearings, sentencing memoranda, and other government pleadings." *Id.* (citing, *inter alia*, *Briggs* and *Anderson*).

B. ***The District Court Erred As A Matter Of Law By Failing To Recognize That Public Disclosure Of The Conspirator Letter Violates Due Process.***

In opposing the Media's request for the Conspirator Letter, the Government specifically argued that, under the authority set forth in the USAM, it is improper to publicly name unindicated co-conspirators due to their inability "to challenge that potentially injurious designation in court." (A189.) That argument followed the

Government's letter request to maintain the confidentiality of the Conspirator Letter pursuant to the authority of those courts that have "have approved sealing to avoid the public allegations of wrongdoing by uncharged third parties." (A150-51 (1-2 & n.2) (citing, *inter alia*, *Briggs*, 513 F.2d at 805-08 and *Anderson*, 55 F. Supp. 2d at 1168-69)). Those cases, as shown above, make clear that, in the absence of a legitimate government interest, publicly naming an individual as an unindicted co-conspirator violates that individual's right to due process.

Here, even if the Government had identified unindicted coconspirators in a bill of particulars rather than a discovery letter, public disclosure of that designation would cause severe and irreparable reputational harm to those so identified. That is because a true bill of particulars is "regarded as [a] supplement[] to the indictment." *Smith*, 776 F.2d at 1111; *see also Capital Cities*, 913 F.2d at 93 ("This Court held that a bill of particulars should be treated the same as other charging documents since it can be viewed as a supplement to an indictment."). Thus, simply by filling in the blanks of the Indictment, the Government would place both its and the grand jury's imprimatur on the allegations that unindicted individuals committed eight federal felonies in conspiring to harm Fort Lee residents, in violation of their civil rights, as a form of political retribution. Although it is the United States Attorney and not the grand jury who names unindicted coconspirators, it is folly to suggest that the public would not perceive that identification as emanating from the grand jury—the same

body that indicted the other conspirators. And in naming unindicted coconspirators, the Government would not only cause the grand jury to exceed its authority—thereby subverting its role as a shield for the innocent—but also would compromise the obligation of the Government and grand jury to maintain the confidentiality of those who have been investigated but not indicted. *See Briggs*, 514 F.2d at 801-03; *Chadwick*, 556 F.2d at 450; *Finn*, 72 F.3d at 1189; *Jordan*, 439 F. Supp. at 202, 204.

Nor is there any question that the Government has no legitimate interest at this stage in the criminal proceeding in publicly branding anyone with eight federal felonies. Indeed, as shown above, the Government has repeatedly acknowledged that the Conspirator Letter had "no adjudicatory significance" at the current stage of the criminal proceeding, and was "communicated to Defendants only for purposes of trial preparation." (A193.) Rather, as the Government made clear, its only potentially legitimate interest in naming unindicted co-conspirators would be known "at or just before trial"—if, for example, the Government decided to introduce co-conspirator statements under Federal Rule of Evidence 801(d)(2)(E). (A195.)

In granting the Media's request to access the Conspirator Letter, the district court did not cite, much less address, the decades of caselaw holding that the Fifth Amendment forbids the public branding of an individual as an unindicted co-conspirator absent a legitimate governmental interest. Nor did it acknowledge the Government's repeated concessions that it had no legitimate interest in publicly

releasing the names of unindicted co-conspirators at this stage of the proceeding. Rather, it exclusively analyzed the Media's request under the framework set forth in *Smith*, 776 F.2d 1104. (A26-28.)

But *Smith* was not a due-process case. Rather, it rejected the media's request for access to a bill of particulars at the threshold, holding that the media's First Amendment and common-law right of access yielded to the superior interest in protecting unindicted co-conspirators from serious reputational harm. *Id.* at 1115. In light of that holding, there was no reason for that court to consider whether disclosure would violate the unindicted co-conspirators' rights under the Fifth Amendment, even had that issue been presented to it.

The district court tried to rectify this error by stating, in its May 13 Order, that Doe's "privacy rights were considered in this Court's May 10th Opinion in its application of the *Smith* balancing test." (A34.) But the *Smith* balancing test weighs the harm to an individual against the ***public's*** interest in judicial records. *Smith*, 776 F.2d at 1110. The due-process test, by contrast, weighs the harm to an individual against the ***government's*** interest in publicly naming unindicted co-conspirators. *Briggs*, 514 F.2d at 804. Where, as here, that governmental interest is non-existent, the harm to an individual's reputation is dispositive. *See id.* at 804-05; *Chadwick*, 556 F.2d at 450; *Smith*, 656 F.2d at 1106-07; *Anderson*, 55 F. Supp. 2d at 1167.

Finally, the district court tried to excuse its error by stating that it afforded Doe due process by giving him "the opportunity to be heard orally and in writing." (A34.) But that is inaccurate. The issue is not whether Doe was given the opportunity to argue that the Government violated his due process rights by designating him an unindicted coconspirator, but whether he was given the opportunity to contest that designation.

Because the public disclosure of the Conspirator Letter would clearly violate Doe's right to due process, which outweighs any right of access the Media may enjoy, this Court should reverse the district court's Orders and instruct it to forbid the Conspirator Letter from being publicly disclosed.

III. THE DISTRICT COURT ERRED BY CONCLUDING THAT ANY FIRST AMENDMENT AND COMMON-LAW RIGHT TO ACCESS THE CONSPIRATOR LETTER OUTWEIGHED THE SERIOUS REPUTATIONAL HARM THAT WOULD BEFALL THOSE NAMED ON THAT LIST.

Even if the Conspirator Letter were a bill of particulars (it is not) and its public disclosure would not violate Doe's right to due process (it would), the district court order would still be fatally flawed because it misapplied the balancing test this Court established in *Smith*, 776 F.2d 1104. In that case, the press moved for access under the First Amendment and the common law to "a portion of a bill of particulars under seal pursuant to court order." *Id.* at 1105. On appeal, this Court found that the media did have a First Amendment and common-law right to access that bill of particulars.

But it held that the "reputational and privacy interest" of the unindicted co-conspirators far outweighed that right:

> If published, the sealed list will communicate to the general public that the named individuals, in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust. This broad brush assertion will be unaccompanied by any facts providing a context for evaluating the basis for the United States Attorney's opinion with respect to any given individual. When one adds to this that the United States Attorney's opinion was formed on the basis of an investigation that had not yet reached the point where he was willing to make a decision on whether to prosecute, it becomes apparent that the risk of serious injury to innocent third parties is a grave one. Finally, as the trial judge noted, the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence in a trial. This means that the clearly predictable injuries to the reputations of the named individuals is likely to be irreparable.
>
> The individuals on the sealed list are faced with more than mere embarrassment. It is no exaggeration to suggest that publication of the list might be career ending for some. Clearly, it will inflict serious injury on the reputations of all. In some instances, there may be truth to the prosecutor's accusation. On the other hand, given the stage at which his opinion was formed and his "conceivably may have" standard, it is virtually certain that serious injury will be inflicted upon innocent individuals as well. In these circumstances, we have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals.

Id. at 1113-14 (footnote omitted).

Here, even more so than in *Smith*, the Government has acknowledged that the Conspirator Letter is overbroad and lists innocent individuals against whom the

Government has "no evidence" or insufficient evidence to indict. (A200.) Here, as in *Smith*, publication of the Letter "will communicate to the general public that the named individuals, in the opinion of the chief federal law enforcement official of the District, are guilty, or may be guilty, of a felony involving breaches of the public trust." *Id.* at 1113. Here, as in *Smith*, "the named individuals have not been indicted and, accordingly, will not have an opportunity to prove their innocence in a trial." *Id.* at 1113-14. And here, as in *Smith*, disclosing the Letter would produce "clearly predictable injuries to the reputations of the named individuals," which "is likely to be irreparable." *Id.* at 1114.

Despite *Smith*'s *a fortiori* extension to this case, the district court attempted to "distinguish" it on three grounds. None of them withstand scrutiny. First, the court reasoned that, unlike the individuals in *Smith*, the Government represented that the individuals on the Conspirator Letter are those for "'whom the Government has sufficient evidence to designate as having joined the conspiracy.'" (A25.) But that representation, as shown above, was made solely to inform the defendants, in advance of trial, of those individuals whom the Government might designate as co-conspirators for purposes of Fed. R. Evid. 801(d)(2)(E). (A188 ("[B]ecause evidence relating to even uncharged coconspirators may take on significance at a conspiracy trial, the Government, prior to trial, routinely identifies them so that

defendants can have that information to prepare for trial."); A195-96 (citing the potential relevance of such a designation for purposes of Rule 801(d)(2)(E).)

