UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

UNITED STATES OF AMERICA v. WILLIAM E. BARONI, JR. and BRIDGET ANNE KELLY	Crim. No. 15-193 (SDW) Hon. Susan D. Wigenton, U.S.D.J.

PROPOSED INTERVENORS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION BY NORTH JERSEY MEDIA GROUP INC., BLOOMBERG L.P., NBCUNIVERSAL MEDIA, LLC, THE NEW YORK TIMES COMPANY, NEW JERSEY ADVANCE MEDIA, DOW JONES & COMPANY, INC., THE ASSOCIATED PRESS, PUBLIC MEDIA NJ, INC. AND NEW YORK PUBLIC RADIO TO INTERVENE, FOR ACCESS TO DOCUMENTS PURSUANT TO THE FIRST AMENDMENT AND THE COMMON LAW, AND FOR OTHER RELIEF

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PRELIMINARY STATEMENT

North Jersey Media Group Inc., publishers of Northjersey.com as well as *The Record* and *The Herald News*; Bloomberg L.P., the owner and operator of Bloomberg News; NBCUniversal Media, LLC d/b/a WNBC-TV Channel 4; The New York Times Company; New Jersey Advance Media, publishers of nj.com; Dow Jones & Company, Inc., the publisher of *The Wall Street Journal*; the Associated Press; Public Media NJ, Inc. d/b/a NJTV and New York Public Radio (collectively, "Intervenors" or "Proposed Intervenors") respectfully submit this memorandum of law in support of their motion to intervene in this proceeding for the limited purpose of obtaining an Order: (i) unsealing certain specified filed documents listed below as well as any other documents that have been or may be filed under seal throughout the pendency of this action without the appropriate sealing applications required by this Court's Protective Order dated July 7, 2015 (the "Protective Order"); (ii) to the extent necessary, lifting or otherwise modifying the Protective Order; and, (iii) permitting Proposed Intervenors to remain as intervenors in this proceeding to seek appropriate relief with respect to future sealing applications or orders. Proposed Intervenors have a clear right to intervene and seek relief based on the First Amendment right of access to criminal trials and documents filed in connection thereto, as well as the common law right of access to judicial proceedings and records.

Specifically, Proposed Intervenors seek:

(1) Access as required by the First Amendment and common law to the list of unindicted co-conspirators filed with the Court in this proceeding by the Government in response to a motion for a bill of particulars by defendants William E. Baroni, Jr. ("Baroni") and Bridget Anne Kelly ("Kelly") (together "Defendants");

(2) Access to all sealed or redacted materials filed as judicial documents in this proceeding ("Sealed Documents") pursuant to both the First Amendment and common law rights of access, as well as the Protective Order in this matter, which requires that filed documents be unsealed unless the filing party "file[s] a formal

motion to seal any or all such materials" within ten (10) days from the date of such filing or, otherwise, "the materials shall be unsealed." No party has filed the requisite formal motion to seal;

(3) Access to any Sealed Documents that include materials that have been produced pursuant to Brady v. Maryland, to which a common law right of access attaches, even if appended to discovery motions; and

(4) That this Court exercise its inherent power to modify or lift the Protective Order to expressly require unredaction of the Sealed Documents.

This case (and the events leading up to it) has received widespread publicity and is of tremendous public significance, not only to the citizens of New Jersey and New York where the allegations go to a criminal conspiracy touching on abuse of power by public officials (which by itself has sufficient importance), but also nationally, as the allegations may impact the presidential campaign of New Jersey's Governor Chris Christie, within whose administration the circumstances underlying these charges arose.

The primary document that Proposed Intervenors seek is a list of unindicted co-conspirators emailed to this Court and to Defendants by the Government, purportedly under seal, on January 12, 2016. In U.S. v. Smith, 776 F.2d 1104 (1985) ("Smith I") and its progeny, the Third Circuit expressly declared that there is a First Amendment right of access to filed lists of unindicted co-conspirators in such contexts: "Because of our historic experience and the societal interest served by public access to indictments and informations, we hold that such access is protected by the First Amendment and the common law right of access to the judicial process." Id. at 1112. The public is accordingly entitled to learn the names of those public officials and public employees that the Government believes conspired to violate the public trust but were not, for whatever reason, indicted: "the nature of the offense as well as the public character of the unindicted co-conspirators provide additional support for the public's right of access to the bill of particulars." See id. (Mansmann, J., concurring).

