No. 16-3273

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

M. GUY HARDY, individually and as a participant in the Local 95 Insurance Trust Fund and the Local 95 Pension Fund, and on behalf of all other persons who are, will be, or have at any time since 1/1/80 been, participants or beneficiaries in the, JOSEPH HARDY
Plaintiffs-Appellees,
HARRY J. DIDUCK, HARVEY L. SHERROD
Plaintiffs,
v.
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES
Defendant-Cross-Claimant-Appellee,
WILLIAM KASZYCKI, TRUMP-EQUITABLE FIFTH AVENUE COMPANY, TRUMP ORGANIZATION, HOUSE WRECKERS UNION LOCAL 95 PENSION FUND, TRUSTEES OF THE HOUSE WRECKERS UNION LOCAL 95 INSURANCE TRUST FUND, KASZYCKI & SONS CONTRACTORS, INC., DONALD J. TRUMP, DBA THE TRUMP ORGANIZATION, JOHN SENYSHYN,
Defendants-Cross-Defendants-Cross-Claimants-Appellees,
v.
TIME INC., THE REPORTERS COMMITTEE FOR FREEDOM OF THE PRESS,
Intervenors-Appellants.

On Appeal from the United States District Court
for the Southern District of New York

REPLY BRIEF FOR INTERVENORS-APPELLANTS

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SUMMARY OF ARGUMENT

This case concerns the public's right of access to sealed judicial records in the matter of *Hardy, et al. v. Kaszycki & Sons Contractors, Inc. et al.* ("*Hardy*"), a class action lawsuit to which Appellees President Donald J. Trump and the Trump Organization were parties. The sealed documents consist of two court orders and a transcript filed with the district court that reflect the district court's approval of a proposed settlement of the claims of the certified class of plaintiffs in *Hardy*, as required by Federal Rule of Civil Procedure 23(e).[1]

Contrary to Appellees' arguments, the common law and First Amendment presumptions of access apply to the sealed settlement-related records. The records at issue here do not consist of mere settlement negotiations or conferences between individual, private litigants, nor do they relate to a private settlement agreement entered into without judicial involvement. Rule 23(e) required the district court to exercise its Article III powers to evaluate and approve the proposed settlement in *Hardy*, and it did so. Accordingly, the sealed records at issue are judicial records to which strong common law and First Amendment rights of access apply.

Moreover, in this case, the applicable common law and First Amendment presumptions of access require that the public be afforded access to the sealed

[1] Unless otherwise stated, all references herein to the "Rules" are to the Federal Rules of Civil Procedure.

settlement-related records. The public interest in access to these records—which concern the conduct and litigation tactics of President Trump—is particularly powerful, and Appellees have not established any countervailing interest, let alone a compelling one, that could overcome the public's common law and First Amendment rights to inspect them. Appellees' general assertion, unsupported by the record, that sealing of the settlement-related records was done to facilitate settlement cannot satisfy the demands of either the First Amendment or common law and does not justify the continued sealing of those judicial records.

Finally, because the sealed records at issue are judicial records to which the common law and First Amendment presumptions of access apply, the district court erred in applying a good cause standard both when it initially sealed the settlement-related records and when it evaluated Appellants' motion to unseal them. As this Court's precedent makes clear, the good cause standard, which is far less stringent than the standards required by the common law and First Amendment, applies to protective orders governing documents exchanged between parties in civil discovery; such discovery materials stand on entirely different footing from judicial records. The district court's erroneous application of a good cause standard to the settlement-related records, alone, requires reversal.

ARGUMENT

I. The common law and First Amendment establish strong rights of access to the settlement-related records, which concern the judicially approved settlement of a class action lawsuit.

A. The sealed settlement-related records are judicial records subject to the common law and First Amendment rights of access.

As Appellants established in their opening brief, *see* Moving Br. at 17–20, 25–26, settlement-related documents in class action lawsuits are subject to both the common law and First Amendment presumptions of access because of the "larger role" played by the trial court in such settlements. *See Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986). Specifically, Rule 23(e) requires that class action settlements be judicially approved. Fed. R. Civ. P. 23(e). Unable to refute this argument, Appellees argue that the settlement in *Hardy* was "in effect, removed" from "the general category of court-approved settlements" by the waiver of "the standard notice requirements under Rule 23(e)." Appellees' Br. at 3–4, 17.