That purpose is vastly different from saying that the Government has sufficient evidence to charge those individuals with a crime. Not only are the standards of proof for both different, but a Rule 801(d)(2)(E) determination is made in context and subject to judicial safeguards and fact-finding. *See Anderson*, 55 F. Supp. 2d at 1169 ("[T]here is an important distinction between being unqualifiedly identified in a pretrial document as an 'unindicted coconspirator' and being identified as a coconspirator at trial for purposes of 801(d)(2)(E). Pursuant to the court's rulings, an 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a 'joint venture' in a common plan."); A188 ("Courts review the admissibility of such statements by a preponderance of the evidence, a less demanding standard than the 'beyond a reasonable doubt' standard to which the Government is held in a trial of an indicted defendant."). Moreover, the Government's potential 801(d)(2)(E) designations are typically overbroad, in order to err on the side of greater disclosure and to account for the fact that "any number of developments might lessen or eliminate the need for the admission of a statement made by an unindicted coconspirator." (A196-97.) This overbroad designation meant, as the Government readily conceded, that the Conspirator Letter ***included innocent individuals for whom it did not have sufficient evidence to indict***:

> In cases charging a criminal conspiracy, the Government often does not charge every individual about whom there is some evidence to suggest that the individual was a member of the conspiracy. Such decisions may be made for any number of proper reasons, including, for example, the assessment that there is not enough evidence to prove guilt beyond a reasonable doubt. . . .
>
> Unindicted coconspirators designated at this phase of prosecution have a status before the law that is no different than other individuals who were subjects of an investigation that yielded either no evidence of their wrongdoing or some such evidence, but not enough to warrant their being charged.

(A188-89, A200.) The Government even specifically noted that, "[a]lthough an individual may be indicted on a finding that there is probable cause to believe that the individual has committed a crime, it is not the practice of this Office to seek an indictment against an individual unless the Government concludes that there is proof of guilt beyond a reasonable doubt." (A188 (n.4).) Thus, this situation is like the one presented in *Smith*, because "it is virtually certain that serious injury will be inflicted upon innocent individuals," *Smith*, 776 F.2d at 1114, by publication of the Conspirator Letter. In fact, it is worse here, because the Government has made a considered decision ***not*** to prosecute the individuals named in the Conspirator Letter, but it will nonetheless be accompanied by the district court's flatly erroneous assertion that the individuals identified in that letter are persons "'whom the Government has sufficient evidence to designate as having joined the conspiracy.'" (A25.) This is the crux of the constitutional problem the Conspirator Letter presents:

No one has tested whether the Government has sufficient evidence to conclude that the individuals it names joined the conspiracy charged in the Indictment. In stating that the Government has such evidence, the district court asserted as fact the precise allegation Doe wants—but has thus far been denied the opportunity—to challenge.

Next, the district court reasoned that the Media's extensive coverage of Bridgegate meant that any of the thousands of persons "tangentially involved" with that affair had a diminished or non-existent right of "priva[cy]." (A27.) It similarly reasoned that the unindicted co-conspirators have diminished privacy rights because they "have been public employees and/or elected and appointed officials, and anyone named in the Conspirator Letter is likely to have held a similar position." (A27-28.) But this misapprehends the concept of "privacy" discussed in *Smith*, 776 F.3d 1104. *Smith* used the term "privacy" not in its colloquial sense, but as shorthand for the unindicted co-conspirators' "reputational interests." *Smith*, 776 F.3d at 1113; *see also id.* at 1114 (concluding that disclosure was improper due to the "clearly predictable injuries to the reputations of the named individuals"); *id.* ("[W]e have no hesitancy in holding that the trial court had a compelling governmental interest in making sure its own process was not utilized to unnecessarily jeopardize the privacy and reputational interests of the named individuals." (footnote omitted).); *id.* at 1115 (concluding that the trial court's refusal to disclose the names of unindicted co-

conspirators properly safeguarded the "the reputational and privacy interests of third parties.").

Here, as in *Smith*, the harm that would befall those named in the Conspirator Letter is "clearly predictable" and severe. *Smith*, 776 F.2d at 1113-14; *see also Capital Cities*, 913 F.2d at 94 (explaining that "[m]ore than mere embarrassment would have resulted from revealing the names of the unindicted co-conspirators [in *Smith*] since the individuals' reputations and careers could have been irreparably harmed even though the grand jury ultimately may have decided not to indict them for any crime."); *Briggs*, 514 F.2d at 799 (observing that it "defies common sense" to argue that "one's interests are not adversely affected to any extent by being publicly branded as a felon so long as he is not named as a defendant for trial."). But the district court failed to recognize this critical fact, much less make any factual finding proving otherwise (none exist). Worse, that Bridgegate has received widespread media coverage enhances, rather than diminishes, the reputational harm that the unindicted co-conspirators will suffer, because it will enhance the publicity the Conspirator Letter will receive. *See Smith*, 776 F.2d at 1107 (accepting the lower court's factual finding that "'[t]he publicity generated from release of the names to the media would probably subject the persons named therein to embarrassment, annoyance, ridicule, scorn, traduction, and loss of reputation in the community.").

Indeed, as shown above, the media is already speculating about the identity of the Bridgegate "accomplices" who "plotted to gridlock traffic."

The only other basis cited by the district court to "different[iate]" *Smith* was the fact that "'the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office.'" (A27-28 (quoting *Smith*, 776 F.2d at 11114).) But *Smith* was also a public-corruption case. And it specifically held—in the sentence immediately following the one quoted by the district court—that the public's interest in the integrity of its public officers was ***not*** a legitimate basis to inflict upon them serious reputational harm. *See Smith*, 776 F.2d at 1114 ("We do not think that the subject matter of the particular information to which access is sought can control the issue before us, however."); *see also id.* (citing prior instances by this Court and the Fifth Circuit holding that even the "extraordinary public interest" in the public corruption revealed through Abscam did not justify ignoring "the interest of protecting the privacy interests of third parties").

The district court's conclusion and analysis simply cannot be squared with *Smith*. Its decision must therefore be reversed.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO GRANT DOE A STAY FOR PURPOSES OF SECURING POST-JUDGMENT RELIEF.

In his May 12, 2016 motion, Doe asked the district court to stay its order to permit him to submit full briefing and argument to demonstrate, in particular, how

the May 10 Order was infected by a clear error of constitutional law. (A43, Doc. # 37-1, at 1.) *See, e.g.*, *Keifer v. Reinhart Foodservices, LLC*, 563 F. App'x 112, 115 (3d Cir. 2014) (recognizing the propriety of a motion to alter or amend a judgment to "'correct a clear error of law or fact or to prevent manifest injustice.'" (quoting *Max's Seafood Cafe v. Quinteros*, 176 F.3d 669, 677 (3d Cir. 1999)); *Sanders v. Downs*, 622 F. App'x 127, 129 (3d Cir. 2015) (citing authority permitting a Rule 60(b)(1) motion to correct legal error while noting the Third Circuit's failure to resolve this issue); *Cox v. Horn*, 757 F.3d 113, 122 (3d Cir. 2014) (explaining that Rule 60(b)(6) represents "'a grand reservoir of equitable power to do justice in a particular case,'" available in extraordinary circumstances, that requires a district court to "consider the full measure of any properly presented facts and circumstances attendant to the movant's request.").

The district court, however, denied this stay motion for one reason: that Doe had failed to show a "likelihood of success on the merits." (A35.) But that ruling was based solely on the court's erroneous conclusions that (i) the Conspirator Letter constituted a "judicial record" that triggered a First Amendment and common-law right of access; (ii) Doe's "privacy" rights were properly accounted for in the Court's May 10th Opinion; and (iii) the Conspirator Letter's release would not violate Doe's right to due process. Because those conclusions are wrong as a matter of law, the court's denial of Doe's stay motion was an abuse of discretion. *See Jackson*, 656

F.3d at 162 (denial of a stay is an abuse of discretion when based on "a serious error of law or a mistake in considering the facts.").

CONCLUSION

For the reasons set forth above, this Court should reverse the May 10 Order and instruct the district court to forbid the public disclosure of the Conspirator Letter.

Dated: May 23, 2016
New York, New York

Respectfully submitted,

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COMBINED CERTIFICATIONS

I, Jenny Kramer, hereby certify as follows:

Bar Membership

I have signed the Brief and am a member in good standing of the Bar of this Court.

Typeface, Type Styles and Type-Volume Limitation

This brief complies with the requirements of Fed. R. App. P. 32(a), because it contains 13,968 words, as determined by Microsoft Office Word 2010, exclusive of title page, tables and certifications. This Brief has been prepared in a proportionally spaced typeface in Times New Roman 14 point font.

Service Upon Counsel or Litigants

On May 23, 2016, a true and correct copy of Appellant John Doe's Brief, Appendices, and this Certificate of Compliance were electronically filed and served via CM/ECF and was served via email and by first class mail or hand-delivery upon the following counsel:

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Dated: May 23, 2016

/s Jenny Kramer
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ADDENDUM A

APPENDIX OF FORMS

(See Rule 58)

Form 1. INDICTMENT FOR MURDER IN THE FIRST DEGREE OF FEDERAL OFFICER.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE

No. _____
(18 U.S.C. §§ 1111, 1114)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe with premeditation and by means of shooting murdered John Roe, who was then an officer of the Federal Bureau of Investigation of the Department of Justice engaged in the performance of his official duties.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 2. INDICTMENT FOR MURDER IN THE FIRST DEGREE ON FEDERAL RESERVATION.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE

No. _____
(18 U.S.C. § 1111)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, and on lands acquired for the use of the United States and under the (exclusive) (concurrent) jurisdiction of the United States, John Doe with premeditation shot and murdered John Roe.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 3. INDICTMENT FOR MAIL FRAUD.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE ET AL.

