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May 13, 2016

VIA ECF
Honorable Susan D. Wigenton, U.S.D.J.
United States District Court for the District of New Jersey
50 Walnut Street
Newark, New Jersey 07101

Re: North Jersey Media Group Inc., et al. v. United States of America, et al.
Civil Action No.: 2:16-cv-00267-SDW
Criminal No: 2:15-cr-193-SDW

Dear Judge Wigenton:

This firm represents Media Intervenors in the above-referenced action. Please accept this letter brief in opposition to the 11th-hour motion by John Doe to intervene and for a stay of this Court's Order (Doc 31) to release the names of the unindicted co-conspirators in this matter.

INTRODUCTORY STATEMENT

This motion is a frivolous and desperate attempt to improperly seek reargument of this Court's Order by a movant who failed to seek relief until after the issues were briefed and a decision was rendered. Notice could not conceivably be an issue: every media outlet in New Jersey wrote about the public filing of Media Intervenor's motion and yet Doe waited until hours before the Court-imposed deadline to force wasteful expenditure of resources without any factual or legal basis. This Court should sanction Doe for making this motion.

The primary argument by Doe is that this Court erred when it applied *U.S. v. Smith*, 776 F.2d 1104 (3d Cir. 1985). The *Smith* Court ruled that a bill of particulars was simply an extension of an indictment, for which there are First Amendment rights of access, thus providing First Amendment access to the bill of particulars. That Court provided a balancing test to weigh privacy interests with the constitutional right of access, and this Court – having had the benefit of actually seeing the list of unindicted coconspirators filed January 11, 2016 (the "Conspirator Letter.") -- went through the analysis required by *Smith* and ordered the Conspirator Letter released.

Despite this Court having outlined the reasons why the Conspirator Letter was a bill of particulars (Slip Op Doc 30, at 3), and the Government having implicitly acknowledged it was a bill of particulars by making reference to how bills of particulars are treated in the U.S. Attorney's Manual, Doe ridiculously claims that the letter "was nothing more than a discovery letter" (Br. at 9) because there was not a specific Court Order requiring disclosure. This would logically mean that no production could be a bill of particulars in response to a motion unless it was specifically ordered. Doe then says it was unnecessary for the Government to file the Conspirator Letter with the Court, so it should not trigger presumptive access. Doe is confusing common law access – which requires a judicial filing – and First Amendment access – which is not dependent on such a filing. But, Doe is also claiming that because the Conspirator Letter did not have to be filed, it should count as not being filed. This turns common law access on its head and is completely erroneous.

Doe's contention that he will be "branded a felon" by the publication of the list of unindicted co-conspirators is also without merit. First, an unindicted co-conspirator is – by definition – not convicted or even charged with any crime. The Government specifically explained in its opposition to the Media Intervenors motion that it does not seek indictment where there is insufficient evidence of culpability. Gov. Opp. Br., 3 n.4. Further, Doe concedes that his name may come out at trial, so this motion is simply postponing the inevitable.

For these and the reasons set forth below, the untimely anonymous proposed intervenor's motion to intervene should be denied. Even if intervention is permissible there no likelihood of success on the merits to entertain any stay motion; the request for a hearing post-judgment is improper and thus a stay should be denied.

ARGUMENT

I. Doe's Motion For Intervention Should Be Denied

"Intervention, whether by right under Rule 24(a) or by permission under Rule 24(b), must be timely." *Gen. Refractories Co. v. First State Ins. Co.*, No. 04–3509, 2012 WL 262647, at *7 (E.D.Pa. Jan. 30, 2012). "Timeliness of an intervention request 'is determined by the totality of the circumstances.'" *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir.2005) (*quoting U.S. v. Alcan Aluminum, Inc.*, 25 F.3d 1174, 1181 (3d Cir.1994)). A trial court's determination of timeliness is a discretionary determination. *Mountain Top Condo. Ass'n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 369 (3d Cir.1995). "Among the factors to be considered are: (1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay." *Id.* (citations omitted). Delay "should be measured from the point at which the applicant knew, or should have known, of the risk to its rights." *Mountain Top Condo. Ass'n,* 72 F.3d at 370), (*quoting Alcan,* 25 F.3d at 1183). "The point at which the applicant should have known its rights were at risk is usually a factual determination." *Alcan,* 25 F.3d at 1183. Moreover "[p]ost-judgment intervention is justified only under 'extraordinary circumstances.' " *Haymond v. Lundy,* No. 99–5048, 2002 WL 31149289, at *3 (E.D.Pa. Sept.26, 2002) (*quoting Del. Valley Citizens' Council for Clean Air v. Pa.,* 674 F.2d 970, 974 (3d Cir.1982)).