The public is similarly entitled access to the other Sealed Materials detailed in this brief for various reasons, not the least of which is the fact that "the process by which the government investigates and prosecutes its citizens is an important matter of public concern" (see United States v. Wecht, 484 F.3d 194, 210 (3d Cir. 2007), as amended (July 2, 2007) (citing United States v. Criden, 675 F.2d 550, 556 (3d Cir. 1982) ("Criden II")), and the public has a "significant interest" in filed documents involving the conduct of government officials (see id. at 210). Those Sealed Documents could provide crucial context for a public beset by chronic corruption and abuse of power by elected and appointed officials.

STATEMENT OF FACTS

This Court is well aware of the Indictment before it, just as it is aware of the significant public concern and interest in this case. The Indictment presents allegations not only of criminal activity, but of significant abuse of power and violation of the public trust by appointed Port Authority of New York and New Jersey ("Port Authority") and Christie Administration officials. There could scarcely be a more important example of the need for maximum transparency by the parties and the Government regarding filed judicial documents.

By way of brief background, on April 23, 2015, defendant Kelly and defendant Baroni were both indicted on charges of conspiracy, fraud and civil rights violations. See Document 1 on ECF (Indictment). The Indictment made reference to "others" who the Government alleges deliberately decided to punish Fort Lee Mayor Mark Sokolich for not endorsing Governor Christie for re-election in 2013 and then labels these "others" as "Conspirators" without further identification. See id., pg. 5 at ¶ 4. The Government has stated that one of the "others" is David Wildstein, whom it alleges was a criminally culpable co-conspirator, and who has pleaded guilty to conspiracy and other charges. See Document 45 on ECF (Brief of Government in Opposition

to Defendants' Discovery Motions), pgs. 34-35. The Government also stated in response to Defendants' request for a bill of particulars that it "will, 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." Id., pg. 35.

On July 7, 2015, this Court entered a Protective Order (Document 22 on ECF) that only covers materials produced by the Government that contain:

(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.

The Protective Order provides that if any of the above material is filed, it shall only be placed under seal ***provisionally***, pending further application by the proponent of sealing within 10 days of initial filing:

> Any Party shall have 10 days from the date of such filing to file a formal motion to seal any or all of such materials, which may be opposed by any other party. If the court grants the motion to seal, the materials at issue in the motion to seal shall remain under seal. If no motion to seal is filed, or such motion is denied, the materials shall be unsealed.

Id., ¶ 4.

On or about November 10 and 11, 2015, defendant Baroni and defendant Kelly each filed discovery motions (Documents 43 and 42 on ECF), seeking *inter alia*, a bill of particulars that would include the names of unindicted co-conspirators referenced in the Indictment, alleging that the Government has failed in its discovery obligations to adequately identify exculpatory materials

it must produce pursuant to Brady v. Maryland[1], as well as producing more than 1.7 million documents in a non-searchable format. Each defense motion included multiple exhibits that contained significant redactions, and the only authority for making such redactions is the Protective Order. No party made the required formal motion pursuant to Paragraph 4 of the Protective Order to continue the provisional seal on any of the redacted material within 10 days of filing. Indeed, no party has ever made a motion to seal any of the documents purportedly filed pursuant to the Protective Order. Under the express terms of the Protective Order, the provisional seal should have lifted automatically.

Specifically, certain exhibits to these discovery motions include numerous redactions made by defense counsel, and where no motion has been made by any party. For example:

- Numerous redactions in the Brief in support of the Baroni Discovery Motion (Document 43-1 on ECF) which were made expressly pursuant to the Protective Order and acknowledge the 10 day deadline before automatic unsealing should occur. See **Exhibit A** to the Declaration of Bruce S. Rosen, Esq. ("Rosen Decl."), submitted herewith.
- Extensive Portions of a July 22, 2015 Discovery Letter sent by U.S. Attorney Paul Fishman to defense counsel were redacted and attached to the Declaration of Michael Critchley, Esq. accompanying the Kelly Discovery Motion (Document 42-1 on ECF) as Exhibit A. See **Exhibit B** to Rosen Decl. While it is not known what numerous passages in that letter refer to, there is clearly a section on page 15 of Document 42-1 which transmits Brady material to the defendants ("3. Aware of our obligations under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, we are providing the information below in an abundance of caution and without conceding that any of such information is, in fact, exculpatory:"). These Brady disclosures are numbered by small letters and appear to extend to "g" or beyond and in which at least "b," "d," "e" and "g" (and perhaps portions of other numbered sections) are redacted. See id., pgs. 15-17.

