MARC
ATTORNEYS AT LAW
A PROFESSIONAL CORPORATION
McCUSKER • ANSELMI
ROSEN • CARVELLI
210 Park Avenue, Suite 301
Florham Park, New Jersey 07932
Tel: 973.635.6300 • Fax: 973.635.6363
www.marc-law.com

BRUCE S. ROSEN
Director
Direct: 973.457.0123
Fax: 973.457.0276
brosen@marc-law.com

November 3, 2016

VIA ECF

The Hon. Susan D. Wigenton, U.S.D.J.
United States District Court, District of New Jersey
50 Walnut Street
Newark, NJ 07102

Re: United States of America v. Baroni, et al.
Docket No.: 2:15-cr-0193

North Jersey Media Group Inc., et al. v. United States of America, et al.
Docket No.: 2:16-cv-0267

Dear Judge Wigenton:

This firm represents Media Intervenors in the above-referenced matters. Media Intervenors respectfully submit this letter-motion in lieu of a more formal application: (1) seeking First Amendment and common law access to all documents and materials filed in redacted form on or about November 3, 2016 by Defendants Baroni and Kelly in support of their motions for a mistrial in the criminal proceedings (15-cr-193, ECF Doc 268) (the "Mistrial Motion") (2) opposing the Government's request to seal the letter it sent to the Court directly on November 3, 2016. (15-cr-193, ECF Doc 269), (3) providing access to transcripts of any sealed proceeding as soon as practicable and (4) requesting that the Court not exclude the public and media from access to proceedings without articulating the compelling need for such exclusion, and that the exclusion be limited only to matters with such a compelling need.

As we have stated before, this is one of the highest-profile trials of public officials in state history and it continues to draw national attention. It is essential to public confidence in the integrity of the judicial system that the public be able to fully understand and discuss the issues at stake as to conduct of this trial. This prosecution and the issues involving allegations of public corruption are at the very core of the First Amendment and the public is entitled to be fully informed. Again, while we acknowledge the Court may need to consider fair trial issues, there can be no dispute that the Court is also constitutionally obligated to keep proceedings transparent and open to public view or provide specific reasons for sealing documents or the courtroom that pass constitutional muster.

1. The Public Has a First Amendment and Common Law Right to Defendants' Motion

It is well settled that the public has both a First Amendment and common law right of access to judicial proceedings and records. See Richmond Newspapers v. Virginia, 448 U.S. 555 (1980); Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596 (1982); In re Cendant, 260 F.3d at 192 (3d Cir. 2001). "The right of the public to inspect and copy judicial records antedates the Constitution." Bank of Am. Nat. Trust & Sav. Ass'n v. Hotel Rittenhouse Associates, 800 F.2d 339, 343 (3d Cir. 1986) (citing United States v. Criden, 648 F.2d 814, 819 (3d Cir. 1981) ("Criden I")). This right provides the public presumptive access to a wide variety of judicial records and documents. See Littlejohn v. Bic Corp., 851 F.2d 673, 678 (3d Cir. 1988); Leucadia Inc. v. Applied Extrusion Techs, 998 F.2d 157, 161 (3d Cir. 1993); see also United States v. Martin, 746 F.2d 964, 968 (3d Cir. 1984) ("The common law right of access is not limited to evidence, but rather encompasses all judicial records and documents. It includes transcripts, evidence, pleadings, and other materials submitted by litigants.") (internal quotations and citations omitted).

The Third Circuit has held that open proceedings are "mandated by at least six societal interests": (1) promotion of "informed discussion of governmental affairs by providing the public with a more complete understanding of the judicial system"; (2) "assurance that the proceedings [are] conducted fairly to all concerned"; (3) "significant community therapeutic value"; (4) "a check on corrupt practices by exposing the judicial process to public scrutiny, thus discouraging decisions based on secret bias or partiality"; (5) enhancement of "the performance of all involved"; and (6) "discourage[ment] of perjury." United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) ("Criden II").

Closure of criminal case filings to which there is a presumptive right of access is permitted only under rare circumstances when there is "good cause shown that outweighs the value of the openness." Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 509 (1984); United States v. Wecht, 484 F.3d 194, 211 (3d Cir. 2007). A showing of good cause sufficient to restrict public access to records and proceedings "is established on a showing that disclosure will work a clearly defined and serious injury to the party seeking closure. The injury must be shown with specificity." Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786 (3d Cir. 1994) (quoting Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984)). [1]

