UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

NORTH JERSEY MEDIA GROUP INC., ET AL., Movants, v. UNITED STATES OF AMERICA, ET AL., Respondents.	Civil Action No.: 2:16-cv-00267-SDW

MEDIA INTERVENORS' REPLY BRIEF IN FURTHER SUPPORT OF THEIR MOTION TO INTERVENE AND FOR OTHER CERTAIN RELIEF

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PRELIMINARY STATEMENT

The Government's opposition[1] to Proposed Media Intervenors' motion disregards established law in favor of a paternalistic suggestion that the Government knows best when the public should have access to information to which it is constitutionally entitled. The Government cannot have it both ways; it cannot issue a 37-page, 8-count indictment and hold an extensive press conference referencing substantial abuses by "public servants," but then arbitrarily declare that the public's First Amendment right to access further information is "unwarranted," or may exist at some time in the future, without providing a compelling government interest as to why that information should not be made public now.[2]

The Government's dubious argument that it hid its filing of the list of unindicted coconspirators through a non-ECF transmittal to the Court and Defendants as a means of "expeditiously providing" that information, rather than using the well-established filing and sealing procedures in this District, is emblematic of its lack of transparency. Particularly given the Government's position that the people of Fort Lee were "callously victimized" and "the public has a right to expect better," there is no good reason, let alone a compelling reason, for it to shield the list of unindicted coconspirators from public access.

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[1] The Port Authority of New York and New Jersey ("PA") also submitted a brief in opposition to the Media Intervenors' Motion to Intervene and for Certain Relief. PA's opposition brief requests that this Court deny Media Intervenors' motion to modify the Protective Order entered in the criminal docket in 2:15-cr-193 (U.S. v. Baroni and Kelly) to access documents that are the subject of this Court's February 5, 2016 and February 10, 2016 Orders in the criminal docket sealing those documents. Media Intervenors will rely upon the arguments set forth herein in opposition to the PA's motion, though Media Intervenors do not oppose PA's request to intervene.

[2] As this Court is aware, the Motion to Intervene and for Certain Relief was originally filed as part of the criminal docket in 2:15-cr-193 (U.S. v. Baroni and Kelly). It was then transferred by the Clerk to a newly created civil action, 2:16-cv-267 (North Jersey Media Group v. U.S.). All of the references herein, with the exception of briefing in the civil action, refer to items on the criminal docket.

The Government claims that strong privacy interests overcome a presumption of First Amendment access to the list, yet completely fail to articulate that interest with any specificity. For example, they could have explained why these particular privacy interests exist for these particular individuals. Instead, they attempt to twist the law by asserting a ***presumption*** of privacy based upon an erroneous interpretation of the controlling case in this circuit. Moreover, the Government's argument claiming some vague privacy interest on behalf of the unindicted coconspirators -- likely all public employees or public officials -- is belied by its position that the information could be revealed at trial if the Court were to make a determination as to the admissibility of a coconspirator's statement, for example. Essentially, it comes down to the U.S. Attorney's Office demanding that it be allowed to determine the context and timing of the release, because again, it knows best. But that is not Third Circuit law.

Not satisfied with rewriting the substantive law governing the public's presumptive First Amendment right of access to the Government's responses to a request for a bill of particulars -- which is exactly what the list of unindicted coconspirators is -- the Government then attempts to rewrite the law of public access to add "relevancy" or "adjudicatory significance" as a criteria for release. Noticeably, however, the Government cites absolutely no authority for this argument, for there is none.

Finally, the Government rewrites the procedural history of the criminal matter when it arbitrarily declares it does not have to follow the specific requirements of the limited Protective Order in place, which provides the Parties with ten days to move to seal documents that it or defense counsel filed under provisional seal. Instead, the Government argues it can instead enter into so-called informal agreements with Defendants to maintain documents under seal. However, the Government has apparently overlooked or forgotten that this Court specifically rejected a

previous protective order that would have provided the type of informal latitude the Government now claims exists. The fact of the matter is that no motions to seal (as required by the Protective Order) were ever made before Media Intervenors requested this information. ***And no such motions have been made since.*** The Government should not be allowed to rewrite the Protective Orders' terms, and these documents should be immediately unsealed.