Appellees' argument is meritless. Appellees acknowledge that settlement of *Hardy*, a class action lawsuit, was subject to Rule 23(e)'s requirements. *See id.* at 17 (asserting that the class waived Rule 23(e)(1)'s notice requirement). Rule 23(e) sets forth five requirements that apply to proposed class action settlements, of which notice to class members is but one. *See* Fed. R. Civ. P. 23(e)(1)–(5). Whether or not the *Hardy* plaintiffs waived the notice requirement of Rule 23(e)(1) is irrelevant to the issue before this Court; it does not affect Rule 23(e)'s separate

requirement that the claims, issues, or defenses of a certified class may be settled "only with the court's approval." Fed. R. Civ. P. 23(e). Indeed, Appellees do not—and cannot—claim that the district court was not required to judicially approve the *Hardy* settlement under Rule 23(e).

Put simply, even if the notice requirement of Rule 23(e) was waived, the Rule still required the district court to determine if the proposed *Hardy* settlement was "fair, reasonable, and adequate," and, if it so determined, to approve the settlement. Fed. R. Civ. P. 23(e)(2). These acts are quintessential exercises of the district court's Article III power. And the public's ability to monitor the district court's exercise of this power hinges upon its access to the court's order approving the settlement, as well as documents reflecting the terms of the settlement agreement that the court approved. *See Geltzer v. Andersen Worldwide, S.C.*, No. 05 Civ. 3339 (GEL), 2007 WL 273526 at *2 (S.D.N.Y. Jan. 30, 2007) ("The press and public could hardly make an independent assessment of the facts underlying a judicial disposition, or assess judicial impartiality or bias, without knowing the essence of what the court has approved."). Thus, for the reasons set forth in Appellants' opening brief, the sealed settlement-related records are judicial records to which the common law and First Amendment rights of access apply.

Appellees' attempt to distinguish *Geltzer* is unavailing. *See* Appellees' Br. at 17–18. According to Appellees, the *Geltzer* court held that a heightened

presumption of access applied to a judicially-approved bankruptcy settlement because the plaintiff-trustee in that case was not acting for "'his . . . own personal interest, but on behalf of others.'" *Id.* at 17 (quoting *Geltzer*, 2007 WL 273526 at *1). As an initial matter, the class representatives in *Hardy* were acting on behalf of others. *See Geltzer,* 2007 WL 273526 at *1 (noting that class actions are among the types of cases where the plaintiff acts in a representative capacity for others). And, in any event, the court in *Geltzer* did not rest its holding that there was a presumption of access to the settlement agreement in that case upon the fact that the plaintiff-trustee was acting "on behalf of others"; the court simply noted this to illustrate why bankruptcy settlements, like class action settlements, require "more searching judicial scrutiny" than other types of settlements. *Id.*

In re Sept. 11 Litigation is also fully applicable to the facts of this case. Contrary to Appellees' argument, the district court in that case did not conclude that the common law and First Amendment presumptions of access applied because it had "to conduct extensive proceedings after approving the settlement," including allocation and distribution of the settlement award. Appellees' Br. at 14. Rather, as the court stated: "The categories of information sealed pursuant to [the court's order] *are central to the parties' settlement and my decision on their motion for approval*. As such the presumptions of access under the common law and First Amendment apply." *In re Sept. 11 Litig.*, 723 F. Supp. 2d 526, 531

(S.D.N.Y. 2010) (emphasis added). Thus, while the court did note that it would allocate and distribute the settlement, those facts were merely "*additional considerations*" informing the presumption of access. *Id.* (emphasis added). The court in *In re Sept. 11 Litigation* held that the constitutional and common law presumptions of access applied because, as in *Hardy*, the settlement-related documents were relevant to the court's approval of the parties' settlement.

B. Appellees' claim that the common law right of access does not apply to the sealed settlement-related records fails.

Appellees provide no authority for their bald assertion that the common law right of access is simply inapplicable to the settlement-related records at issue, nor any argument in support of this claim. *See* Appellees' Br. at 2 (stating that "neither the First Amendment nor common law right of access applies here"). Indeed, Appellees appear to concede that the common law right of access does apply; the majority of their argument is devoted to their contention that the common law right of access is overcome, not that it is inapplicable. *See id*. at 9–11.