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[1] Even a properly entered sealing order "must be lifted at the earliest possible moment when the reasons for sealing no longer obtain." Cendant, 260 F.3d at 196. District Courts will not hesitate to vacate or modify protective orders that can no longer be justified. See, e.g., Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 500 (E.D. Pa. 2004) (vacating protective order *sua sponte* after determining that objecting non-party's generalized fear of diminished reputation resulting from "guilt by association" with defendant in accounting fraud matter was insufficient to establish good cause for continued sealing); Charlie H. v. Whitman, 213 F.R.D. 240, 248 (D.N.J. 2003) (partially granting motion of media intervenors to lift protective order but maintaining redaction of certain identifying information contained in records of Division of Youth and Family Services); Jackson v. Delaware River & Bay Auth., 224 F. Supp. 2d 834, 840 (D.N.J. 2002) (granting motion of media intervenor for access to previously sealed settlement agreement where reason for initial sealing – the

Moreover, where, as here, "the common law right of access is buttressed by the significant interest of the public in observation, participation, and comment on the trial events, . . . the existence of a presumption of release is undeniable." Criden I, 648 F.2d at 823. The public interest is even stronger in cases (such as this one) that involve the functioning of government and the conduct of public officials. The Supreme Court has held that there is a "paramount public interest in a free flow of information to the people concerning public officials, their servants." Garrison v. Louisiana, 379 U.S. 64, 77 (1964). Moreover, the Third Circuit noted more than three decades ago that "the public has a lively interest in considering the relationships formed by elected officials." Medico v. Time, Inc., 643 F.2d 134, 142 (3d Cir.) cert. denied, 454 U.S. 836 (1981). "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. Smith, 776 F.2d 1104, 1116 (3d Cir. 1985) (Mansmann, J., concurring).

The determination that documents or materials are within the common law right of access "does not end the inquiry." Leucadia, 998 F.2d at 165. This is because "[a]lthough 'the right of access is firmly entrenched," it is "not absolute.'" Id. (quoting Bank of Am. 800 F.2d at 344); Cendant, 260 F.3d at 194 (acknowledging that "[t]he presumption of public access may be rebutted."). Faced with a request to seal materials to which the right to access attaches, a court must conduct a balancing inquiry. "'[T]he strong common law presumption of access must be balanced against the factors militating against access.'" Leucadia, 998 F.2d at 165 (quoting Bank of Am., 800 F.2d at 344). The burden rests with the party seeking closure, who must show that: (1) "the material is the kind of information that courts will protect" and (2) "disclosure will work a clearly defined and serious injury to the party seeking closure." Cendant, 260 F.3d at 194. In order to meet this burden, "specificity is essential" and "[b]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." Id. Closure is only appropriate where the party seeking closure has demonstrated that "the interest in secrecy outweighs the presumption." Id. (quoting Leucadia, 998 F.2d at 165).

Defendants, in an egregious decision to ignore the cases cited above, filed the brief in support of the Mistrial Motion with every word of argument redacted and without any accompanying sealing motion, providing no public explanation or reasoning for such redactions. At the very least, this Court should examine the redacted portions of the Mistrial Motion and determine the appropriate scope, in light of the extensive revelations thus far and the important public concerns reflected by these documents, of the public's First Amendment and common law rights of access.

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fact that public entity party to the agreement had not yet obtained authority to execute it – no longer existed).

2. The Government's Motion to Seal Should be Denied

The Government claims that its November 3 letter addresses matters that occurred in a sealed courtroom and that disclosure would "complicate the Court's efforts to assure a fair trial," and provided a rationale that "in an abundance of caution, the filing should be maintained under seal." Declaration of AUSA David W. Feder (15-cr-193, ECF Doc 269-1), ¶ 2. This purported "abundance of caution" ignores the presumption of access (instead asking the Court to presume closure) and hardly meets the standard for denying access articulated by the Supreme Court or the Third Circuit. In fact, this type of assertion is exactly the"[b]road allegations of harm, bereft of specific examples or articulated reasoning" that the Cendant Court warned of. The Court should review this document and determine whether such harm exists. Even if the Court were to find certain passages problematic, it should be redacted so that only passages that can be shown to cause specific harm are temporarily sealed. In the end, all of these documents should be unsealed regardless of these motions, as soon as whatever real harm that the Court might determine would occur, dissipates.

Conclusion

For the foregoing reasons, Media Intervenors, on behalf of the public, respectfully request that the Court grant this motion for common law and First Amendment access to all documents filed sealed or in redacted form by Defendants Baroni and Kelly and the Government on November 3, 2016, grant access transcripts of all sealed proceedings as soon as practicable, deny the Government's request to seal their November 3 letter, that the Court not exclude the public and media from access to proceedings without articulating the compelling need for such exclusion, and that the exclusion be limited only to matters with such a compelling need.

Respectfully submitted,

/s/ Bruce S. Rosen
Bruce S. Rosen
Zachary D. Wellbrock

cc: All counsel of record (via ECF) in 2:16-cv-0267