For the reasons set forth within and in Media Intervenors' moving brief, this Court should grant Media Intervenors' requests in their entirety.

LEGAL ARGUMENT

I. THE GOVERNMENT CONCEDES THAT PROPOSED INTERVENORS SHOULD BE PERMITTED TO INTERVENE.

In its opposition brief ("Gov. Br."), the Government agreed with Media Intervenors' arguments that they have standing to intervene and challenge the sealing of judicial records, in order to protect the public's constitutional and common law access rights (see, e.g., United States v. Cianfrani, 573 F.2d 835 (3d Cir.1978)). Moreover the Government agreed that this standing to intervene should continue through the end of this action.

Accordingly, Media Intervenors respectfully request that this Court grant their motion to intervene for the duration of U.S. v. Baroni and Kelly.

II. THE LIST OF UNINDICTED CONCONSPIRATORS AND OTHER JUDICIAL RECORDS ARE SUBJECT TO THE FIRST AMENDMENT OR COMMON LAW RIGHTS OF ACCESS AND THESE DOCUMENTS NEED NOT HAVE "ADJUDICATORY SIGNIFICANCE" OR BE "PART OF A REQUEST FOR ADJUDICATION."

The Government -- implicitly recognizing that there is no compelling government interest or interest in privacy sufficient to rebut the public's presumptive right of access -- erroneously attempts to block the requested judicial records from access on the grounds that they allegedly

have no "adjudicatory significance" (see Gov. Br., pg. 8) and are not "part of a request for adjudication" (see id., pg. 17). This is not the law.

In the Third Circuit, "[w]hether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record' … The status of a document as a 'judicial record,' in turn, depends on ***whether a document has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings.***" In re Cendant Corp., 260 F.3d 183, 192 (3d Cir. 2001) (citation omitted) (emphasis added). No matter how the Government might wish it, a document is subject to the right of access where it has been ***filed*** with the court -- which is exactly what the Government did when it sent the list of unindicted coconspirators by email directly to chambers in response to Defendants' request for a bill of particulars. There is no additional requirement that the document be incorporated or integrated into a district court's adjudicatory proceedings. See Leucadia, Inc. v. Applied Extrusion Tech. Inc., 998 F.2d 157, 161-62 (1993) ("***filing*** of a document gives rise to a presumptive right of public access") (emphasis added); see also Enprotech Corp. v. Renda, 983 F.2d 17, 20 (3d Cir. 1993).

Instead, the "incorporated or integrated" language in these cases is intended as an ***alternative*** mechanism whereby a document not filed with the court may nonetheless be deemed a judicial record because it was otherwise interpreted or enforced by the court. See In re Mid-Valley, Inc., 288 F. App'x 784, 785-86 (3d Cir. 2008) (affirming district court's determination that document not filed with the court ***nor*** incorporated or integrated into the adjudicatory proceedings was not a judicial record); see also In re Cendant Corp., 260 F.3d at 192 ("a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document").

While some other judicial circuits have defined judicial records as those that are used or relevant to a district court's adjudicatory proceedings, the Third Circuit has instead steadfastly defined judicial records much more broadly. The N.J. Supreme Court explains the state of the federal law as such:

> [S]ome tension exists among the circuits with respect to whether the presumption of access attaches to all documents filed with the court, or only those that are used or considered relevant. … Recently, the United States Court of Appeals for the Third Circuit reaffirmed its broadly defined right-of-public-access to judicial records in Leucadia, Inc. v. Applied Extrusion Tech. Inc., 998 F.2d 157, 164 (1993). The Court found a "presumptive right of public access to pretrial motions of nondiscovery nature, whether preliminary or dispositive, and the material filed in connection therewith." Ibid. Under that holding, the mere ***filing*** of the documents or materials with the court causes the common-law presumption of public access to attach.