As set forth in Appellants' opening brief, the sealed settlement-related records are unquestionably subject to the common law right of access, which applies to all documents "relevant to the performance of the judicial function and useful in the judicial process." *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) ("*Amodeo I*"). The two sealed district court orders in *Hardy* clearly meet this standard. *See In re United States*, 707 F.3d 283, 290 (4th Cir. 2013) ("[I]t is

commonsensical that judicially authored or created documents are judicial records."). In addition, the sealed transcript, which contains terms of the proposed class action settlement, is also a judicial record; it contains material central to the district court's decision to approve that settlement.

C. Appellees' argument that the First Amendment right of access does not apply to the sealed settlement-related records fails.

Appellees' attempt to argue that the First Amendment right of access does not apply to the sealed settlement-related records fares no better.

Appellees argue, first, that settlement proceedings and documents have not historically been open to the public. *See* Appellees' Br. at 8. Yet none of the cases Appellees cite in support of this proposition address proposed class action settlement agreements filed with a court for approval and are, therefore, distinguishable from the settlement-related records in *Hardy*. For example, in *Schoeps v. Museum of Modern Art*, the court concluded that a settlement agreement submitted to the court upon its request *solely* for the purpose of determining whether to make the agreement public may remain confidential. 603 F. Supp. 2d 673, 674, 676 (S.D.N.Y. 2009). Similarly, in *In re Franklin National Bank Securities Litigation*, the settlement agreement in question was apparently brought before the court so that the court could order that the settlement terms and documents be kept confidential—not because the court was required to approve the settlement. 92 F.R.D. 468, 470 (E.D.N.Y. 1981), *aff'd sub nom. FDIC v. Ernst &*

Ernst, 677 F.2d 230 (2d Cir. 1982). In addition, *Palmieri v. State of New York* concerns the sealing of settlement negotiations and a settlement agreement that apparently was not submitted to the court at all, much less submitted to the court for its approval. 779 F.2d 861, 863–64 (2d Cir. 1985). Finally, in *United States v. Glens Falls Newspapers, Inc.*, this Court held only that *draft* settlement documents and settlement *negotiations* are not open to the public. 160 F.3d 853, 856 (2d Cir. 1998). In fact, the Court in *Glens Falls* concluded that final settlement agreements that were submitted "for court action," like the sealed settlement-related records in *Hardy*, would "thereby becom[e] public." *Id.* at 857.

Appellees do not address the precedent cited in Appellants' opening brief in which courts have recognized the tradition of public access to court orders, *see* Moving Br. at 24–25 (citing *In re United States*, 707 F.3d at 290; *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006); *Union Oil Co. of Cal. v. Leavell*, 220 F.3d 562, 568 (7th Cir. 2000)), and to settlement agreements filed with a court for its approval. *See id.* at 25 (citing *Herrnreiter v. Chi. Hous. Auth.*, 281 F.3d 634, 636 (7th Cir. 2002); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993); *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343, 345 (3d Cir. 1986)). Appellees also overlook the fact that the sealed settlement-related records' status as judicial records supports a finding of a history of openness. *See Hartford Courant Co. v. Pellegrino*, 380 F.3d 83, 92 (2d Cir.

2004). The case law cited by Appellants amply demonstrates that judicial records like the settlement-related records at issue here have historically been open.

Second, Appellees argue that public access to the settlement-related records would not play "a significant positive role in the functioning of the settlement process." Appellees' Br. at 9. This argument ignores the duty imposed by Rule 23(e) on district courts to evaluate and approve class action settlements like the one in *Hardy*, and that the court in *Hardy* in fact did approve the settlement proposed by the parties. Rule 23(e) evidences a policy determination that judicial oversight of the class action settlement process is particularly important, as it requires the court to take on a "larger role" in that process and to "be satisfied of the fairness" of any settlement. *Janus Films, Inc.*, 801 F.2d at 582. Public access to class action settlement agreements thus facilitates public oversight of the judicial branch's key role in the class action settlement process, and, accordingly, plays a significant positive role in the functioning of that process. *See United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995) ("*Amodeo II*") (stating that public monitoring of the courts requires access to documents "used in the performance of Article III functions"). Access to the sealed *Hardy* records will allow the public to evaluate the district court's decision to approve the settlement agreement. Accordingly, the First Amendment right of access applies.