[1] In Brady v. Maryland, 373 U.S. 83, 87 (1963), the Supreme Court held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Since Brady, the Supreme Court has held that the duty to disclose is applicable even where there has been no request by the defendants and required the government to broadly disclose such evidence to defendants, including impeachment and exculpatory evidence. See Rinaldi v. Gillis, 248 F. App'x 371, 375 fn. 3 (3d Cir. 2007).

- An Email from Governor Christie to PoliticsNJ providing examples of what appear to be erroneous reporting, accompanying the Baroni Discovery Motion (Document 43-2 on ECF, pg. 68). See **Exhibit C** to Rosen Decl.
- The so-called "Gibson Dunn Memo," ("GD Memo") which also accompanies the Baroni Discovery Motion and is redacted in its entirety (Document 43-2 on ECF, pgs. 146-163). See **Exhibit D** to Rosen Decl. The GD Memo was apparently described in a redacted sentence of Baroni's brief which Baroni acknowledged "was made in an abundance of caution. Mr. Baroni does not believe the redacted material is subject to the Protective Order." See Document 43-1 on ECF, pg. 32 fn. 12. This document should have been automatically unsealed pursuant to the 10 day requirement in the Protective Order, yet is now subject to a Port Authority Motion to Seal and return its contents. See Document 47 on ECF.
- Another redacted memo attached to the Declaration of Michael Critchley, Esq. accompanying the Reply Brief in further support of the Kelly Discovery Motion as Exhibit 4 on December 23, 2015 (Document 57-2). See **Exhibit E** to Rosen Decl. This document, which also should have been automatically unsealed pursuant to the 10 day requirement in the Protective Order, is also the subject of a motion to seal filed on January 8, 2016. See Document 60 on ECF.[2]

The Proposed Intervenors were awaiting, as the Government promised, the public filing of a sealed list of unindicted co-conspirators. However, Proposed Intervenors have just learned that on January 11, 2016, the Government inexplicably and contrary to its prior representations submitted that list to this Court and Defendants via email ***without any mention on the public docket*** in an apparent effort to avoid public scrutiny of its action. See Document 61 on ECF (Letter from Baroni to Court). As that letter points out:

(a) The "filing" of a list of unindicted coconspirators is not subject to automatic sealing under Fed. R. Cr. P. 6 (involving grand jury materials).

(b) Pursuant to the District of New Jersey's Electronic Case Filing and Procedures, Paragraph 10: "Documents subject to sealing must be submitted as a Paper Filing, in an envelope clearly marked "sealed," and shall be accompanied by a CD containing the document in PDF. A motion to file a document under seal,

[2] Proposed Intervenors take no position on whether the document sought to be sealed and returned in the initial Port Authority motion (Document 47 on ECF) is privileged, but to the extent it is not, the document should be unsealed pursuant to the express terms of the Protective Order. Further, Proposed Intervenors believe the documents in both Port Authority motions are not completely unrelated to the allegations in the Indictment and would request an opportunity to be heard more fully if the Court decides to permit intervention.

and the order authorizing the filing of documents under seal, may be filed electronically, unless prohibited by law." None of these requisites were satisfied.

(c) This Court has already entered a Protective Order regarding materials eligible for sealing, as detailed above, and there is nothing in that Order that would permit this document to be filed under seal.

There can be no question that the list of unindicted coconspirators, is a judicial document eligible for First Amendment and common law access. "The status of a document as a 'judicial record' . . . 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).[3]

[3] "Filing clearly establishes the status of a document as a judicial record. The government filed its 5K letter with the court, and the District Court used it in adjudicatory proceedings as a basis for departing from the sentencing guidelines. Therefore, as a judicial document, the 5K letter falls under the presumption of openness that attaches to such documents." United States v. Chang, 47 F. App'x 119, 122 (3d Cir. 2002) (granting media access to sentencing memorandum filed as a letter). See Leucadia, Inc. v. Applied Extrusion Techs., Inc., 998 F.2d 157, 162 (3d Cir. 1993) (quoting In re Johnson, 598 N.E.2d 406, 410 (Ill.App.Ct.1992)) ("Once documents are filed with the court, they lose their private nature and become part of the court file and 'public components' of the judicial proceeding to which the right of access attaches."). Moreover, "a document may still be construed as a judicial record, absent filing, if a court interprets or enforces the terms of that document, or requires that it be submitted to the court under seal." See In re Cendant Corp., 260 F.3d at 192; 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). "[A] document becomes judicial when it becomes integrated into court proceedings when, for example, it is "**placed under seal,** interpreted or enforced" by the Court." United States v. Kushner, 349 F. Supp. 2d 892, 902-03 (D.N.J. 2005). (emphasis added) Based on Cendant, the mere fact that the document was filed with the Court with a request that the Court file it under seal should be sufficient to make it a judicial document. If this Court places the document under seal, under the Kushner analysis, it should automatically become a judicial record. If this Court does not place the document under seal, it should be made available to the public. Alternatively, this Court should consider that the Government likely chose its method of delivery to avoid an ECF filing in order to circumvent public knowledge of the filing and its accessibility under the First Amendment, and this Court should therefore require its filing through ECF as a judicial document as explained above.