No. _____
(18 U.S.C. § 1341)

The grand jury charges:

1. Prior to the _____ day of _____, 19__, and continuing to the _____ day of _____, 19__,[1] the defendants John Doe, Richard Roe, John Stiles and Richard Miles devised and intended to devise a scheme and artifice to defraud purchasers of stock of XY Company, a California corporation, and to obtain money and property by means of the following false and fraudulent pretenses, representations and promises, well knowing at the time that the pretenses, representations and promises would be false when made: That the XY Company owned a mine at or near San Bernardino, California; that the mine was in actual operation; that gold ore was being obtained at the mine and sold at a profit; that the current earnings of the company would be sufficient to pay dividends on its stock at the rate of six percent per annum.

2. On the _____ day of _____, 19__, in the _____ District of _____, the defendants for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mrs. Mary Brown, 110 Main Street, Stockton, California, to be sent or delivered by the Post Office Establishment of the United States.

Second Count

1. The Grand Jury realleges all of the allegations of the first count of this indictment, except those contained in the last paragraph thereof.

2. On the ____ day of _____, 19__, in the _____ District of _____, the defendants, for the purpose of executing the aforesaid scheme and artifice and attempting to do so, caused to be placed in an authorized depository for mail matter a letter addressed to Mr. John J. Jones, 220 First Street, Batavia, New York, to be sent or delivered by the Post Office Establishment of the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

[1] Insert last mailing date alleged.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 4. INDICTMENT FOR SABOTAGE.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (18 U.S.C. § 2154)

The grand jury charges:

On or about the _____ day of _____, 19__, within the_____ _____ District of _____, while the United States was at war, John Doe, with reason to believe that his act might injure, interfere with or obstruct the United States in preparing for or carrying on the war, willfully made and caused to be made in a defective manner certain war material consisting of shells, in that he placed and caused to be placed certain material in a cavity of the shells so as to make them appear to be solid metal, whereas in fact the shells were hollow.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 5. INDICTMENT FOR INTERNAL REVENUE VIOLATION.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (26 U.S.C. § 2833)*

The grand jury charges:

On or about the ____ day of _____, 19__, in the _____ District of _____, John Doe carried on the business of a distiller without having given bond as required by law.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

*So in original. Now covered by 26 U.S.C. § 5601(a)(4).

Form 6. INDICTMENT FOR INTERSTATE TRANSPORTATION OF STOLEN MOTOR VEHICLE.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (18 U.S.C. § 2312)

The grand jury charges:

On or about the _____ day of _____, 19__, John Doe transported a stolen motor vehicle from _____, State of _____, to _____, State of _____, in _____ District of _____, and he then knew the motor vehicle to have been stolen.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 7. INDICTMENT FOR RECEIVING STOLEN MOTOR VEHICLE.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (18 U.S.C. § 2313)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe received and concealed a stolen motor vehicle, which was moving as interstate commerce, and he then knew the motor vehicle to have been stolen.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 8. INDICTMENT FOR IMPERSONATION OF FEDERAL OFFICER.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(18 U.S.C. § 912)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe with intent to defraud the United States and Mary Major falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Federal Bureau of Investigation, and falsely took upon himself to act as such, in that he falsely stated that he was a special agent of the Federal Bureau of Investigation engaged in pursuit of a person charged with an offense against the United States.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 9. INDICTMENT FOR OBTAINING MONEY BY IMPERSONATION OF FEDERAL OFFICER.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA
v.
JOHN DOE
No. _____
(18 U.S.C. § 912)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe with intent to defraud the United States and Mary Major, falsely pretended to be an officer and employee acting under the authority of the United States, namely, an agent of the Alcohol Tax Unit of the Department of the Treasury, and in such pretended character demanded and obtained from Mary Major the sum of $100.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 10. INDICTMENT FOR PRESENTING FRAUDULENT CLAIM AGAINST THE UNITED STATES.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (18 U.S.C. § 287)

The grand jury charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe presented to the War Department of the United States for payment a claim against the Government of the United States for having delivered to the Government 100,000 lineal feet of No. 1 white pine lumber, and he then knew the claim to be fraudulent in that he had not delivered the lumber to the Government.

A True Bill.

_____,
Foreman.

_____,
United States Attorney.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

Form 11. INFORMATION FOR FOOD AND DRUG VIOLATION.

In the United States District Court for the _____ District of _____, _____ Division

UNITED STATES OF AMERICA *v.* JOHN DOE	No. _____ (21 U.S.C. §§ 331, 333, 342)

The United States Attorney charges:

On or about the _____ day of _____, 19__, in the _____ District of _____, John Doe unlawfully caused to be introduced into interstate commerce by delivery for shipment from the city [1] of _____, _____ (State), to the city [1] of _____, _____ (State), a consignment of cans containing articles of food which were adulterated in that they consisted in whole or in part of decomposed vegetable substance.

_____,
United States Attorney.

[1] Name of city is stated only to preclude a motion for a bill of particulars and not because such a statement is an essential fact to be alleged.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949.)

ADDENDUM B

affidavit of ..... and ....., duly verified the ..... day of ....., 194.., all in support of said motion, and the defendant ..... having appeared by ..... and ....., and the defendant ..... having appeared by ..... and ....., in support of said motion, and the plaintiff having appeared by ....., United States Attorney for the ..... District of ....., by ....., Assistant United States Attorney, it is

ORDERED, ADJUDGED AND DECREED that the said motion and demand for a bill of particulars in connection with the above described indictment be and the same hereby is in all respects denied (*or*, granted).

....., U. S. D. J.

FORM NO. 77

Bill of Particulars

UNITED STATES DISTRICT COURT
..... DISTRICT OF .....

UNITED STATES OF AMERICA,
Plaintiff,

against

....., Defendant.

Now comes the United States of America, by ....., Special Assistant to the Attorney General, and, in compliance with the order of this Court, files herewith its bill of particulars concerning the indictment in this cause, and, in this connection, says . . .

....., Special Assistant to the Attorney General.

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Email: jkramer@chadbourne.com

Counsel for Intervenor John Doe

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP INC., BLOOMBERG L.P., NBCUNIVERSAL MEDIA, LLC, THE NEW YORK TIMES COMPANY, NEW JERSEY ADVANCED MEDIA, DOW JONES & COMPANY, INC., THE ASSOCIATED PRESS, PUBLIC MEDIA NJ, INC., NEW YORK PUBLIC RADIO, AMERICAN BROADCASTING COMPANIES, INC., PHILADELPHIA MEDIA NETWORK, PBC, and POLITICO, Movants/Appellees, v. UNITED STATES OF AMERICA, WILLIAM E. BARONI, JR., and BRIDGET ANNE KELLY, Respondents, THE PORT AUTHORITY OF NEW YORK AND NEW JERSEY, Intervenor, JOHN DOE, Intervenor/Appellant.	Civil Action No. 16-267 (SDW) **NOTICE OF APPEAL TO THE U.S. COURT OF APPEALS FOR THE THIRD CIRCUIT**

NOTICE is hereby given that Intervenor John Doe appeals to the United States Court of Appeals for the Third Circuit from (i) the Amended Opinion and Amended Order, dated May 10, 2016 (Exhibit A); and (ii) the Letter Order dated May 13, 2016 (Exhibit B).

CHADBOURNE & PARKE LLP

By: /s/ Jenny Kramer
Jenny Kramer
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Attorneys for Intervenor John Doe

Dated: May 13, 2016

EXHIBIT A

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP, ET AL., Movants, v. UNITED STATES OF AMERICA, ET AL., Respondents.	Civil Action No: 16-267(SDW) **AMENDED OPINION** May 10, 2016

WIGENTON, District Judge.

Before this Court are 1) North Jersey Media Group, Inc., Bloomberg L.P., NBCUniversal Media, LLC, The New York Times Company, New Jersey Advanced Media, Dow Jones & Company, Inc., The Associated Press, Public Media NJ, Inc., New York Public Radio, American Broadcasting Companies, Inc., Philadelphia Media Network, PBC, and Politico's (collectively "Media") Motion to Intervene and For Access to Documents in the matter of *United States v. William E. Baroni, Jr. and Bridget Anne Kelly*, Criminal Action No. 15-193 ("Criminal Matter");[1]

[1] This motion was originally filed as part of the Criminal Matter docket, but was then moved to this separate civil docket ("Civil Matter"). For the purposes of this opinion, unless otherwise noted, all references to docket entries refer to the criminal docket.

and 2) The Port Authority of New York and New Jersey's ("Port Authority") Motion to Intervene to oppose the Media's Motion for Access to Documents.