In this case, the Court's decision and order on Media Intervenor's motion is akin to a final judgment. Doe himself cites to case law on the right to intervene after judgment as being comparable to the instant circumstances. (Br. at 2-3). However, the cases cited by Doe in which intervention was permitted post-judgment were far different than this. In *United Airlines, Inc. v.*

McDonald, 432 U.S. 385, 395-96 (1977), the case involved an intervention to appeal an adverse class determination, which could only be done after final judgment was entered in the case. In *Dow Jones & Co. v. United States Dep't of Justice*, 161 F.R.D. 247, 252 (S.D.N.Y. 1995), the matter involved a Freedom of Information Act ("FOIA") request for a copy of former Deputy White House Counsel Vincent Foster's suicide note, which had been withheld by the Department of Justice. The Court entered an order on summary judgment ordering the note's production, and then, within 18 days after, permitted the deceased Vincent Foster's widow to intervene in the matter solely for purposes of taking an appeal. The Court noted that until that time, during the pendency of the action, the widow had been relying on the United States government to protect her interests and therefore did not intervene earlier. The Court also noted that Mrs. Foster did not intend to add to the factual record of the case, and thus would not cause delay to the case for the parties – rather the parties were in the same position had they been had one of the parties filed an appeal of the decision. In the third post-judgment case cited by Doe, *Bloomberg, L.P. v. Bd. of Governors of the Fed. Reserve Sys.*, 601 F.3d 143, 146 (2d Cir. 2010), an association of financial institutions sought to intervene in a FOIA case filed by the media seeking an order requiring the Board of Governors of the Federal Reserve System to turn over certain confidential financial information pertaining to customers' use of emergency lending programs established in the wake of the financial crisis. Following a decision by the Court granting the media's FOIA request, the association sought intervention in order to appeal the final judgment.

None of the above cases are analogous to the instant motion to intervene which seeks to re-open the underlying merits of the case and hold a hearing. None of the case law cited by Doe supports the relief sought. The standard for intervening post-judgment is very high – requiring "extraordinary circumstances" – and Doe has not offered any justification at all, much less "extraordinary" circumstances, in his attempt to intervene only after the decision by Judge Wigenton has already been entered, and hours before the government was scheduled to release the unindicted co-conspirator list pursuant to order. Doe carefully avoids addressing the need to demonstrate compelling justification for its delay in seeking to intervene and instead continues to argue only that he has a constitutional due process right to oppose the turning over of the unindicted co-conspirator list.

Media Intervenors' motion to intervene in *U.S. v. Baroni and Kelly* was filed January 31, 2016. It was filed publicly on PACER. It received national attention in the media. Any one of the unindicted co-conspirators, who have been identified as public figures and/or government employees, have long been on notice that their rights were directly implicated in the motion and would be affected by the court's decision on the motion. The deliberate and strategic decision to "wait and see" until after a final decision is entered, rather than attempting to intervene at the merits stage, is not one countenanced by our courts.

II. Doe Would Not Be Branded A Felon

As noted by the Government in its opposition papers, as well as the Third Circuit and other federal courts, a designation of "unindicted co-conspirator" is not a charge of criminal wrongdoing but rather a contention as to some relationship, not necessarily criminal, between the relevant actors for evidentiary purposes. "The distinction should be noted between 'conspiracy' as a crime and the co-conspirator exception to the hearsay rule." *United States v. Trowery*, 542 F.2d 623, 626 (3d Cir. 1976) (explaining that "[t]he co-conspirator exception to the hearsay rule" in contrast with the crime of conspiracy "is merely a rule of evidence founded, to some extent, on concepts of

agency law" that "may be applied in both civil and criminal cases"). "The conspiracy that forms the basis for admitting coconspirators' statements need not be the same conspiracy for which the defendant is indicted." *United States v. Ellis*, 156 F.3d 493, 497 (3d Cir. 1998) (quoting *United States v. Arce,* 997 F.2d 1123, 1128 (5th Cir. 1993)); *United States v. Saimiento-Rozo*, 676 F.2d 146, 149 (5th Cir. 1982) ("However, it is not necessary that the conspiracy upon which admissibility of these statements is predicated be the conspiracy charged. Nor need the conspiracy or agreement be criminal in nature; it may be in the form of a joint venture") (citations omitted); *United States v. Layton*, 855 F.2d 1388, 1399 (9th Cir. 1988) ("the goal or objective of the common enterprise would appear to be irrelevant. The critical inquiry is simply whether the confederate was acting in his capacity as an agent of the defendant when he uttered the statements sought to be admitted, *i.e.,* whether the statements were made 'during the course and in furtherance of' the common enterprise"). Even *Anderson*, relied upon by the Doe, acknowledges that "an 801(d)(2)(E) coconspirator is not necessarily a criminal. All that is required is that he or she be a 'joint venturer' in a common plan." *Anderson, supra*, 55 F. Supp. at 1169 (citing cases).