LEGAL ARGUMENT

I. PROPOSED INTERVENORS HAVE A RIGHT TO INTERVENE

It is well-settled that Intervenors and the public have both a First Amendment and common law right of access to judicial proceedings and records. Press-Enterprise Co. v. Superior Court of California for Riverside Cty., 478 U.S. 1 (1986) ("Press Enterprise II"); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978); see also United States v. Antar, 38 F.3d 1348, 1361 (3d Cir. 1994) (quoting Publicker Indus., Inc. v. Cohen, 733 F.2d 1059, 1066–67 (3d Cir. 1984)). As the Third Circuit has consistently reaffirmed, "this right of access promotes important societal interests including confidence in the judicial system." In re Newark Morning Ledger Co., 260 F.3d 217, 220 (3d Cir. 2001) (holding that only the countervailing interest in grand jury secrecy warranted temporary delay of public access to filed materials in contempt proceedings).

Having such a protected interest, members of the media "are entitled to 'notice and an opportunity to be heard at a meaningful time, and in a meaningful manner' before they can be deprived of that interest." Kushner, 349 F. Supp. 2d at 896 (quoting Antar, 38 F.3d at 1361 fn. 18). This protected interest confers on members of the media standing to permissively intervene and to challenge a protective or confidentiality order that was entered in an action in order to protect their, and the public's, right to access to judicial records. See Jackson v. Delaware River & Bay Auth., 224 F. Supp. 2d 834, 837 (D.N.J. 2002); see also Pansy v. Borough of Stroudsburg, 23 F.3d 772, 777 (3d Cir. 1994) ("The Newspapers have met the standing requirements in this case: they have shown that the putatively invalid Confidentiality Order which the district court entered interferes with their attempt to obtain access...").

Proposed Intervenors seek to intervene in this proceeding in order to gain access to filed judicial documents to which the public has a constitutional and common law right of access. Because third parties such as Proposed Intervenors have standing to challenge protective orders and confidentiality orders in an effort to obtain access to information or judicial proceedings (see Pansy, 23 F.3d at 777), Proposed Intervenors' motion to intervene should be granted.

II. THE PUBLIC IS ENTITLED TO THE LIST OF UNINDICTED CO-CONSPIRATORS IN THIS PROCEEDING

A. The Public Is Presumptively Entitled Access to Judicial Proceedings And Records Absent a Compelling Governmental Interest.

As noted, the public has both a First Amendment and common law right of access to judicial proceedings and records. See Richmond Newspapers, 448 U.S. 555 and Globe Newspaper Co. v. Superior Court for Norfolk Cty., 457 U.S. 596 (1982); see also In re Cendant Corp., 260 F.3d at 192 ("It is well-settled that there exists, in both criminal and civil cases, a common law public right of access to judicial proceedings and records.").

The Third Circuit has held that these open-court 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) discouragement of perjury. Criden II, 675 F.2d at 556.

These interests "may not be abridged absent the satisfaction of substantive and procedural protections." See Antar, 38 F.3d at 1359. Accordingly, closure of criminal records to which there is a presumptive right of access is permitted only under rare circumstances when there is "cause

shown that outweighs the value of the openness." Press-Enterprise Co. v. Superior Court of California, Riverside Cty., 464 U.S. 501 (1984) ("Press Enterprise I").

As such, this Court has required that closure may occur only where there are very specific findings that meet exacting standards:

> [A] court ordering closure must first establish that the competing interest asserted is not only "compelling," but also that it outweighs the First Amendment right of access. Second, it must determine that the limitations imposed are both necessary to and effective in protecting that interest. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. On the procedural side, these determinations must be covered by specific, individualized findings articulated on the record *before* closure is effected.