For the reasons stated herein, the Motions to Intervene are GRANTED and the Media's Motion for Access to Documents is GRANTED in part and DENIED in part.

I. BACKGROUND AND PROCEDURAL HISTORY

This Court assumes familiarity with the allegations and procedural history of this case and reviews only the facts relevant to the present motion. On April 23, 2015, Defendants William E. Baroni, former Deputy Executive Director of the Port Authority of New York and New Jersey and Bridget Anne Kelly, former Deputy Chief of Staff for Legislative and Intergovernmental Affairs for the Office of the Governor of New Jersey ("OGNJ") (collectively, "Defendants') were indicted by the United States Attorney's Office for the District of New Jersey ("USAO") on charges of conspiracy, fraud and civil rights violations for their alleged roles in causing lane closures on the George Washington Bridge in September 2013. (Dkt. No. 1, Indictment.) The Indictment also references unnamed and unindicted co-conspirators. (*Id.* at 5-7.)

Discovery in the Criminal Matter is subject to a Protective Order. (Dkt. No. 22.) The Protective Order applies to Confidential Discovery Materials produced by the Government and provides that if those materials are subsequently filed, they shall be filed "provisionally under seal." (*Id.* ¶ 4.) Confidential Discovery Materials are defined as: "(1) Information of a personal nature including family and financial matters; (2) HIPPA information; (3) Personal contact information; (4) Information about governmental and business matters not related to the Indictment; and (5) Search warrant applications and affidavits." (*Id.*) The Protective Order further provides that a party has ten days after such filing to make a formal motion to seal. (*Id.*) "If no motion to seal is filed, or such motion is denied, the materials shall be unsealed." (*Id.*)

In November, 2015, Defendants filed partially redacted motions seeking bills of particulars which requested, among other things, the names of any unindicted co-conspirators. (Dkt. Nos. 42 at 4-10, 43 at 50-60.) Defendants have not formally moved to seal those motions.[2] In response, the Government agreed to "identify any other individual about whom the Government has sufficient evidence to designate as having joined the conspiracy." (Dkt. No. 45 at 31.) On January 11, 2016, the Government submitted a letter with that information to this Court and Defendants ("Conspirator Letter"). The Conspirator Letter was not filed on the docket nor have its contents been made public. Although the Government requested that this Court maintain the letter under seal, it has not made a formal motion to do so.[3]

On January 13, 2016, the Media filed the instant motion, seeking an order permitting them to intervene in the Criminal Matter and granting them access to: 1) the Conspirator Letter; 2) all sealed or redacted materials for which a formal motion to seal has not been properly filed; and 3) any and all materials produced pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady* materials"). (Media Mot. 1-2.) On February 16, 2016, the Government timely filed its opposition and the Port Authority moved to intervene in order to oppose the Media's motion. The Media filed its reply on February 26, 2016. As there is no opposition to either the Media or the Port Authority

[2] Although the parties have not filed formal motions to seal those redacted briefs and exhibits, the Port Authority has. Specifically, the Port Authority filed motions to seal 1) a memorandum by Gibson, Dunn & Crutcher LLP and its cover email attached to Defendant Baroni's moving papers, and 2) an email exchange between Port Authority executives regarding an unrelated civil matter attached to Defendant Kelly's reply brief. (Dkt. Nos. 47, 60, Port Authority Mot. at 2-3.) The Media "believe the documents in both Port Authority motions are not completely unrelated to the allegations in the Indictment" and have requested "an opportunity to be heard more fully if the Court decides to permit intervention." (Media Mot. at 6, n. 2.) However, this Court has since granted the Port Authority's motions. (Dkt. Nos. 78, 82.) The documents covered by those orders shall remain sealed and the Media's request to be heard is denied.

[3] Defendant Baroni objected to both the manner in which the Government submitted the Conspirator Letter and its request to seal its contents. (Dkt. Nos. 61, 68.)

intervening (Gov't. Opp. Br. 8, Media Reply at 1, n. 1, 3.), those motions shall be granted. The only issue before this Court, therefore, is the scope of the materials to which the Media shall have access.

II. DISCUSSION

In order to "promote[] important societal interests including confidence in the judicial system," *In re Newark Morning Ledger Co.*, 260 F.3d 217, 220 (3d Cir. 2001), both the First Amendment and the common law provide the public with a right of access to criminal judicial proceedings and records. *See Globe Newspaper Co. v. Superior Court of Norfolk Cty.*, 457 U.S. 596, 604 (1982) (noting that the "press and general public have a constitutional right of access to criminal trials") (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (stating that "[i]t is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records"); *United States v. Smith*, 776 F.2d 1104, 1107 (3d Cir. 1985) (stating that the "public's right of access to at least some judicial proceedings is now beyond peradventure"). That access is not absolute, however, and requires a balancing between the public's right of access and governmental interests. *See, e.g., United States v. Sealed Search Warrants*, Nos. 99-1096, 99-1097, 99-1098, 1999 WL 1455215, at *4 (D.N.J. Sept. 2, 1999). With that in mind, this Court turns to the Media's requests for access.

A. List of Unindicted Co-Conspirators

The First Amendment and the common law rights of access "extend to bills of particulars." *Smith*, 776 F.2d at 1111. Because the First Amendment is implicated, ensealment of a list of co-conspirators produced in response to a demand for a bill of particulars is only permissible if it "'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that

interest.'" *Id.* at 112 (quoting *Press Enterprise*, 464 U.S. 501, 540 (1984); *Globe Newspaper Co.*, 457 U.S. at 607)).

Here, the Government argues that "the privacy interests of uncharged third parties, who have no opportunity to vindicate themselves at trial" is such a compelling interest. (Gov't Opp. Br. at 8.) To do so, it relies on the Third Circuit's decision in *Smith*, which affirmed the district court's decision to deny a media motion to unseal a list of unindicted co-conspirators, finding that the privacy interests of those named outweighed the public's right to know their identities. *Smith*, 776 F.2d at 1114. That reliance is misplaced.

In finding a compelling privacy interest, the *Smith* court noted that the Government had a "broadly conceptualized list of unindicted co-conspirators," which included not only persons who the Government believed were unindicted co-conspirators, but also those who "*could conceivably be considered* as unindicted co-conspirators." (*Id.* at 1114, 1113 (emphasis in original).) Further, at the time the media sought to intervene, the Government had "not yet reached the point where [the U.S. Attorney] was willing to make a decision on whether to prosecute." *Id.* As Judge Mansmann emphasized in his concurrence, the privacy interests of the unnamed persons in *Smith* were uniquely compelling because the U.S. Attorney had produced "an overbroad bill of particulars" in order to give the government "great latitude in the description of the crime charged." *Id.* at 1116-17 (Mansmann, J., concurring).

The facts in the instant matter are different. The underlying events that gave rise to the Indictment have been extensively covered by the media, such that even persons tangentially involved have already been identified and exposed in the press. There is very little that is private about the lane closures or the lives of the people allegedly connected to them. Further, individuals thus far identified as being involved in the lane closings have been public employees and/or elected

and appointed officials, and anyone named in the Conspirator Letter is likely to have held a similar position. As the *Smith* court noted, "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." *Id.* at 1114; *see also id.* at 1116 (Mansmann, J., concurring) (stating that public employees and elected officials "cannot claim a right of privacy with respect to the manner in which they perform their duties. Where a criminal trial allegedly involves violations of the public trust by government officials, the public's need to monitor closely the judicial proceedings is perforce increased."); *United States v. Kushner*, 349 F. Supp. 2d 892, 906-07 (D.N.J. 2005) (noting that the "public has a strong interest in the use officials make of their positions of public trust"). In addition, the Government has limited the scope of the Conspirator Letter to those individuals for "whom the Government has sufficient evidence to designate as having joined the conspiracy." (Dkt. No. 45 at 31.) Although privacy for third-parties is indeed important, this Court is satisfied that the privacy interests of uncharged third parties are insufficiently compelling to outweigh the public's right of access. Disclosure is appropriate and the Media's motion for access to the list of unindicted co-conspirators is granted.