Hammock by Hammock v. Hoffmann-LaRoche, Inc., 142 N.J. 356, 373 (1995) (emphasis in original).

Indeed, the Second Circuit has recognized the Third Circuit's broad definition of judicial documents as those "physically on file with the court" and contrasted that standard with the First Circuit's definition requiring that the documents "have a role in the adjudication process". See United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995). While the Government's argument may gain traction in another judicial circuit, it should not do so here, where the law is settled: "Filing clearly establishes the status of a document as a judicial record." See United States v. Chang, 47 F. App'x 119, 122 (3d Cir. 2002) (citation omitted) (permitting public access to the U.S. Sentencing Guidelines § 5K1.1 letter motion by the Government in the case of a defendant linked to then-U.S. Sen. Robert Torricelli).

Moreover, even if the Government's argument somehow applied in the Third Circuit -- which it does not -- documents filed under seal are considered to be "incorporated or integrated" into a district court's adjudicatory proceedings and are, therefore, judicial records. See U.S. v.

Kushner, 349 F.Supp.2d 892, 902 (D.N.J. 2005) ("A document becomes integrated into court proceedings when, for example, it is 'placed under seal, interpreted or enforced' by the Court.") (quoting Pansy v. Borough of Stroudsburg, 23 F.3d 772, 781 (3d Cir. 1994)); see also United States v. New Jersey, No. CIV. 10-91 KSH MAS, 2012 WL 3265905, at *27 (D.N.J. June 12, 2012) aff'd sub nom. United States v. New Jersey, 522 F. App'x 167 (3d Cir. 2013) (quoting In re Cendant Corp., 260 F.3d at 192) ("A document is a 'judicial record' if it 'has been filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings,' such as if a court 'interprets or enforces the terms of that document, or requires that it be submitted to the court under seal.'").

Thus, the Government's attempt to strip the requested documents of their status as "judicial records" must be wholly rejected by this Court. The list of unindicted coconspirators and other documents sought by Media Intervenors are judicial records subject to the public right of access ***now***, not only at trial or at another point in this proceeding when the Government unilaterally deems them to have "adjudicatory significance."

III. THE GOVERNMENT HAS FAILED TO REBUT THE PUBLIC'S PRESUMPTIVE FIRST AMENDMENT ENTITLEMENT TO THE LIST OF UNINDICTED COCONSPIRATORS.

The Government concedes that the public has a presumptive right of access to the list of unindicted coconspirators. As set forth at length in Media Intervenors' moving brief, in order to sustain the ensealment of a list of unindicted coconspirators, the Government must establish a "compelling government interest" that outweighs the First Amendment right of access, as well as establish that any limitations on the First Amendment right of access are narrowly tailored. See United States v. Antar, 38 F.3d 1348, 1359 (3d Cir. 1994). While the Government essentially ignores this requirement, the U.S. Supreme Court has repeatedly stated that the circumstances

where the Government's interest outweighs the First Amendment right of access "must be rare" (see Press-Enter. Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501, 509 (1984)) and the Government's "justification in denying access must be a weighty one" (see Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 606 (1982)). See also In re Cendant Corp., 360 F.3d at 198 ("The First Amendment right of access requires a much higher showing … before a judicial proceeding can be sealed.").

Here, the only government interests set forth are generalized reputational and privacy interests of those individuals named on the list of unindicted coconspirators (which do not outweigh the public's First Amendment right of access), individuals whom the Government does not deny include public figures. See Gov. Br., pg. 12. Tellingly, however, the Government fails to set forth specific and particularized reasons why sealing is essential to protect these individuals' reputational and privacy interests from substantial impairment. The party opposing access must place a "record before the trial court" that demonstrates "'an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" See Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1071 (3d Cir. 1984) (quoting Press-Enter Co., 464 U.S. at 510).