II. The public's common law and First Amendment rights of access to the sealed settlement-related records are not overcome.

A. Given President Trump's status as a public official and prominent public figure, the public interest in access is at its apex.

As Appellants' opening brief demonstrates, *see* Moving Br. at 12–13, public access to judicial proceedings—regardless of the parties involved—is "an essential feature of democratic control" of the judicial system, as it "provides judges with critical views of their work," "deters arbitrary judicial behavior," and promotes public confidence in the "conscientiousness, reasonableness, [and] honesty of judicial proceedings." *Amodeo II*, 71 F.3d at 1048. Public oversight of the judicial process is particularly important in class action lawsuits, where, as noted above, district courts play a central role in the settlement process. *See Janus Films, Inc.,* 801 F.2d at 582. Because now-President Trump and the Trump Organization were parties to the *Hardy* litigation, the public's interest in access is only heightened here. *See* Moving Br. at 34–38.

Appellees, however, argue that there is no heightened public interest in access to the sealed records at issue because Mr. Trump was not President of the United States at the time those records were sealed. Without citation to any authority, Appellees assert that "the proper analysis is for this Court to look at whether [sealing] was proper at the time the parties came before the District Court

requesting that their settlement be sealed (in 1998) and not after there has been a change in circumstances." Appellees' Br. a 19. Appellees are wrong.

Precedent of this Court makes clear that when evaluating a request to unseal judicial records and determining whether countervailing or compelling interests overcome the common law or First Amendment presumptions of access, a court must look to the current circumstances before it. For example, this Court evaluated a district court's decision on a motion to unseal a transcript of a closed proceeding based on present circumstances. *Newsday LLC v. Cty. of Nassau*, 730 F.3d 156 (2d Cir. 2013). The Court stated that "[j]udges (especially appellate judges) deciding whether transcripts can be released after the fact have the benefit of hindsight," *id.* at 163 n.8, and it noted that a motion to unseal a transcript "proceeds with the benefit of hindsight, so that release of the transcript may be required even where closing the courtroom was justified given what might reasonably have been anticipated in advance," *id.* at 165 n.10. Similarly, as to requests to unseal search warrant applications made pursuant to the common law right of access, this Court has made clear that courts should look to current circumstances, not the circumstances at the time the search warrant application was sealed. *See In re Newsday, Inc.*, 895 F.2d 74, 79 (2d Cir. 1990) (holding that a search warrant application is subject to the common law right of access once it has been executed

and any prosecution has concluded—circumstances not present at the time the application is sealed).

Indeed, it is commonsensical that courts must evaluate motions to unseal judicial records based on current facts, because changing circumstances can render obsolete the reasons that may have initially supported a sealing order. The existence of compelling or countervailing interests in favor of nondisclosure—such as jeopardy to an ongoing criminal investigation—often, if not always, disappear over time. For example, in *In re Newsday* this Court noted that the defendants' privacy interest in information contained in a sealed search warrant application "had been diminished by their guilty pleas," which were entered after the application was sealed but before the motion to unseal. *Id.* at 76. In sum, the district court, when ruling on Appellants' motion to unseal, should have considered the circumstances before it at the time, including the public's heightened interest in access to judicial records concerning then-Republican presidential nominee Trump, and this Court, for purposes of this appeal, should not ignore the fact that Mr. Trump now occupies the highest public office in the country.