B. Sealed or Redacted Materials Not Sealed Pursuant to a Formal Motion to Seal

The Media also seeks access to "the Sealed Documents filed in this proceeding pursuant to the Protective Order, which were provisionally sealed and for which no motion for permanent seal has been filed." (Media Br. at 17.) Under the Federal Rules of Criminal Procedure, courts may adopt protective orders for "good cause." FED. R. CRIM. P. 16(d)(1) (recognizing a court's power to "deny, restrict, or defer discovery or inspection"). The Protective Order was entered after extensive negotiation between the parties and is narrowly drawn to protect the privacy of others, to prevent the exposure of governmental and business matters that are unrelated to the charges in the Indictment, and to maintain judicial fairness while avoiding unnecessary doubt under public

scrutiny. To achieve those goals, when Confidential Discovery Materials are filed, they are provisionally sealed. The Protective Order then requires a formal motion to seal to be filed within ten days, or the material is to be unsealed. As neither Defendants nor the Government have moved to seal their filings, the Media argues that those materials must be made available to the public under the order's plain terms.[4]

Before doing so, however, this Court will permit Defendants and the Government to each file a single motion out of time to seal any material previously submitted but not subject to a formal motion to seal.[5] This Court will then review and rule on those motions. If no such motion(s) are made, the currently redacted or provisionally sealed materials will be made public. Going forward, the parties must comply with the express terms of the Protective Order, or move to amend it. The Media's motion for access to sealed or redacted materials which have not been sealed pursuant to a formal motion to seal, therefore, is denied without prejudice.[6]

III. CONCLUSION

[4] The Media requests, in the alternative, that this Court modify or lift the Protective Order. (Media Br. at 1, 20.) This Court is satisfied that the Protective Order is properly drawn and will not exercise its discretion to alter it or lift it at this time.

[5] This is required even if the parties agreed the documents should remain under seal. The Government's position that a formal motion to seal is not necessary where the parties consented to seal certain materials, (Gov't. Opp. at 17, 22), is unavailing. Such an agreement does not abrogate either side's obligation to follow the express terms of the Protective Order, nor does it grant them the authority to expand its reach.

[6] The alleged *Brady* material sought by the Media is contained in the redacted documents the Media seeks to have unsealed. (Media Br. at 19.) The Media argues that the Third Circuit's decision in *United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007) recognizes a global right of access to *Brady* materials and, consequently, for access to these documents in particular. This Court reserves any decision as to whether to unseal the materials in question until after such time as the Defendants and/or Government file, and this Court reviews, the formal motions to seal discussed above. Further, as there been no ruling on whether the documents at issue constitute *Brady* materials, this Court takes no position as to whether *Wecht* mandates access to them, except to note that the *Wecht* court explicitly limited its decision to the facts before it. *Id.* at 211.

For the reasons set forth above, the Media's Motion to Intervene is GRANTED and Motion for Access to Materials is GRANTED in part and DENIED in part. The Port Authority's Motion to Intervene is also GRANTED. An appropriate order follows.

/s/ Susan D. Wigenton

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP, ET AL., Movants, v. UNITED STATES OF AMERICA, ET AL., Respondents.	Civil Action No: 16-267(SDW) **AMENDED ORDER** May 10, 2016

WIGENTON, District Judge.

This matter having come before this Court on 1) Movants North Jersey Media Group, Inc., Bloomberg L.P., NBCUniversal Media, LLC, The New York Times Company, New Jersey Advanced Media, Dow Jones & Company, Inc., The Associated Press, Public Media NJ, Inc., New York Public Radio, American Broadcasting Companies, Inc., Philadelphia Media Network, PBC, and Politico's (collectively "Media") Motion to Intervene and For Access to Documents in the matter of *United States v. William E. Baroni, Jr. and Bridget Anne Kelly*, Criminal Action No. 15-193 ("Criminal Matter"); and 2) The Port Authority of New York and New Jersey's ("Port Authority") Motion to Intervene to oppose the Media's Motion for Access to Documents; and this Court having considered the submissions of the parties; and for good cause shown:

IT IS on this 10th day of May, 2016,

ORDERED that the Media's Motion to Intervene is hereby **GRANTED**; and it is further

ORDERED that the Media's Motion for Access to Documents is **GRANTED** as to the list of unindicted co-conspirators submitted to this Court by the Government on January 11, 2016; and it is further

ORDERED that the Media's Motion for Access to Documents is **DENIED WITHOUT PREJUDICE** as to materials submitted under provisional seal for which no formal motion to seal has been filed; and it is further

ORDERED that the parties to the Criminal Matter have ten (10) days from the date of this Order to file formal out of time motions to seal materials submitted to this Court in redacted form as required by the Protective Order currently in place in the Criminal Matter. Any materials not addressed in a formal motion to seal shall be made public; and it is further

ORDERED that the Port Authority's Motion to Intervene is **GRANTED**; and it is further

ORDERED that this civil matter is **CLOSED**.

SO ORDERED.

/s/ Susan D. Wigenton

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

EXHIBIT B

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

MARTIN LUTHER KING COURTHOUSE
50 WALNUT ST.
NEWARK, NJ 07101
973-645-5903

May 13, 2016

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LETTER ORDER FILED WITH THE CLERK OF THE COURT

Re: North Jersey Media Group, Inc. et al. v. United States of America et al.
Civil Action No. 16-267 (SDW)

Counsel:

Before this Court is Proposed Intervenor John Doe's ("Doe") 1) Emergent Motion to Intervene, to Proceed Anonymously, and to Stay this Court's May 10, 2016 Order directing the Government to make public the Conspirator Letter, and 2) Motion for Stay Pending Appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A). This Court having considered the parties' submissions, and for the reasons discussed below, grants Doe's motions to intervene and to proceed anonymously and denies his motions for a stay and for a stay pending appeal.

DISCUSSION

A. Request for Intervention

Federal Rule of Civil Procedure 24(a) provides for two means of intervention in matters pending in federal court: intervention as of right and permissive intervention. *ACR Energy Partners, LLC v. Polo North Country Club, Inc.*, 309 F.R.D. 191, 192 (D.N.J. 2015); *see generally* FED. R. CIV. P. 24. Intervention as of right exists where: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Mountain Top Condo. Ass'n v. Dave Stabbert Builder, Inc.*, 72 F.3d 361, 365-66 (3d Cir. 1995). Alternatively, a court may "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). Under either path to intervention, the motion to intervene must be timely. *See, e.g. Gen. Refractories Co. v. First State Ins. Co.*, No 04-3509, 2012 WL 262647, at *7 (E.D. Pa. Jan. 30, 2012). Timeliness is "determined by the totality of the circumstances," *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994), and in exercising its discretion to make such a determination, the trial court must consider, "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Mountain Top*, 72 F.3d at 369. In considering the "temporal component to the timeliness inquiry" a court should look to when "an applicant knows, or should know, its rights are directly affected by the litigation . . .." *Alcan*, 25 F.3d at 1182-83.

Looking first to timeliness, this Court is puzzled by Doe's failure to intervene sooner in this matter, given the four-month window between the public filing of the Media's January 13, 2016 motion for access to records and the entry of this Court's May 10th Opinion and Order. In addition to the docketing of the motion, the extensive media coverage was more than sufficient to put him on notice that his interests were at stake. Doe had every opportunity to intervene during the pendency of that motion, yet waited to do so until after the Order was entered. As Doe's moving papers fail to indicate why he did not seek to protect his rights sooner, this Court can only speculate as to the strategy behind such a choice. However, in an abundance of caution, and in light of the interest Doe has in this matter as a person whose name may be released to the public as an unindicted co-conspirator, and noting that his interests were not expressly represented by either Movants or Respondents, this Court grants Doe's motion to intervene pursuant to Federal Rule of Civil Procedure 24.

B. Request to Proceed Anonymously

Federal Rule of Civil Procedure 10(a) states that case captions must "name all the parties." FED. R. CIV. P. 10(a); *see also Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (noting that the rule "requires parties to a lawsuit to identify themselves in their respective pleadings."). However, "courts have recognized that a party may, under limited circumstances, proceed by way of pseudonym . . .." *Doe v. Oshrin*, 299 F.R.D. 100, 102 (D.N.J. 2014). "The decision to allow a plaintiff to proceed anonymously rests within the sound discretion of the court." *Id*. at 103. The Third Circuit requires the trial court to weigh factors that favor anonymity such as:

> (1) the extent to which the identity of the litigant has been kept confidential; (2) bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives, *Megless*, 654 F.3d at 409,

against factors disfavoring anonymity such as:

> The universal level of public interest in access to the identities of litigants; (2) whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Id.

Here, the purpose of Doe's motion is to maintain the anonymity he currently possesses as an unindicted co-conspirator whose name has not been publicly released. Although this Court is unpersuaded that Doe will be wrongfully "brand[ed] . . . as a criminal," (Doe Mot. at 1), requiring him to identify himself defeats the very purpose of his motion to stay this Court's Order directing the Government to disclose the contents of the Conspirator Letter. Given that Doe's identity has been kept confidential until this point, Doe's motion to proceed anonymously is granted.

C. Request for Stay

A party seeking a stay must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

Turning first to his likelihood of success on the merits, Doe contends that 1) the Conspirator Letter is not a bill of particulars or judicial record to which the public has a right of access but rather is a "courtesy copy" of a discovery document sent to the Court, and 2) "identifying him as an unindicted co-conspirator without providing him a forum to challenge that designation would undeniably deprive him of due process." (Doe Mot. at 9.) This Court disagrees.