Such specificity is necessary before a court could issue findings that closure is narrowly tailored to serve that interest. See Capital Cities Media, Inc. v. Chester, 797 F.2d 1164, 1189 (3d Cir. 1986) (citing Press-Enter Co., 464 U.S. at 510). These findings must be "particularized" in the record and demonstrate that "absent limited restrictions on the right of access, that other interest would be substantially impaired." United States v. Wecht, 537 F.3d 222, 233, 235 (3d Cir. 2008) ("[t]he interest is to be articulated along with findings specific enough that a reviewing court can

determine whether the closure order was properly entered") (internal citation and quotation omitted).

Particularity is also essential under the less stringent common law right of access and no objection to the disclosure of materials to which a presumptive right of access exists may be sustained absent such particularity. See In re Cendant Corp., 260 F.3d at 194. "[T]he party seeking the closure of a hearing or the sealing of part of the judicial record 'bears the burden of showing that the material is the kind of information that courts will protect' and that 'disclosure will work a ***clearly defined and serious injury to the party seeking closure***.' In delineating the injury to be prevented, specificity is essential. Broad allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." Id. (quoting Miller v. Indiana Hosp., 16 F.3d 549 (3d Cir. 1994) and Publicker, 733 F.2d at 1071) (emphasis added).

Here, the Government ignores the existence of these cases and this high threshold, asking this Court to simply accept their representation that the public's constitutional rights must yield to these individuals' unspecified privacy interests. This is contrary to both law and common sense.

The Government first focuses on internal Department of Justice guidance set forth in the U.S. Attorneys' Manual -- a manual that explicitly admits that "[i]t is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal" (see United States Department of Justice, U.S. Attorney's Office, U.S. Attorneys' Manual Section 1-1.100, United States Department of Justice, May 2009, http://www.justice.gov/usam/usam-1-1000-introduction). It then turns to the outcome, rather than the Court's enunciation of the law in U.S. v. Smith, 776 F.2d 1104, 1112 (3d Cir. 1985) ("Smith I").

Smith I determined that there was a First Amendment right of access to the list , but then decided to seal the list of unindicted coconspirators based on a unique set of facts, specifically the Government's inappropriate inclusion on that list of any individuals who "could conceivably be considered" unindicted coconspirators, as well as the fact that the list was formed on the basis of an investigation that had not yet reached the point where the Government was willing to make a decision on whether to prosecute. Id. at 1113. Given these facts, the Smith I Court concluded that it was "virtually certain that serious injury will be inflicted upon innocent individuals". Id. at 1114.

Here, however, the Government has clearly stated that the list of unindicted coconspirators here includes individuals "about whom the Government has sufficient evidence to designate as having joined the conspiracy". See Document 45 on Criminal ECF Docket, pg. 35. This prior statement not only establishes that the list of unindicted coconspirators here is nothing like the situation in Smith I, but also belies the Government's attempt now, in its opposition brief, to convince this Court to the contrary. See Gov. Br., pgs. 10-11. The list here is not "broadly conceptualized" as in Smith I, but instead was made -- as conceded by the Government -- "only upon careful consideration of the facts." See Gov. Br., pg. 10.[3]

It is apparent the list here is far more limited than in Smith I and likely is composed of public officials and/or employees. Well-established U.S. Supreme Court case law strongly militates against providing special dispensations for the reputations of such public individuals. "Our prior cases have firmly established … that injury to official reputation is an insufficient

[3] The Government attempts to parse the severe criticism leveled at the U.S. Attorney by the Smith I Court for over-including individuals on the list of unindicted conspirators by stating disingenuously that because the Smith I Court didn't require that U.S. Attorney to go through that extensive list and pick out those individuals who ***really*** were unindicted coconspirators, the Smith I Court essentially ruled that it did not matter who was on the list -- it just should not be turned over. See Gov. Br. at 14.

reason 'for repressing speech that would otherwise be free.'" Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964)). See Garrison v. State of La., 379 U.S. 64, 72-73 (1964) ("In any event, where the criticism is of public officials and their conduct of public business, the interest in private reputation is overborne by the larger public interest, secured by the Constitution, in the dissemination of truth.").