In any event, even if it were appropriate to consider the public's interest in disclosure as though it were the late 1990s, when the settlement-related records were initially sealed, the public interest in access to those records still would be particularly strong. At that time, now-President Trump was a prominent, high-

profile businessman; he had placed himself at the forefront of the public controversy surrounding the use of undocumented workers to demolish the Bonwit Teller building in order to construct Trump Tower—a large real estate project in midtown Manhattan—and was a central figure in the *Hardy* litigation, which was widely reported on. *See, e.g.*, Dean Baquet, *Trump Says He Didn't Know He Employed Illegal Aliens*, N.Y. Times (July 13, 1990), http://nyti.ms/1IdeNhV; Selwyn Raab, *After 15 Years in Court, Workers' Lawsuit Against Trump Faces Yet Another Delay*, N.Y. Times (June 14, 1998), https://nyti.ms/2lm58kH (stating that Mr. Trump said that he had resisted efforts to settle *Hardy* out of principle).

Courts have repeatedly recognized the heightened public interest in access to court records concerning the conduct of public figures and participants in high-profile community controversies. *See, e.g.*, *Constand v. Cosby*, 112 F. Supp. 3d 308, 315–16 (E.D. Pa. 2015) (unsealing documents containing excepts from deposition of comedian Bill Cosby in part because he "has freely entered the public square and 'thrust himself into the vortex of th[ese] public issue[s]'" (alterations in original) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 352 (1974)); *Felling v. Knight*, 211 F.R.D. 552, 554–55 (S.D. Ind. 2003) (allowing disclosure of videotaped depositions of basketball coach Bobby Knight, a university athletic director, and assistant coaches, noting that "[s]eemingly few topics in the state of Indiana have generated more attention or public debate in recent times than the

events surrounding Knight's termination"). In short, even if the Court were to ignore the fact that he is now President, during the late 1990s Mr. Trump was a high-profile businessman and an active participant in the public controversy surrounding the demolition of the Bonwit Teller building and the *Hardy* litigation. Public interest in disclosure of the settlement-related records was particularly high at the time the records were sealed. It is now at its apex.

B. There is no countervailing or compelling interest that justifies continued sealing.

Appellees have not demonstrated any countervailing, let alone compelling, interest that would justify the continued sealing of the records at issue. Apparently abandoning the unsupported argument they made before the district court that "privacy interests" of other parties to the *Hardy* litigation and/or their counsel may be implicated by unsealing,[2] *see* App. at 34 n.1, Appellees now argue only that a general interest in facilitating the settlement of lawsuits justifies the ongoing sealing of the settlement-related records in *Hardy*. Appellees' Br. at 15–16. The cases upon which Appellees rely, however, provide no support for this proposition.

[2] On August 23, 2016, Lewis M. Steel, counsel to plaintiffs in *Hardy*, filed a letter with the district court stating that the named plaintiffs in *Hardy* "are deceased," that his former co-counsel Wendy Sloan "knows of no one who was a member of the plaintiff class that has a privacy interest" in the sealed records, and that neither he nor Ms. Sloan "know of any reason why those documents should not at this time be unsealed." App. 39–40.

1. Appellees cite the Third Circuit's decision in *LEAP Systems, Inc. v. MoneyTrax, Inc.*, 638 F.3d 216 (3d Cir. 2011) ("*LEAP*"), as nonbinding authority purportedly supportive of their argument that "reliance" by parties to a settlement agreement on assurances of confidentiality can overcome the public's rights of access. Appellees' Br. at 16. *LEAP* is inapposite.

The parties in *LEAP* reached two settlement agreements following a settlement conference. *LEAP*, 638 F.3d at 218. Upon the request of a defendant, and "[t]o ensure that the settlement agreements 'would not fall apart as soon as the parties left the courthouse,'" the terms of those agreements were memorialized on audiotape before the district court. *Id.* At the time the audiotape was made, the court assured the parties "that [it] would not file a transcript of the proceedings" and "explained that because the proceeding was 'not being transcribed as part of a court document,' there would be no reason to seal its contents." *Id.*

The district court in *LEAP* subsequently dismissed the action, retaining jurisdiction to enforce the parties' agreements and, following a motion to seal filed by the plaintiff, entered an order sealing the portions of the transcript memorializing the terms of the settlement agreements. *Id.* at 218–19. In doing so, the district court found that the plaintiff had demonstrated an "interest in maintaining the confidentiality of sensitive business information" and was "reasonably concerned that competitors would use this information to its

disadvantage." *Id.* at 219. Shortly thereafter, the parties resumed litigation and a new defendant, Todd Langford, moved to unseal portions of the transcript. *Id.* The district court denied that motion. *Id.* The Third Circuit affirmed, finding that the transcript was subject to the common law right of access, but that the right had been overcome under the circumstances. *Id.* at 221, 223. *LEAP* is unhelpful to Appellees' argument for several reasons.