First, the Conspirator Letter was submitted to this Court and Defendants in response to Defendants' motions for bills of particulars. The Government requested that the document be maintained under seal, pursuant to internal policies of the U.S. Attorney's office "regarding bills of particulars that identify unindicted co-conspirators." (Gov't. Opp'n Br. to Media Mot. Intervene, Dkt. No. 26 at 7-8.) The document was never labeled a courtesy copy, nor has the Government included this Court in other exchanges of mere discovery material. Therefore, this Court deemed the Conspirator Letter a judicial record, and applied the Third Circuit's analysis in *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) to balance the public's right of access to judicial records and proceedings against the Government's interest in maintaining the seal on such documents to determine that the public's compelling interest outweighed the privacy interests of those identified in the letter. (Dkt. Nos. 33 & 34.) Doe does not address the Court's analysis, nor provide a counter-analysis under the *Smith* standard.

Second, Doe fails to show that he has been denied Due Process. Doe cites to no binding authority that stands for the proposition that his Due Process rights will be violated by being identified as an unindicted co-conspirator. Nor does Doe acknowledge that his privacy rights were considered in this Court's May 10th Opinion in its application of the *Smith* balancing test and in *in camera* proceedings before this Court during which time Doe was given the opportunity to be heard orally and in writing. This Court does not take the identification of unindicted co-conspirators lightly, recognizing the possible reputational consequences of such a revelation. However, here, this Court has given Doe notice and an opportunity to be heard and has thoroughly considered his privacy interests in determining that the Conspirator Letter should be made public. Pursuant to the dictates of Due Process, Doe has been heard by this Court.

Because Doe has not shown a likelihood of success on the merits, this Court need not reach the remaining three factors for injunctive relief.[1] Therefore, Doe's request for a stay is denied. As the standard for a stay pending appeal is "essentially the same as that for obtaining a preliminary injunction," *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of HHS*, No. 13-1144, 2013 WL 1277419, at *1 (3d Cir. Feb.8, 2013), this Court also denies Doe's request for a stay pending appeal.

CONCLUSION

For the reasons set forth above,

IT IS on this 13th day of May, 2016,

ORDERED that Doe's Motion to Intervene is **GRANTED**, and it is further

ORDERED that Doe's Motion to Proceed Anonymously is **GRANTED**, and it is further

ORDERED that Doe's Motion for a Stay is **DENIED**, and it is further

ORDERED that Doe's Motion for a Stay Pending Appeal is **DENIED**.

SO ORDERED.

____/s/ Susan D. Wigenton_____

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

[1] This Court notes, however, that Doe has not articulated any irreparable harm other than possible "stigma" in being named an unindicted co-conspirator. (Doe Mot. at 11.) As to a balancing of the equities, they do weigh in Doe's favor because, although the Media has a great interest in knowing the contents of the Conspirator Letter, there is no urgency to their request. Finally, the public interest does not favor issuance of a stay. As noted in this Court's May 10th Opinion and Order, the public has a presumptive right of access to the Conspirator Letter pursuant to the First Amendment. As Doe concedes in his papers, this stay will likely only delay the inevitable, as his identity and alleged role in the lane closures "will be learned at trial." (Doe Mot. at 12.)

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP, et al., Movants, v. UNITED STATES OF AMERICA, et al., Respondents.	Civil Action No. 2:16-cv-267 Hon. Susan B. Wigenton **CERTIFICATE OF SERVICE**

JENNY KRAMER, of full age, hereby certifies and states:

1. I am an attorney at law of the State of New Jersey and counsel with the law firm of Chadbourne & Parke LLP, attorneys for Intervenor, John Doe ("Doe"), in this matter.

2. On this date, I caused to be filed with the Clerk of the Court and to be served on all counsel of record via the Electronic Filing System Doe's Notice of Appeal together with a Certificate of Service.

I certify under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed on May 13, 2016

/s/ Jenny Kramer
JENNY KRAMER

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP, ET AL., Movants, v. UNITED STATES OF AMERICA, ET AL., Respondents.	Civil Action No: 16-267(SDW) **AMENDED ORDER** May 10, 2016

WIGENTON, District Judge.

This matter having come before this Court on 1) Movants North Jersey Media Group, Inc., Bloomberg L.P., NBCUniversal Media, LLC, The New York Times Company, New Jersey Advanced Media, Dow Jones & Company, Inc., The Associated Press, Public Media NJ, Inc., New York Public Radio, American Broadcasting Companies, Inc., Philadelphia Media Network, PBC, and Politico's (collectively "Media") Motion to Intervene and For Access to Documents in the matter of *United States v. William E. Baroni, Jr. and Bridget Anne Kelly*, Criminal Action No. 15-193 ("Criminal Matter"); and 2) The Port Authority of New York and New Jersey's ("Port Authority") Motion to Intervene to oppose the Media's Motion for Access to Documents; and this Court having considered the submissions of the parties; and for good cause shown:

IT IS on this 10th day of May, 2016,

ORDERED that the Media's Motion to Intervene is hereby **GRANTED**; and it is further

ORDERED that the Media's Motion for Access to Documents is **GRANTED** as to the list of unindicted co-conspirators submitted to this Court by the Government on January 11, 2016; and it is further

ORDERED that the Media's Motion for Access to Documents is **DENIED WITHOUT PREJUDICE** as to materials submitted under provisional seal for which no formal motion to seal has been filed; and it is further

ORDERED that the parties to the Criminal Matter have ten (10) days from the date of this Order to file formal out of time motions to seal materials submitted to this Court in redacted form as required by the Protective Order currently in place in the Criminal Matter. Any materials not addressed in a formal motion to seal shall be made public; and it is further

ORDERED that the Port Authority's Motion to Intervene is **GRANTED**; and it is further

ORDERED that this civil matter is **CLOSED**.

SO ORDERED.

/s/ Susan D. Wigenton

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP, ET AL., Movants, v. UNITED STATES OF AMERICA, ET AL., Respondents.	Civil Action No: 16-267(SDW) **AMENDED OPINION** May 10, 2016

WIGENTON, District Judge.

Before this Court are 1) North Jersey Media Group, Inc., Bloomberg L.P., NBCUniversal Media, LLC, The New York Times Company, New Jersey Advanced Media, Dow Jones & Company, Inc., The Associated Press, Public Media NJ, Inc., New York Public Radio, American Broadcasting Companies, Inc., Philadelphia Media Network, PBC, and Politico's (collectively "Media") Motion to Intervene and For Access to Documents in the matter of *United States v. William E. Baroni, Jr. and Bridget Anne Kelly*, Criminal Action No. 15-193 ("Criminal Matter");[1]

[1] This motion was originally filed as part of the Criminal Matter docket, but was then moved to this separate civil docket ("Civil Matter"). For the purposes of this opinion, unless otherwise noted, all references to docket entries refer to the criminal docket.

and 2) The Port Authority of New York and New Jersey's ("Port Authority") Motion to Intervene to oppose the Media's Motion for Access to Documents.

For the reasons stated herein, the Motions to Intervene are GRANTED and the Media's Motion for Access to Documents is GRANTED in part and DENIED in part.

I. BACKGROUND AND PROCEDURAL HISTORY

This Court assumes familiarity with the allegations and procedural history of this case and reviews only the facts relevant to the present motion. On April 23, 2015, Defendants William E. Baroni, former Deputy Executive Director of the Port Authority of New York and New Jersey and Bridget Anne Kelly, former Deputy Chief of Staff for Legislative and Intergovernmental Affairs for the Office of the Governor of New Jersey ("OGNJ") (collectively, "Defendants') were indicted by the United States Attorney's Office for the District of New Jersey ("USAO") on charges of conspiracy, fraud and civil rights violations for their alleged roles in causing lane closures on the George Washington Bridge in September 2013. (Dkt. No. 1, Indictment.) The Indictment also references unnamed and unindicted co-conspirators. (*Id.* at 5-7.)