Antar, 38 F.3d at 1359 (internal quotations and citations omitted) (emphasis in original).

B. The Public Is Presumptively Entitled Access to the List of Unindicted Co-Conspirators.

The First Amendment right of access applies to a list of unindicted co-conspirators filed in response to a defendant's motion for bills of particulars. Smith I, 776 F.2d at 1111. Smith I involved media intervenors' motions to intervene in a criminal proceeding and to modify a protective order which sealed a list of names of unindicted co-conspirators filed by the government. Id. at 1106. The district court found that the list could remain sealed so long as the government showed "good cause," and concluded that while unsealing the list "would not prejudice the defendant's right to a fair trial" nor adversely impact the government's continuing investigation, unsealing would nonetheless cause "serious injury to the persons named on the list" because it would invade their privacy rights and provide them no meaningful opportunity to respond. Id. at 1107.

On appeal, the Third Circuit analyzed the issue through the "historical and structural analysis mandated by *Richmond Newspapers, Globe Newspaper,* and *Press-Enterprise(I)*", noting that "[a]lthough those cases concerned access to judicial proceedings, no reason occurs to us why their analysis does not apply as well to judicial documents", such as the list of unindicted co-conspirators. Id. at 1111-1112. Repeating the "logic and experience" language of Globe Newspaper Co., 457 U.S. at 606, the Smith I Court recognized the "institutional value of public indictment[s]" and concluded that "[b]ecause of our historic experience and the societal interest served by public access to indictments and informations, ... such access is protected by the First Amendment and the common law right of access to the judicial process." 776 F.2d at 1112.[4]

Against this background, the Smith I Court explained that "[s]ince a First Amendment right of access is involved, ***the trial court ensealment of the list of names can be sustained only if it 'is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest.***'" Id. (quoting Press Enterprise I, 464 U.S. at 510; Globe Newspaper Co., 457 U.S. at 607)) (emphasis added). Accordingly, the Third Circuit disavowed the district court's "good cause" standard and set forth a stringent and exacting standard that must be met to prohibit access.

The Third Circuit ultimately affirmed the district court's decision that the list should remain sealed to protect the named persons' privacy rights ***based on narrow circumstances not present here, such as***: (1) "the bill . . . set forth a list of names including not only those 'persons who, in the opinion of the United States [Attorney], are unindicted co-conspirators in this case,' but also those persons who, in his opinion, '*could conceivably be considered as* unindicted co-conspirators due to their alleged involvement in events included in the conspiracy'," and (2) "the United States

[4] The Smith I Court further concluded that bills of particulars are "more akin to the functions of an indictment than to discovery", where access to filed documents is limited. 776 F.2d at 1111.

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". Id. at 1113 (emphasis in original).

In view of these facts, and in light of the inclusion by the United States Attorney for the Eastern District of Pennsylvania of the names of persons who only "conceivably may" be considered co-conspirators, the Smith I Court concluded that "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.

The concurrence by Judge Mansmann shed further light on the Smith I decision, doing nothing short of lambasting that particular United States Attorney for using a "broad brush" in filing its bills of particulars and producing an "overbroad bill of particulars which provides the government with great latitude in the description of the crime charged." Id. at 1116-17 (Mansmann, J., concurring). Judge Mansmann explained that defendants' interest in a narrowly drawn indictment and bill of particulars and the public's interest in a speedy and public trial "require that the government be prepared to name as unindicted co-conspirators in a bill of particulars only those individuals for whom it has the requisite evidence. ... The government may not speculate as to those who could conceivably be co-conspirators." Id. at 1117.

Moreover and relevant here, in reaching its decision, the Smith I Court noted that "the list contains the names of some individuals who are public officials and some who are public employees" and concluded that "the public has a substantial interest in the integrity or lack of integrity of those who serve them in public office." Id. at 1114. Judge Mansmann's concurrence

also addressed this point: "The list of unindicted co-conspirators at issue includes the names of public employees and elected officials, who 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." Id. at 1116 (Mansmann, J., concurring). ***Thus, absent the unique circumstances of Smith I or other rare circumstances, public officials and public employees included on a list of unindicted co-conspirators have no privacy and reputational interests sufficiently compelling to avoid disclosure.***