Accordingly, public officials do not, absent compelling circumstances, have an interest in privacy that outweighs the public's presumptive First Amendment right of access. Instead, "interests of privacy and reputation ***can be*** compelling enough to overcome the constitutional right of access, a right which, when it attaches, is extremely difficult to surmount." Kushner, 349 F. Supp. 2d at 898 (emphasis added). In Smith I, for example, the compelling circumstance was the fact that the list of unindicted coconspirators included "innocent third parties," added to the list of unindicted coconspirators as a trial tactic, whose privacy and reputational interests would be unnecessarily jeopardized. 776 F.2d at 1113-14.

The Government here fails to set forth any such compelling interest in privacy or reputation warranting sealing the list of unindicted coconspirators and, therefore, has wholly failed to meet its requisite burden.[4] Moreover, in light of the fact that the Government concededly "does not take the position that the coconspirator designation should necessarily be sealed for all time" (see Gov. Br., pg. 14), it defies credulity that there is any compelling interest in privacy or reputation in this case.

[4] The cases cited by the Government do not change this result. United States v. Martin, 746 F.2d 964 (3d Cir. 1984), does not involve privacy or reputational interests. United States v. Smith, 985 F. Supp. 2d 506 (S.D.N.Y. 2013), and United States v. Luchko, No. CRIM.A. 06-319, 2007 WL 1651139 (E.D. Pa. June 6, 2007), do not involve judicial records, but instead discovery materials that are not presumptively available to the public as a matter of constitutional law.

The Government's argument that the list of unindicted coconspirators should be made available to the public, if at all, in connection with a determination at trial as to whether statements by individuals on the list are admissible is similarly flawed. If the government is saying that individuals on the list should be revealed only when the statement is deemed admissible, that is effectively no relief at all. The admission of the statement will put on the public record the government's view that the speaker is a co-conspirator, which is all that the list says.[5] The First Amendment right of access attaches to all proceedings and judicial records that satisfy the "experience" and "logic" test set forth by the United States Supreme Court, not only during a trial or a particular stage of a case. See Wecht, 537 F.3d at 233; United States v. Smith, 123 F.3d 140, 146 (3d Cir. 1997). Accordingly, the public is afforded access to numerous proceedings in a case, from inception to trial, including judicial records associated with those proceedings. See id. This includes lists of unindicted coconspirators filed in response to a defendant's motion for a bill of particulars. See Smith I, 776 F.2d at 1111.

The Government's attempt to set a temporal restraint on the public's right of access to the list of unindicted coconspirators, supported only by the Government's self-serving belief that access should await a so-called "necessary" time, should be wholly rejected by this Court. It is

[5] Further, the admissibility or inadmissibility of one of the unindicted coconspirators' statements at trial does not establish those individuals' status as coconspirators. The very Federal Rule of Evidence cited by the Government, 801(d)(2)(E), includes a caveat that the statement "must be considered but does not by itself establish … the existence of the conspiracy or participation in it under (E)." See Fed. R. Evid. 801(d)(2)(E). Rather, admission of coconspirator statements requires only that a Court find by ***a preponderance of the evidence***: "(1) that 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." United States v. McGlory, 968 F.2d 309, 333 (3d Cir. 1992). "Even in matters where there had been an objection raised to co-conspirator testimony, the Court of Appeals has not required explicit findings of existence of conspiracy and membership of the accused in upholding admissibility." United States v. Onque, No. CRIM.A. 10-510 JBS, 2015 WL 566987, at *14 (D.N.J. Feb. 9, 2015).