Discovery in the Criminal Matter is subject to a Protective Order. (Dkt. No. 22.) The Protective Order applies to Confidential Discovery Materials produced by the Government and provides that if those materials are subsequently filed, they shall be filed "provisionally under seal." (*Id.* ¶ 4.) Confidential Discovery Materials are defined as: "(1) Information of a personal nature including family and financial matters; (2) HIPPA information; (3) Personal contact information; (4) Information about governmental and business matters not related to the Indictment; and (5) Search warrant applications and affidavits." (*Id.*) The Protective Order further provides that a party has ten days after such filing to make a formal motion to seal. (*Id.*) "If no motion to seal is filed, or such motion is denied, the materials shall be unsealed." (*Id.*)

In November, 2015, Defendants filed partially redacted motions seeking bills of particulars which requested, among other things, the names of any unindicted co-conspirators. (Dkt. Nos. 42 at 4-10, 43 at 50-60.) Defendants have not formally moved to seal those motions.[2] In response, the Government agreed to "identify any other individual about whom the Government has sufficient evidence to designate as having joined the conspiracy." (Dkt. No. 45 at 31.) On January 11, 2016, the Government submitted a letter with that information to this Court and Defendants ("Conspirator Letter"). The Conspirator Letter was not filed on the docket nor have its contents been made public. Although the Government requested that this Court maintain the letter under seal, it has not made a formal motion to do so.[3]

On January 13, 2016, the Media filed the instant motion, seeking an order permitting them to intervene in the Criminal Matter and granting them access to: 1) the Conspirator Letter; 2) all sealed or redacted materials for which a formal motion to seal has not been properly filed; and 3) any and all materials produced pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) ("*Brady* materials"). (Media Mot. 1-2.) On February 16, 2016, the Government timely filed its opposition and the Port Authority moved to intervene in order to oppose the Media's motion. The Media filed its reply on February 26, 2016. As there is no opposition to either the Media or the Port Authority

[2] Although the parties have not filed formal motions to seal those redacted briefs and exhibits, the Port Authority has. Specifically, the Port Authority filed motions to seal 1) a memorandum by Gibson, Dunn & Crutcher LLP and its cover email attached to Defendant Baroni's moving papers, and 2) an email exchange between Port Authority executives regarding an unrelated civil matter attached to Defendant Kelly's reply brief. (Dkt. Nos. 47, 60, Port Authority Mot. at 2-3.) The Media "believe the documents in both Port Authority motions are not completely unrelated to the allegations in the Indictment" and have requested "an opportunity to be heard more fully if the Court decides to permit intervention." (Media Mot. at 6, n. 2.) However, this Court has since granted the Port Authority's motions. (Dkt. Nos. 78, 82.) The documents covered by those orders shall remain sealed and the Media's request to be heard is denied.

[3] Defendant Baroni objected to both the manner in which the Government submitted the Conspirator Letter and its request to seal its contents. (Dkt. Nos. 61, 68.)

intervening (Gov't. Opp. Br. 8, Media Reply at 1, n. 1, 3.), those motions shall be granted. The only issue before this Court, therefore, is the scope of the materials to which the Media shall have access.

II. DISCUSSION

In order to "promote[] important societal interests including confidence in the judicial system," *In re Newark Morning Ledger Co.*, 260 F.3d 217, 220 (3d Cir. 2001), both the First Amendment and the common law provide the public with a right of access to criminal judicial proceedings and records. *See Globe Newspaper Co. v. Superior Court of Norfolk Cty.*, 457 U.S. 596, 604 (1982) (noting that the "press and general public have a constitutional right of access to criminal trials") (citing *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980)); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001) (stating that "[i]t is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records"); *United States v. Smith*, 776 F.2d 1104, 1107 (3d Cir. 1985) (stating that the "public's right of access to at least some judicial proceedings is now beyond peradventure"). That access is not absolute, however, and requires a balancing between the public's right of access and governmental interests. *See, e.g., United States v. Sealed Search Warrants*, Nos. 99-1096, 99-1097, 99-1098, 1999 WL 1455215, at *4 (D.N.J. Sept. 2, 1999). With that in mind, this Court turns to the Media's requests for access.

A. List of Unindicted Co-Conspirators

The First Amendment and the common law rights of access "extend to bills of particulars." *Smith*, 776 F.2d at 1111. Because the First Amendment is implicated, ensealment of a list of co-conspirators produced in response to a demand for a bill of particulars is only permissible if it "'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that

interest.'" *Id.* at 112 (quoting *Press Enterprise*, 464 U.S. 501, 540 (1984); *Globe Newspaper Co.*, 457 U.S. at 607)).

Here, the Government argues that "the privacy interests of uncharged third parties, who have no opportunity to vindicate themselves at trial" is such a compelling interest. (Gov't Opp. Br. at 8.) To do so, it relies on the Third Circuit's decision in *Smith*, which affirmed the district court's decision to deny a media motion to unseal a list of unindicted co-conspirators, finding that the privacy interests of those named outweighed the public's right to know their identities. *Smith*, 776 F.2d at 1114. That reliance is misplaced.

In finding a compelling privacy interest, the *Smith* court noted that the Government had a "broadly conceptualized list of unindicted co-conspirators," which included not only persons who the Government believed were unindicted co-conspirators, but also those who "*could conceivably be considered* as unindicted co-conspirators." (*Id.* at 1114, 1113 (emphasis in original).) Further, at the time the media sought to intervene, the Government had "not yet reached the point where [the U.S. Attorney] was willing to make a decision on whether to prosecute." *Id.* As Judge Mansmann emphasized in his concurrence, the privacy interests of the unnamed persons in *Smith* were uniquely compelling because the U.S. Attorney had produced "an overbroad bill of particulars" in order to give the government "great latitude in the description of the crime charged." *Id.* at 1116-17 (Mansmann, J., concurring).

The facts in the instant matter are different. The underlying events that gave rise to the Indictment have been extensively covered by the media, such that even persons tangentially involved have already been identified and exposed in the press. There is very little that is private about the lane closures or the lives of the people allegedly connected to them. Further, individuals thus far identified as being involved in the lane closings have been public employees and/or elected

and appointed officials, and anyone named in the Conspirator Letter is likely to have held a similar position. As the *Smith* court noted, "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." *Id.* at 1114; *see also id.* at 1116 (Mansmann, J., concurring) (stating that public employees and elected officials "cannot claim a right of privacy with respect to the manner in which they perform their duties. Where a criminal trial allegedly involves violations of the public trust by government officials, the public's need to monitor closely the judicial proceedings is perforce increased."); *United States v. Kushner*, 349 F. Supp. 2d 892, 906-07 (D.N.J. 2005) (noting that the "public has a strong interest in the use officials make of their positions of public trust"). In addition, the Government has limited the scope of the Conspirator Letter to those individuals for "whom the Government has sufficient evidence to designate as having joined the conspiracy." (Dkt. No. 45 at 31.) Although privacy for third-parties is indeed important, this Court is satisfied that the privacy interests of uncharged third parties are insufficiently compelling to outweigh the public's right of access. Disclosure is appropriate and the Media's motion for access to the list of unindicted co-conspirators is granted.

B. Sealed or Redacted Materials Not Sealed Pursuant to a Formal Motion to Seal

The Media also seeks access to "the Sealed Documents filed in this proceeding pursuant to the Protective Order, which were provisionally sealed and for which no motion for permanent seal has been filed." (Media Br. at 17.) Under the Federal Rules of Criminal Procedure, courts may adopt protective orders for "good cause." FED. R. CRIM. P. 16(d)(1) (recognizing a court's power to "deny, restrict, or defer discovery or inspection"). The Protective Order was entered after extensive negotiation between the parties and is narrowly drawn to protect the privacy of others, to prevent the exposure of governmental and business matters that are unrelated to the charges in the Indictment, and to maintain judicial fairness while avoiding unnecessary doubt under public

scrutiny. To achieve those goals, when Confidential Discovery Materials are filed, they are provisionally sealed. The Protective Order then requires a formal motion to seal to be filed within ten days, or the material is to be unsealed. As neither Defendants nor the Government have moved to seal their filings, the Media argues that those materials must be made available to the public under the order's plain terms.[4]

Before doing so, however, this Court will permit Defendants and the Government to each file a single motion out of time to seal any material previously submitted but not subject to a formal motion to seal.[5] This Court will then review and rule on those motions. If no such motion(s) are made, the currently redacted or provisionally sealed materials will be made public. Going forward, the parties must comply with the express terms of the Protective Order, or move to amend it. The Media's motion for access to sealed or redacted materials which have not been sealed pursuant to a formal motion to seal, therefore, is denied without prejudice.[6]

III. CONCLUSION

[4] The Media requests, in the alternative, that this Court modify or lift the Protective Order. (Media Br. at 1, 20.) This Court is satisfied that the Protective Order is properly drawn and will not exercise its discretion to alter it or lift it at this time.

[5] This is required even if the parties agreed the documents should remain under seal. The Government's position that a formal motion to seal is not necessary where the parties consented to seal certain materials, (Gov't. Opp. at 17, 22), is unavailing. Such an agreement does not abrogate either side's obligation to follow the express terms of the Protective Order, nor does it grant them the authority to expand its reach.

[6] The alleged *Brady* material sought by the Media is contained in the redacted documents the Media seeks to have unsealed. (Media Br. at 19.) The Media argues that the Third Circuit's decision in *United States v. Wecht*, 484 F.3d 194 (3d Cir. 2007) recognizes a global right of access to *Brady* materials and, consequently, for access to these documents in particular. This Court reserves any decision as to whether to unseal the materials in question until after such time as the Defendants and/or Government file, and this Court reviews, the formal motions to seal discussed above. Further, as there been no ruling on whether the documents at issue constitute *Brady* materials, this Court takes no position as to whether *Wecht* mandates access to them, except to note that the *Wecht* court explicitly limited its decision to the facts before it. *Id.* at 211.

For the reasons set forth above, the Media's Motion to Intervene is GRANTED and Motion for Access to Materials is GRANTED in part and DENIED in part. The Port Authority's Motion to Intervene is also GRANTED. An appropriate order follows.