Indeed, just a year later, the Third Circuit noted the unusual nature of Smith I, explaining that the Smith I Court had concluded that the risk of serious injury to third parties from disclosure outweighed the interest of the public in access because the United States Attorney's opinion expressed in the bill of particulars 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. See United States v. Smith, 787 F.2d 111, 116 (3d Cir. 1986) ("Smith II").[5] The Seventh Circuit, in a 2000 decision, likewise recognized that these unique circumstances were the reason the list remained sealed in Smith I, explaining that "the Government had provided no factual context for its inclusion of particular names on the list." United States v. Ladd, 218 F.3d 701, 704 (7th Cir. 2000). In recognition of this distinction, the Seventh Circuit ***granted access*** to a list of unindicted co-conspirators sought in that case, finding that "where there is a more reliable basis for finding that

[5] This proposition has been affirmed in numerous cases since Smith I. For example, in Smith II, the Third Circuit declined to seal a sidebar conversation involving a high official in Pennsylvania's Republican Party, explaining, "[a]s a high official in the state's Republican Party, he is a public person and subject to public scrutiny." 787 F.2d at 116.

the individuals were indeed coconspirators, that concern [of injury to reputation] must yield to the public's right to know the sources of evidence ..." Id. at 705.

C. The Government Cannot Rebut the Public's Presumptive Right to Access the List of Unindicted Co-conspirators.

Here, where the Government has presumably not engaged in any such "overstepping" and where the list contains names of only those individuals that are truly unindicted co-conspirators, the Government's filing of the list of unindicted co-conspirators under seal cannot stand. There is no "compelling governmental interest" sufficient to rebut the public's presumptive right to access to the list of unindicted co-conspirators, nor could the sealing of the entire filed list of unindicted co-conspirators be narrowly tailored to serve any such interest, even if one did exist.

There are very few governmental interests sufficiently compelling to outweigh the public's First Amendment right of access; they include such limited circumstances as grand jury secrecy (see In re Newark Morning Ledger Co., 260 F.3d at 221), individual privacy interests (see Smith I, 776 F.2d at 1114), the government's need to conduct criminal investigation unfettered by early public disclosure of its sources of evidence and identities of witnesses (see United States v. Sealed Search Warrants, No. 99-1096, 1999 WL 1455215, at *7 (D.N.J. Sept. 2, 1999)), and threat to national security (N. Jersey Media Grp., Inc. v. Ashcroft, 308 F.3d 198, 217-18 and fn. 13 (3d Cir. 2002)). These governmental interests simply do not apply here.

In particular, any argument that the individual privacy interests of the unindicted co-conspirators outweigh public access to their names would be a red-herring. Based on the Indictment, it is anticipated that the unindicted co-conspirators here are various public employees and/or elected and appointed officials who "deliberately caus[ed] significant traffic problems in Fort Lee through a reduction in the number of the Local Access Lanes--all under the false pretense of a traffic study". See Document 1 on ECF, pg. 5 at ¶ 4. As noted above, public employees and

elected and appointed officials "***cannot claim a right of privacy with respect to the manner in which they perform their duties***." Smith I. at 1116 (Mansmann, J., concurring) (emphasis added). As such, any individual privacy interests of the unindicted co-conspirators is insufficiently compelling to outweigh the public's First Amendment rights of access.

Injury to official reputation is an insufficient reason "for repressing speech that would otherwise be free" (Landmark Communications, Inc. v. Virginia, 435 U.S. 829, 841-42 (1978)), and cases decided since Smith I have fairly consistently concluded that public officials have "no privacy interest in freedom from accusations, baseless though they may be, that touch on [their] conduct in public office or in [their] campaign for public office." See In re McClatchy Newspapers, Inc., 288 F.3d 369, 373 (9th Cir. 2002) (holding that newspaper was entitled to writ of mandamus compelling disclosure of unredacted letters). "Political figures are well-equipped and have ample opportunity to respond to any accusations of wrongdoing. ... Privacy interests should be trumped when evoked to protect public officials from criticism." United States v. Huntley, 943 F. Supp. 2d 383, 387 (E.D.N.Y. 2013) (granting petition by members of the press to unseal sentencing memorandum containing list of names). See also Kushner, 349 F. Supp. 2d at 906-07 (explaining that current and former public officials have diminished expectations of privacy). See also United States v. Criden, 648 F.2d 814, 822 (3d Cir. 1981) ("Criden I") ("[W]e note that the criminal trial at which the tapes were played was not an ordinary criminal trial. The two defendants tried were elected public officials accused of receiving money for acts to be performed by them because of their official positions"). Cf. Pansy, 23 F.3d at 788 (finding that if access to a filed document "involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality").