"contemporaneous review" of proceedings and judicial records by the public that acts as an effective restraint on possible abuse, not after-the-fact release. See Wecht, 537 F.3d at 229 (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 596 (1980)). In fact, the need for public access to pre-trial proceedings and judicial records is greater than the need for access at the time of trial, as such pre-trial proceedings and judicial records occur in the absence of a jury, "long recognized as an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge". See Press-Enter. Co. v. Superior Court of California for Riverside Cty., 478 U.S. 1, 12-13 (1986) (internal citation and quotation omitted).

Likewise, there is no basis for the Government's argument that the list of unindicted coconspirators may not be released because of the alleged lack of "factual context" within which to evaluate the coconspirator information. See Gov. Br., pg. 10. The Government's focus here appears to be on its fear that the media and public would misconstrue the importance of an unindicted coconspirator, not on the law of access.

As the Government is well aware, this case has received extraordinary public attention, with the Government itself providing detailed information to the public regarding the conspiracy. See, e.g., United States Department of Justice, U.S. Attorney's Office, District of New Jersey, Former Deputy Executive Director of Port Authority and Former Deputy Chief of Staff in N.J. Governor's Office Indicted, United States Department of Justice, May 1, 2015, http://www.justice.gov/usao-nj/pr/former-deputy-executive-director-port-authority-and-former-deputy-chief-staff-nj-governor. The Government should not be permitted to, on the one hand, feed information to the public regarding the conspiracy in an attempt to bring public attention to this case and, on the other hand, claim the public is too uninformed to grasp the importance of the names of those individuals participating in the conspiracy. Moreover, the unindicted

coconspirators, likely all public officials, will have "ready access" to mass media communication to counter criticism. See Kushner, 349 F. Supp. 2d at 907 (quoting Curtis Publ'g Co. v. Butts, 388 U.S. 130, 164 (1967) (Warren, C.J. concurring)). "Political figures are well-equipped and have ample opportunity to respond to any accusations of wrongdoing." United States v. Huntley, 943 F. Supp. 2d 383, 387-88 (E.D.N.Y. 2013).

In sum, the Government has failed to set forth a compelling government interest that outweighs the public's presumptive First Amendment right of access to the list of unindicted coconspirators and, as a result, this Court should order the list be immediately made the public.

IV. THE GOVERNMENT HAS FAILED TO ABIDE BY THE TERMS OF THE PROTECTIVE ORDER.

The Government contends that the Protective Order provides it unilateral power to seal documents without judicial review, all under the cloak of a concern not to "wast[e] the Court's time with needless motion practice." See Gov. Br., pg. 22. However, this Court previously rejected a prior version of the Protective Order, which would have provided the Government the power it now purports to have. See Document 14-1 on Criminal ECF Docket. This Court instead required the Parties to enter into a Protective Order that plainly and unequivocally required the filing of a "formal motion" within ten days to sustain the ensealment of a document. See Document 22 on Criminal ECF Docket. This requirement was no mere bromide; the law requires a sealing party to justify the "confidentiality of each and every document sought to be covered by a protective order." See Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1122 (3d Cir. 1986).

The fact that Defendant Baroni has, on limited occasions, agreed with the Government's designation of a document as confidential (see Gov. Br., pg. 22) does not obviate the Government's responsibility to file a formal motion to seal. Courts do not give parties "*carte blanche* … to seal documents … Rather, the trial court—not the parties themselves—should scrutinize every such

agreement involving the sealing of court papers and [determine] what, if any, of them are to be sealed …" Pansy, 23 F.3d at 786 (quoting City of Hartford v. Chase, 942 F.2d 130, 136 (2d Cir. 1991)). "It has long been settled that a party's unilateral designation of material as confidential under a broad protective order does not in itself supply a sufficient basis to file judicial documents under seal. The party seeking to file a judicial document under seal has the burden of establishing that the grounds for secrecy are present." Mine Safety Appliances Co. v. N. River Ins. Co., 73 F. Supp. 3d 544, 585-86 (W.D. Pa. 2014) (citing Leucadia, 998 F.2d at 116 and Pansy, 23 F.3d at 789-90 & n. 26). And, in any event, upon intervention by a third party, the Court should consider whether there is good cause for continuing the sealing and protective orders. See Wecht, 484 F.3d at 211-12 (citing Pansy, 23 F.3d at 790); see also Republic of Philippines v. Westinghouse Elec. Corp., 139 F.R.D. 50 (D.N.J.), stay denied, 949 F.2d 653 (3d Cir. 1991)); Leucadia, 998 F.2d 157.[6]