III. The Doe Cannot Demonstrate Any Likelihood Of Success On The Merits

Doe contends that "as a threshold matter, the Conspirator Letter is not a bill of particulars or any other judicial filing to which the public's presumptive right of access attaches; rather, it is nothing more than a discovery letter that should have been sent to the criminal defendants without being filed." (Br. at 9). Doe relies upon the fact that the court did not issue an order granting the motion for a bill of particulars because the dispute was resolved prior to adjudication and the identities of unindicted coconspirators were instead disclosed via letter. This superficial distinction is nonsense. The identities of unindicted coconspirators were disclosed in connection with counsel's motions for a bill of particular and the information was treated at all times by the Government and the Court as a bill of particulars. For example, in opposition to the Media Intervenors' motion for access to the bill of particulars, the Government cited both the U.S. Attorney's Manual's directives "with respect to bills of particulars that identify unindicted co-conspirators" (the "Gov. Opp. Br.," Civil Dkt. No. at 7-8) and the seminal case on the issue of access to bills of particulars, *U.S. v. Smith*, 776 F.2d 1104 (3d Cir. 1985) (which the Government described as concerning "virtually the same set of circumstances") (*id.* at 8). Tellingly, the Government dedicated an entirely distinct portion of the opposition brief to their objections to the Media Intervenors' access to discovery materials. *Id.* at 16-21.

Second, and perhaps most importantly, the only citation to *Smith* contained anywhere in Doe's brief is within its attempt to portray *Smith* as a case, purportedly unlike this one, involving a bill of particulars rather than merely discovery materials. Doe blithely ignores the law set forth by the Third Circuit by never once conducting the analysis prescribed for this exact scenario. Doe levies various facile arguments about its due process rights, but when faced with an unambiguous explanation of the sensitive balancing to be conducted (and which was conducted) by the Court to ensure due consideration of its interests, Doe shrinks from the challenge. He does not even attempt to make the showing required by *Smith*. This alone is fatal to this late motion.

Third, Doe contends that he is likely to succeed on the merits because "identifying him as an unindicted co-conspirator without providing him a forum to challenge that designation

would undeniably deprive him of due process." (Br. at 9). Apart from the fact that the only authority cited by Doe for this statement is a single law review article, this purported lack of due process willfully ignores the fact that the Court fully protected any interest in due process by undertaking the sensitive balancing analysis prescribed by the Court of Appeals in *Smith*.

None of the cases cited by Doe in support of its due process arguments are remotely analogous to this mater. *Wisconsin v. Constantineau*, 400 U.S. 433 (1971), involved a challenge to a state statute which allowed a police chief to post a public notice, without notice or hearing, that sales of alcohol to a particular individual were prohibited on a count of the individual's excessive drinking. *Id.* at 434-35. Here there is no such lack of notice and hearing. It is beyond dispute that this matter has drawn extensive public and media attention and Doe necessarily participated in at least some pre-indictment proceedings. Moreover, as noted above, Doe had ample opportunity to seek to protect its interests at any time between the filing of the Media Intervenors' motion and the issuance of the Court's May 10 Opinion.

In *United States v. Briggs*, 514 F.2d 794 (5th Cir. 1975), it was not merely the public's knowledge of an unindicted coconspirator's identity that constituted a due process violation. Rather, it was the action of the grand jury in naming the coconspirator, although unindicted, in ***the indictment itself.*** Thus, the court was faced with the peculiar concern, not present here, of a "[p]ublic accusation of misconduct through use of a ***non-indicting indictment***." *Id.* at 803 (emphasis added). This non-analogous situation was also the one faced by the Fifth Circuit in *In re Smith*, 656 F.2d 1101, 1106 (5th Cir. 1981), the Ninth Circuit in *United States v. Chadwick*, 556 F.2d 450, 450 (9th Cir. 1977), and the District Court for the Southern District of West Virginia in *Application of Jordan*, 439 F. Supp. 199, 204 (S.D.W. Va. 1977). In *Chadwick*, the Ninth Circuit explained that the naming of an individual ***in the indictment*** amounts to "charging appellant with the offense without making him a defendant," a concern not presented where, as here, the individual's name does not appear in the indictment itself. *Chadwick, supra*, 556 F.2d at 450; *Jordan, supra*, 439 F.Supp at 204 ("There is no place in a criminal indictment for mention of a person accused of crime who is not formally accused of that crime by being indicted"). Likewise, the cited pronouncement from *Doe v. Hammond*, 502 F. Supp. 2d 94, 102 (D.D.C. 2007), that "courts generally have found such disclosures to violate the due process rights of the person revealed" also referred to cases concerning identification within an indictment.