Indeed, as the Supreme Court has held, 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, as the Third Circuit noted more than two decades ago, "the public has a lively interest in considering the relationships formed by elected officials" (Medico v. Time, Inc., 643 F.2d 134, 142, cert. denied, 454 U.S. 836 (1981)), and it is these relationships that seem to form the basis of the Government's allegations of conspiracy here.

D. Before this Court Can Deny the First Amendment Right to Access, it Must Make Specific Findings That Closure Is Essential to Preserve an Overriding Interest and that Alternatives to Closure Cannot Adequately Protect That Interest.

The public's constitutional and common law access right to lists of unindicted co-conspirators as articulated above "may not be abridged absent the satisfaction of substantive and procedural protections." See Antar, 38 F.3d at 1359. Accordingly, closure of criminal proceedings ***or records*** to which there is a presumptive right of access is permitted only under rare circumstances when there is "cause shown that outweighs the value of the openness." Press-Enterprise I, 464 U.S. at 509 (emphasis added). The Supreme Court articulated this standard in Press Enterprise I as follows:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

Id. at 509-510.

As summarized by the Third Circuit in United States v. Simone, 14 F.3d 833, 841-42 (3d Cir. 1994):

> [Under] the test set out in *Press–Enterprise I,* [the district court] must first clearly articulate the overriding interest that it feels is jeopardized by the presence of the public and press. The court must then, in "findings specific enough that a reviewing

> court can determine whether the closure order was properly entered," *Press–Enterprise I,* 464 U.S. at 510, 104 S.Ct. at 824, demonstrate that closure is essential to preserve that interest. *Id.* It must also indicate why alternatives to closure cannot adequately protect that interest. *United States v. Raffoul*, 826 F.2d 218, 225 (3d Cir. 1987)

As such, this Court has required that closure may occur only where there are very specific findings that meet exacting standards:

> [A] court ordering closure must first establish that the competing interest asserted is not only "compelling," but also that it outweighs the First Amendment right of access. Second, it must determine that the limitations imposed are both necessary to and effective in protecting that interest. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. One part of establishing the necessity of a limitation is a consideration of alternative measures and a showing that the limitation adopted is the least restrictive means of accomplishing the goal. On the procedural side, these determinations must be covered by specific, individualized findings articulated on the record *before* closure is effected.

Antar, 38 F.3d at 1359 (internal quotations and citations omitted). Therefore, if, after a hearing, this Court were to find against Intervenors, it must issue specific written findings that comport with the rule articulated in the cases cited above.

III. THE PUBLIC IS ENTITLED TO THE SEALED DOCUMENTS FILED IN THIS PROCEEDING PURSUANT TO THE PROTECTIVE ORDER AND COMMON LAW RIGHT OF ACCESS

A. The Public Is Entitled Access to the Sealed Documents Under the Plain and Unambiguous Terms of the Protective Order.

In addition to the list of unindicted co-conspirators, the public is entitled to access the Sealed Documents filed in this proceeding pursuant to the Protective Order, which were provisionally sealed and for which no motion for a permanent seal has been filed. In no uncertain terms, the Protective Order states:

> If any party, including the Government, includes any Confidential Discovery Materials in connection with the filing of a motion, that party shall file such materials ***provisionally under seal***. Any party shall have ten days from the date of such filing to file a formal motion to seal any or all such materials, which may be

> opposed [sic] any other party. If the Court grants the motion to seal, the materials at issue in the motion to seal shall remain under seal. ***If no motion to seal is filed, or such motions is denied, the materials shall be unsealed.***

See Document 22 on ECF, ¶ 4 (emphasis added).

Neither the Government nor Defendants have filed any motion to seal materials that have previously been filed and redacted, and the ten (10) day window has long passed. Therefore, pursuant to the Protective Order, these Sealed Documents should be automatically unredacted.

B. The Public Is Entitled Access to Brady Materials Filed Under Seal Pursuant to the Common Law.

In addition to the First Amendment right of access, the public also enjoys a common law right of access to judicial records and proceedings. See United States v. Smith, 123 F.3d 140, 155-56 (3d Cir. 1997) ("Smith III"). This right antedates the Constitution, and 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, 998 F.2d at 161 (3d Cir. 1993). See also Martin, 746 F.2d at 968 ("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). 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, we believe that the existence of a presumption of release is undeniable." Criden I, 648 F.2d at 823.

The common law right of access promotes numerous salutary functions:

> The public's exercise of its common law access right in civil cases promotes public confidence in the judicial system.... As with other branches of government, the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness.