As Media Intervenors were about to file this brief, Defendant Baroni filed a letter (Document 28 on this docket) providing even more detail in support of Media Defendants' position, and making clear that the Government was on notice that it should have made formal motions to seal. While Defendant Baroni urges the Government be required to file such a motion out of time, Media Intervenors' position is that the time for such a filing has long passed. Moreover, should this Court grant Proposed Media Intervenors' motion to remain Intervenors for the duration of this action, it is even more important that the Protective Order be followed.

[6] It is also apparent that the Government and/or Defense counsel over-redacted certain documents that do not in any way fit within the Protective Order's limited definition of confidential documents. For example, in its opposition brief, the Government describes page 14 of the requested July 22, 2015 letter as its "request for reciprocal discovery". See Gov. Br., pg. 16. It is hard to imagine how a formulaic request for reciprocal discovery could have come within the Protective Order's purview. This revelation makes it all the more necessary that this Court review each and every redaction and sealed document and require formal motions in the future to seal as the Protective Order requires.

In short, it is undisputed that the Government did not and still has not filed a formal motion to seal the requested documents and, pursuant to the plain terms of the Protective Order, all redacted documents in this matter where a motion has not been made for a permanent seal should be unsealed and/or unredacted immediately.

V. THE GOVERNMENT HAS FAILED TO MEET ITS BURDEN TO JUSTIFY APPLICATION OF THE PROTECTIVE ORDER TO THE DOCUMENTS REQUESTED BY MEDIA INTERVENORS.

To the extent the Government attempts to justify the continued ensealment of the documents in its opposition brief, the Government has it backwards. It is not Media Intervenors' burden to "make the requisite showing to compel the requested disclosures" (see Gov. Br., pg. 2) or to offer a "compelling reason" why the documents should be released (see Gov. Br., pg. 17). Rather, it is the ***Government's burden*** to justify the documents' ensealment. See Cipollone, 785 F.2d at 1122 ("the opposing party could indicate precisely which documents it believed to be not confidential, and the movant would have the burden of proof in justifying the protective order with respect to those documents."). "A qualified right of access attaches automatically to all judicial records, without a showing of any particularized need." Kushner, 349 F. Supp. 2d at 898.

It is not the Media Intervenors' position that there are no documents legitimately deemed confidential pursuant to the Protective Order entered in this case; however, the Parties are required to justify the application of the Protective Order to each redacted and sealed document. This is what the Parties envisioned when they signed the Protective Order and what this Court envisioned when it entered the Protective Order and urged the Parties to follow the District of New Jersey's local rule applying to protective orders in civil cases. That applicable Local Rule, 5.3(c), requires that "[a]ny request by a party or parties to seal, or otherwise restrict public access to, any materials or judicial proceedings shall be made by formal motion … [and] shall describe (a) the nature of

the materials or proceedings at issue, (b) the legitimate private or public interests which warrant the relief sought, (c) the clearly defined and serious injury that would result if the relief sought is not granted, and (d) why a less restrictive alternative to the relief sought is not available." See Stasicky v. S. Woods State Prison, No. CIV.A. 03-369 (FLW), 2006 WL 3486827, at *2 (D.N.J. Nov. 30, 2006) ("[P]rior to restricting access, a court must determine the nature of the materials at issue, the legitimate private or public interest which warrants sealing, the clearly defined and serious injury that would result if the materials were not sealed, and why any less restrictive alternative to sealing is not available.") (citing L. Civ. R. 5.3(c)(5) and Pansy, 23 F.3d 772).