First, *LEAP* was not a class action lawsuit, and Langford apparently did not assert a First Amendment right of access to the transcript. *Id.* at 220 (stating that Langford sought to unseal portions of the transcript pursuant to "his common law right of access to judicial proceedings and judicial records"). Thus, the court considered only the common law right of access. *Id.* at 221. Accordingly, *LEAP* has nothing to offer on the question of whether the First Amendment presumption of access, which applies to the settlement-related records at issue here and demands a higher showing, has been overcome.

Second, the facts of *LEAP* are unique and entirely different from those in *Hardy*. In *LEAP*, the settlement terms were memorialized only to ensure that the parties did not renege on their agreement "as soon as [they] left the courthouse," the district court informed the parties at the time the audiotape was made that a transcript of it would not be filed and did not need to be sealed to remain confidential, the plaintiff had demonstrated an "interest in maintaining the

confidentiality of sensitive business information" contained in the transcript, and the motion to unseal was made, not by the press or public, but by a defendant so that he could use the transcript in further litigation. *Id.* at 218–19. These unique factual circumstances of *LEAP* were central to the court's determination that the common law right of access had been overcome in that case. *Id.* at 222 (stating that "[u]nder these circumstances, we find LEAP's reliance on the [trial court's] assurances of confidentiality entirely reasonable and sufficient to outweigh the public's common law right of access"). None of these circumstances were present in *Hardy*, where, among other things, the parties' proposed class action settlement was filed with the district court for its approval.

Moreover, the Third Circuit in *LEAP* made expressly clear that a district court cannot "rely on the general interest in encouraging settlement to justify the sealing of an agreement which the parties mistakenly believed would remain confidential." *Id.* at 222 (quotation omitted). Rather, a court must specifically find that the parties "would not have entered into the settlement agreement[] *but for* the Court's assurance of confidentiality." *Id.* (emphasis in original). Quoting with approval from *Pansy v. Borough of Stroundsburg*, the Third Circuit noted that in most cases "'settlements will be entered into . . . whether or not confidentiality can be maintained.'" *Id.* (quoting *Pansy v. Borough of Stroundsburg*, 23 F.3d 772, 788 (3d Cir. 1994)).

Here, there is no indication in the record that *any* assurances of confidentiality—apart from the mere fact that the settlement-related records were sealed—were given to the parties by the district court. Moreover, at the time of settlement, *Hardy* had been pending for more than 15 years, having already been tried once and reversed, necessitating a retrial. *See Hardy v. Kaszycki & Sons Contractors, Inc.*, 870 F. Supp. 489, 491, 492–93 (S.D.N.Y. 1994) (comparing *Hardy* to the fictional and interminable legal proceedings in *Jarndyce v. Jarndyce*). And Appellees represented below that, after so many years of litigation, they reached "amicable terms" for settlement "without Court intervention," indicating that assurances of confidentiality on the part of the district court were neither provided, nor necessary for the parties to enter into a settlement. *See* App. at 35. For all these reasons, *LEAP* provides no support for Appellees' claims that the common law and First Amendment presumptions of access have been overcome.

2. Appellees' reliance on this Court's decision in *Gambale v. Deutsche Bank AG*, 377 F.3d 133 (2d Cir. 2004), is also misplaced. In that case, which was also not a class action lawsuit, the parties entered into a settlement agreement that was not made "part of the court record." *Gambale*, 377 F.3d at 143. The settlement documents "were not filed with the court and were not the basis for the court's adjudication." *Id.* Nevertheless, at a conference, the trial court "insisted on

learning the settlement amount," which one of the parties then disclosed "based on what it may have thought were assurances of confidentiality." *Id.* The Court held:

> [T]he presumption [of access] . . . was a weak one under these circumstances: The amount of the settlement was confidential, the parties articulated the reasons for such confidentiality, and the amount made its way into the transcript only in response to the court's apparently casual questioning of counsel in the course of proceedings addressing the settlement, not the adjudication, of litigation.