Leucadia, 998 F.2d at 161 (quoting Republic of Philippines v. Westinghouse Elec. Corp., 949 F.2d 653, 660 (3d Cir. 1991)). See also LEAP Sys., Inc. v. MoneyTrax, Inc., 638 F.3d 216, 220 (3d Cir. 2011).

While, the common law right of access is not ordinarily presumed with respect to discovery materials or documents appended to discovery motions,[6] certain of the Sealed Documents sought by Proposed Intervenors by their own description involve materials produced by the Government in accordance with Brady v. Maryland and pursuant to the Due Process Clause. Although filed Brady disclosures may, procedurally, be considered "discovery," the Third Circuit in Wecht, supra, determined that filed Brady disclosures are in fact governed by the Constitution and, accordingly, the common law right of access attaches to such "discovery". See Wecht, 484 F.3d at 210-11.

Thus, at least those portions of the July 22, 2015 Discovery Letter sent by U.S. Attorney Paul Fishman to defense counsel and attached to the Declaration of Michael Critchley, Esq. should be unsealed after in camera review of the unredacted original document by the Court. See Document 42-1 on ECF, pgs. 15-17; also submitted herewith as Exhibit B to the Rosen Decl. As noted above, at least one section of the letter, identified at PageIDs 695-697 of Document 42-1 confirms on its face that it is transmitting Brady material to Defendants and is heavily redacted. These Brady materials, as well as others that may be found in the Sealed Documents, should be unredacted and unsealed and made accessible to the public pursuant to Wecht, supra.

6 See Leucadia, 998 F.2d at 209; Wecht, 484 F.3d at 209.

C. This Court Should Unseal All Provisionally Sealed Documents Immediately Because the Parties Failed to Move to Permanently Seal – or Alternatively Use its Discretion to Unseal the Redacted Materials.

Moreover, this Court also has the power to modify or lift the Protective Order in its entirety. See Wecht, 484 F.3d at 211 ("We also believe it would have been proper for the District Court to unseal the records pursuant to its general discretionary powers."). Upon intervention by a third party, the Court should consider whether there is good cause for continuing the sealing and protective orders. See id. at 211-12 (citing Pansy, 23 F.3d at 790).

The Court's consideration in this regard requires the sealing party to make a "particularized showing of the need for continued secrecy", which is balanced against the requestor's reason for access. See id.; Pansy, 23 F.3d at 790. The sealing party has "the burden of justifying 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 law is clear that it is within the Court's discretion, *sua sponte,* to unseal the record." Zurich Am. Ins. Co. v. Rite Aid Corp., 345 F. Supp. 2d 497, 506 (E.D. Pa. 2004) (citing In re Cendant Corp., 260 F.3d at 192). See United States v. Sarihifard, 155 F.3d 301, 309 (4th Cir. 1998) ("The decision to seal and unseal evidence is committed to the sound discretion of the trial judge.").

In this matter, the parties have redacted/sealed various materials without explanation, much of it unrelated to the stated purposes of the Protective Order. The Court did not enter that Order to provide the parties a purely discretionary power to avoid the disclosure of potentially embarrassing revelations regarding public employees and officials. Indeed, the Third Circuit has held that in balancing a request for access against the need for secrecy, "whether a party benefitting from the order of confidentiality is a public entity or official" or whether the case "involves issues

important to the public" is highly probative; if the requested material "involves issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality." Pansy, 23 F.3d at 788.

In light of the fact that the redacted materials involve public employees and officials and myriad issues important to the public, and in light of the fact the parties have not offered any particularized showing of the need for continued redaction of any of the requested materials, this Court should lift, or at least modify the Protective Order, and grant Proposed Intervenors access to the redacted materials.

For these reasons, the Proposed Intervenors and the public should be granted access to the Sealed Documents.

CONCLUSION

For these reasons, Proposed Intervenors respectfully request that the Court: (1) grant Proposed Intervenors' motion to intervene for the duration of this proceeding to seek appropriate relief with respect to sealing applications or orders; (2) unseal and grant access to the list of unindicted co-conspirators filed as judicial documents in this proceeding by the Government; (3) unseal/unredact and grant access to documents that have been or may be filed under seal or with redactions throughout the pendency of this action without the appropriate applications required by this Court's Protective Order dated July 7, 2015, including the Sealed Materials more specifically described above and attached to the Declaration of Bruce S. Rosen, Esq.; and (4) to the extent necessary, lift or otherwise modify the Protective Order.

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Date: January 12, 2016