The Government, however, complains that it should not have to do so, essentially asking this Court to accept that public officials' privacy and reputational interests automatically outweigh the public's common law right of access. No law or local rule supports this argument, and the Government has failed to meet its burden to justify application of the Protective Order to the documents requested by Media Intervenors.

VI. MEDIA INTERVENORS ARE ENTITLED TO THE BRADY MATERIALS PURSUANT TO THE COMMON LAW RIGHT OF ACCESS.

The Government's final, superfluous argument is that Media Intervenors are not entitled to information that the Government itself sought to characterize as information being provided due to its "obligations under Brady v. Maryland, 373 U.S. 83 (1963)." As this Court is well-aware, Brady is "founded on the constitutional requirement of a fair trial, binding on both state and federal courts. It is not a rule of discovery." See United States v. Kaplan, 554 F.2d 577, 579 (3d Cir. 1977); see also United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984) ("Brady is not a discovery rule, but a rule of fairness and minimum prosecutorial obligation.") (internal citation and quotation omitted). As this Court is also well-aware, in Wecht, 484 F.3d 194, the Third Circuit

concluded that the common law right of access attaches to Brady materials. Wecht is not an aberration and the Government reads its facts too narrowly.

In Wecht, the Third Circuit granted release of Brady materials after considering the fact that: (1) the Brady materials were filed with a discovery motion and are therefore judicial records; (2) the Brady materials had been determined by the Court to be possible impeachment evidence and should, as such, be produced to the defendant; (3) "the process by which the government investigates and prosecutes its citizens is an important matter of public concern"; (4) "the particular documents at issue here are of significant interest to the public"; and (5) the Brady materials were relevant to a pending filed motion. 484 F.3d at 208-11.

At least four of these five factors are present here. First, the self-described Brady materials were filed with a discovery motion and are judicial records. Second, while no formal request for adjudication has been made to the Court with respect to the Brady materials, the Government concedes the materials contain at least potentially exculpatory evidence, obviating any need for judicial adjudication. It was the underlying fact that the materials were identified as "possible impeachment evidence" that supported the common law right of access in Wecht, not any judicial adjudication thereof. See Section II, supra. Third and fourth, it is inescapable that the public has an interest in the process by which the Government is investigating and prosecuting this case, and that the public has a significant interest in this case's judicial records. Fifth, while the specific Brady material set forth in the July 22, 2015 letter does not appear to currently be subject to any pending motion -- aside from the Media Intervenors' motion herein -- the Government's failure to provide all Brady materials is currently the subject of a motion to dismiss the indictment by Defendant Baroni. See Document 72-1 on Criminal ECF Docket. In combination, these factors

more than establish Media Intervenors' common law right of access to the Brady materials under the standard articulated by the Wecht Court.

The Government's erroneous attempt to limit Wecht and its clear pronouncement that Brady materials are subject to the common law right of access must be rejected. Disclosure of the materials is not "conditioned on the district court's finding that the materials required disclosure to the defense" (see Gov. Br., pg. 20); Brady materials are, pursuant to the constitution, required to be disclosed to the defense and no district court finding is required. There is accordingly no concern here that the public will be granted access to "undiscoverable documents". See id. Moreover, the Government's attempt to backtrack and diminish the materials' significance by claiming that it only stated they "***may*** constitute Brady material" (emphasis added) and did not assert "that any of the information disclosed was, in fact, exculpatory within the meaning of Brady" is a distinction without a difference. Brady materials are, by their very nature, only ***potentially*** exculpatory evidence. See United States v. Jones, 372 F. App'x 343, 345 (3d Cir. 2010) (Brady "requires that prosecutors disclose potentially exculpatory evidence to the defense.").

As such, Media Intervenors are entitled to the Brady materials under the common law right of access.

CONCLUSION

For the reasons as set forth in this brief and Media Intervenors' moving papers, this Court should grant Media Intervenors their requested relief.

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