/s/ Susan D. Wigenton

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

NOT FOR PUBLICATION

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CHAMBERS OF
SUSAN D. WIGENTON
UNITED STATES DISTRICT JUDGE

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May 13, 2016

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LETTER ORDER FILED WITH THE CLERK OF THE COURT

Re: North Jersey Media Group, Inc. et al. v. United States of America et al.
Civil Action No. 16-267 (SDW)

Counsel:

Before this Court is Proposed Intervenor John Doe's ("Doe") 1) Emergent Motion to Intervene, to Proceed Anonymously, and to Stay this Court's May 10, 2016 Order directing the Government to make public the Conspirator Letter, and 2) Motion for Stay Pending Appeal pursuant to Federal Rule of Appellate Procedure 8(a)(2)(A). This Court having considered the parties' submissions, and for the reasons discussed below, grants Doe's motions to intervene and to proceed anonymously and denies his motions for a stay and for a stay pending appeal.

DISCUSSION

A. Request for Intervention

Federal Rule of Civil Procedure 24(a) provides for two means of intervention in matters pending in federal court: intervention as of right and permissive intervention. *ACR Energy Partners, LLC v. Polo North Country Club, Inc.*, 309 F.R.D. 191, 192 (D.N.J. 2015); *see generally* FED. R. CIV. P. 24. Intervention as of right exists where: "(1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter, by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation." *Mountain Top Condo. Ass'n v. Dave Stabbert Builder, Inc.*, 72 F.3d 361, 365-66 (3d Cir. 1995). Alternatively, a court may "permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact." FED. R. CIV. P. 24(b)(1). Under either path to intervention, the motion to intervene must be timely. *See, e.g. Gen. Refractories Co. v. First State Ins. Co.*, No 04-3509, 2012 WL 262647, at *7 (E.D. Pa. Jan. 30, 2012). Timeliness is "determined by the totality of the circumstances," *United States v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir. 1994), and in exercising its discretion to make such a determination, the trial court must consider, "(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Mountain Top*, 72 F.3d at 369. In considering the "temporal component to the timeliness inquiry" a court should look to when "an applicant knows, or should know, its rights are directly affected by the litigation . . .." *Alcan*, 25 F.3d at 1182-83.

Looking first to timeliness, this Court is puzzled by Doe's failure to intervene sooner in this matter, given the four-month window between the public filing of the Media's January 13, 2016 motion for access to records and the entry of this Court's May 10th Opinion and Order. In addition to the docketing of the motion, the extensive media coverage was more than sufficient to put him on notice that his interests were at stake. Doe had every opportunity to intervene during the pendency of that motion, yet waited to do so until after the Order was entered. As Doe's moving papers fail to indicate why he did not seek to protect his rights sooner, this Court can only speculate as to the strategy behind such a choice. However, in an abundance of caution, and in light of the interest Doe has in this matter as a person whose name may be released to the public as an unindicted co-conspirator, and noting that his interests were not expressly represented by either Movants or Respondents, this Court grants Doe's motion to intervene pursuant to Federal Rule of Civil Procedure 24.

B. Request to Proceed Anonymously

Federal Rule of Civil Procedure 10(a) states that case captions must "name all the parties." FED. R. CIV. P. 10(a); *see also Doe v. Megless*, 654 F.3d 404, 408 (3d Cir. 2011) (noting that the rule "requires parties to a lawsuit to identify themselves in their respective pleadings."). However, "courts have recognized that a party may, under limited circumstances, proceed by way of pseudonym . . .." *Doe v. Oshrin*, 299 F.R.D. 100, 102 (D.N.J. 2014). "The decision to allow a plaintiff to proceed anonymously rests within the sound discretion of the court." *Id*. at 103. The Third Circuit requires the trial court to weigh factors that favor anonymity such as:

> (1) the extent to which the identity of the litigant has been kept confidential; (2) bases upon which disclosure is feared or sought to be avoided, and the substantiality of these bases; (3) the magnitude of the public interest in maintaining the confidentiality of the litigant's identity; (4) whether, because of the purely legal nature of the issues presented or otherwise, there is an atypically weak public interest in knowing the litigant's identities; (5) the undesirability of an outcome adverse to the pseudonymous party and attributable to his refusal to pursue the case at the price of being publicly identified; and (6) whether the party seeking to sue pseudonymously has illegitimate ulterior motives, *Megless*, 654 F.3d at 409,

against factors disfavoring anonymity such as:

> The universal level of public interest in access to the identities of litigants; (2) whether, because of the subject matter of this litigation, the status of the litigant as a public figure, or otherwise, there is a particularly strong interest in knowing the litigant's identities, beyond the public's interest which is normally obtained; and (3) whether the opposition to pseudonym by counsel, the public, or the press is illegitimately motivated.

Id.

Here, the purpose of Doe's motion is to maintain the anonymity he currently possesses as an unindicted co-conspirator whose name has not been publicly released. Although this Court is unpersuaded that Doe will be wrongfully "brand[ed] . . . as a criminal," (Doe Mot. at 1), requiring him to identify himself defeats the very purpose of his motion to stay this Court's Order directing the Government to disclose the contents of the Conspirator Letter. Given that Doe's identity has been kept confidential until this point, Doe's motion to proceed anonymously is granted.

C. Request for Stay

A party seeking a stay must show: "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharms., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004).

Turning first to his likelihood of success on the merits, Doe contends that 1) the Conspirator Letter is not a bill of particulars or judicial record to which the public has a right of access but rather is a "courtesy copy" of a discovery document sent to the Court, and 2) "identifying him as an unindicted co-conspirator without providing him a forum to challenge that designation would undeniably deprive him of due process." (Doe Mot. at 9.) This Court disagrees.

First, the Conspirator Letter was submitted to this Court and Defendants in response to Defendants' motions for bills of particulars. The Government requested that the document be maintained under seal, pursuant to internal policies of the U.S. Attorney's office "regarding bills of particulars that identify unindicted co-conspirators." (Gov't. Opp'n Br. to Media Mot. Intervene, Dkt. No. 26 at 7-8.) The document was never labeled a courtesy copy, nor has the Government included this Court in other exchanges of mere discovery material. Therefore, this Court deemed the Conspirator Letter a judicial record, and applied the Third Circuit's analysis in *United States v. Smith*, 776 F.2d 1104 (3d Cir. 1985) to balance the public's right of access to judicial records and proceedings against the Government's interest in maintaining the seal on such documents to determine that the public's compelling interest outweighed the privacy interests of those identified in the letter. (Dkt. Nos. 33 & 34.) Doe does not address the Court's analysis, nor provide a counter-analysis under the *Smith* standard.

Second, Doe fails to show that he has been denied Due Process. Doe cites to no binding authority that stands for the proposition that his Due Process rights will be violated by being identified as an unindicted co-conspirator. Nor does Doe acknowledge that his privacy rights were considered in this Court's May 10th Opinion in its application of the *Smith* balancing test and in *in camera* proceedings before this Court during which time Doe was given the opportunity to be heard orally and in writing. This Court does not take the identification of unindicted co-conspirators lightly, recognizing the possible reputational consequences of such a revelation. However, here, this Court has given Doe notice and an opportunity to be heard and has thoroughly considered his privacy interests in determining that the Conspirator Letter should be made public. Pursuant to the dictates of Due Process, Doe has been heard by this Court.

Because Doe has not shown a likelihood of success on the merits, this Court need not reach the remaining three factors for injunctive relief.[1] Therefore, Doe's request for a stay is denied. As the standard for a stay pending appeal is "essentially the same as that for obtaining a preliminary injunction," *Conestoga Wood Specialties Corp. v. Sec'y of U.S. Dep't of HHS*, No. 13-1144, 2013 WL 1277419, at *1 (3d Cir. Feb.8, 2013), this Court also denies Doe's request for a stay pending appeal.

CONCLUSION

For the reasons set forth above,

IT IS on this 13th day of May, 2016,

ORDERED that Doe's Motion to Intervene is **GRANTED**, and it is further

ORDERED that Doe's Motion to Proceed Anonymously is **GRANTED**, and it is further

ORDERED that Doe's Motion for a Stay is **DENIED**, and it is further

ORDERED that Doe's Motion for a Stay Pending Appeal is **DENIED**.

SO ORDERED.

____/s/ Susan D. Wigenton_____

SUSAN D. WIGENTON, U.S.D.J

Orig: Clerk
cc: Parties

[1] This Court notes, however, that Doe has not articulated any irreparable harm other than possible "stigma" in being named an unindicted co-conspirator. (Doe Mot. at 11.) As to a balancing of the equities, they do weigh in Doe's favor because, although the Media has a great interest in knowing the contents of the Conspirator Letter, there is no urgency to their request. Finally, the public interest does not favor issuance of a stay. As noted in this Court's May 10th Opinion and Order, the public has a presumptive right of access to the Conspirator Letter pursuant to the First Amendment. As Doe concedes in his papers, this stay will likely only delay the inevitable, as his identity and alleged role in the lane closures "will be learned at trial." (Doe Mot. at 12.)