Doe points to no binding authority that stands for the proposition that any identification whatsoever of an unindicted coconspirator necessarily invokes his due process rights. Nor can it. As noted above, and in the papers submitted by Media Intervenors and the Government in connection with this motion for access to the bill of particulars, this exact scenario (and the attendant privacy concerns of the individuals involved) was addressed by the Third Circuit in *Smith*.

To the extent that *Hammond* concerns other identifications of unindicted coconspirators and states that "when considering a challenge to the identification of an unindicted co-conspirator, '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,'" (Br., 11). (*citing United States v. Anderson*, 55 F. Supp. 2d 1163, 1167 (D. Kan. 1999)), such concerns are

fully addressed by the Court's application of the *Smith* analysis, which requires balancing of these exact concerns. *See Smith, supra*, 776 F.2d at 1113 (acknowledging that "whether 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"). Although *Smith* does not employ the "due process" terminology adopted by Doe, the "due process" concerns raised are these precise issues of privacy. Moreover, the privacy concerns of the individuals named as indicted coconspirators were raised extensively articulated by the Government in its opposition to the Media Intervenors' motion. Gov. Opp. Br., 8-15.

Moreover, the existence of a common law right of access to judicial proceedings and to inspect judicial records is beyond dispute." *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066 (3d Cir. 1984). Doe's reference to "valid judicial filings" (Br. at 9), is a fiction. Doe submits no case law to support a purported qualification to *Publicker*'s holding as to the common law public right of access to certain materials submitted to a court versus others. Indeed, unless something is designated as being filed under seal, all submissions to a court – courtesy or compulsory – become part of the public record of the case, subject to public inspection. That includes letters, as well as courtesy copies of discovery.

IV. Doe Does Not Face Any Threat Of Irreparable Harm

Doe's showing on the critical issue of irreparable harm is woefully inadequate. To begin with, Doe offers a single conclusory sentence on this point. (Br. at 11). Doe cites no law or other authority for this position. Additionally, it is not true that disclosure of Doe's identity will result in his being "branded a felon." (Br. at 3). As the Government notes, an unindicted coconspirator is by definition a person against whom even the prosecuting attorneys do not believe there is evidence to establish guilt beyond a erasable doubt. Gov. Op. Br., 7-8.

Further, Doe completely neglects to mention or consider that any "stigma" occasioned by the public's access to the identities of the unindicted coconspirators can be readily answered in the ongoing public discourse concerning this matter. Any individual named as an unindicted coconspirator (whether a public employee or simply active in public affairs) is likely, as the Court says, to be a public employee or official and will have "ready access" to mass media communication to counter criticism. *See U.S. v. Kushner*, 349 F. Supp. 2d 892, 907 (D.N.J. 2005) (*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).

V. The Public Interest Does Not Favor The Issuance Of A Stay Of The May 10 Opinion

Doe concludes, without citing any supporting authority, that "the public interest favors a stay because Doe's due process rights are paramount to the media's curiosity." (Br. At 12). However, this *ipsie dixit* is directly contrary to (1) the unambiguous law of the Third Circuit that there are common law and First Amendment rights to access to judicial proceedings and

records, including bills of particulars (*Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982); *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001); *United States v. Smith*, 776 F.2d 1104, 1107 (3d Cir. 1985)), and (2) longstanding and fundamental principles of law that the public has a critical interest in monitoring the operations of its government. *Kushner, supra*, 349 F. Supp. 2d at 906-07 ("The public has a strong interest in the use officials make of their positions of public trust"); *United States v. Gonzalez*, 927 F. Supp. 768, 784 (D. Del. 1996) (acknowledging that "concerns of institutional or individual embarrassment are far outweighed by the absolute necessity of allowing the light of public scrutiny to shine brightly upon government agencies, the courts, and the judicial process, so that the citizenry may be fully informed").[1] The equities, in fact, weigh far stronger for Media Intervenors as "the loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury," *Elrod v. Burns,* 427 U.S. 347, 373 (1976).

Moreover, in attempting to dismiss the public's fundamental interest in overseeing its government, Doe acknowledges that its late application for a stay of the May 10 Opinion can only delay the inevitable. "To the extent any unindicted co-conspirator has taken any action relevant to the criminal case, that conduct and the actor's identity will be learned at trial." (Br. at 12).

CONCLUSION

For the above reasons, Doe's application for intervention should be denied and sanctions issue.

Respectfully Submitted,

/s/ Bruce S. Rosen
Bruce S. Rosen
Zachary D. Wellbrock
Laura A. Siclari

BSR/ckc
cc: All counsel of Record

[1] Even if Doe were not himself a public official or employee, it is beyond question that the conduct of any unindicted co-conspirators is inextricably intertwined with the operations of the state government and the conduct of public officials and employees.