Id. *Gambale* is distinguishable from *Hardy*, where the settlement-related records were made a part of the court record because the district court was required to, and did, review and approve the settlement terms.

III. The district court erred in applying a good cause standard when it originally sealed the settlement-related records in *Hardy* and when it evaluated Appellants' motion to unseal.

Appellees argue that the district court "properly" sealed the records at issue for "good cause." Appellee's Br. at 22. This argument is specious. As set forth in Appellants' opening brief, *see* Moving Br. at 26–30, the good cause standard applicable to protective orders governing discovery exchanged between parties in litigation is inapplicable to judicial records, and the district court erred in concluding that Appellants were required to demonstrate either "extraordinary circumstances or compelling need" to unseal the settlement-related records in *Hardy*. *See Newsday LLC*, 730 F.3d at 166 (stating that "the facts necessary to show good cause for a protective order applicable to discovery documents that are

not yet implicated in judicial proceedings will not necessarily meet the higher threshold imposed by the First Amendment with respect to judicial documents"). The cases upon which Appellees rely to support the district court's application of a good cause standard are inapposite.

1. In *Hasbrouck v. BankAmerica Housing Services*, the defendant in a wrongful termination lawsuit sought discovery regarding the terms of a settlement between the plaintiff and another former employer, Trustco Bank. 187 F.R.D. 453, 454 (N.D.N.Y. 1999), *aff'd sub nom. Hasbrouck v. BankAmerica Hous. Servs., Inc.*, 190 F.R.D. 42 (N.D.N.Y. 1999). The plaintiff sought a protective order pursuant to Rule 26(c) to shield the settlement agreement from discovery. *Id.* Applying the good cause standard applicable to protective orders governing discovery, the district court granted the plaintiff's motion. *Id.* at 458. The settlement agreement at issue in *Hasbrouck* "was not ordered by a court, nor even filed with a court." *Id.* at 456. Rather, the plaintiff and Trustco Bank had reached a settlement without any judicial intervention whatsoever. *Id.* at 454. Thus, *Hasbrouck* supports the unremarkable proposition that a good cause standard applies when a district court evaluates a litigant's attempt to obtain a protective order shielding a private settlement agreement that was never filed with nor approved by the court from discovery—nothing more.

2. Similarly, in *Schoeps* the district court found that a settlement agreement was confidential. 603 F. Supp. 2d at 676. As noted above, however, the settlement agreement was not "so-ordered" by the court and did not form the basis of any decision or action by the court; it was submitted to the court only upon its request, so that it could determine whether or not to make the agreement public. *Id.* at 674, 676 n.2. Thus, the facts of *Schoeps* differ significantly from the facts of *Hardy*, where a proposed settlement was filed with the court for its approval, and the terms were "so-ordered" by the court. *Schoeps* provides no support for the application of a good cause standard to sealing of the judicial records at issue here.

3. *United States v. Longueuil*, also cited by Appellees, does not even discuss settlement agreements at all. In that case, a *pro se* appellant sought to "unseal" documents that she had been provided by the government during discovery that were subject to a protective order under Rule 26(c). *United States v. Longueuil*, 567 F. App'x 13, 15 (2d Cir. 2014). The Court noted that documents "'*passed between the parties in discovery* lie entirely beyond the [common law] presumption's reach'" and cannot be converted into judicial documents merely by challenging application of a protective order. *Id.* at 15–16 (emphasis in original) (quoting *Amodeo I*, 44 F.3d at 146). The Court further found that if the records were something more than those merely passed between the parties in discovery,

the common law standard articulated in *Amodeo I* would apply to their "unsealing." *Id.* at 16.

4. Finally, in *Geller v. Branic Int'l Realty Corp.*, 212 F.3d 734, 736 (2d Cir. 2000), a case Appellees also cite, the parties entered into a stipulated settlement agreement in a non-class action lawsuit that contained several confidentiality provisions, including sealing of the entire case file. The district court ordered the settlement but did not seal the entire case file; appellants later sought to have the case file sealed. *Id.* The district court refused, and this Court reversed. *Id.* at 738. In doing so, the Court did not discuss the applicability of the First Amendment or common law rights of access, issues that appear not to have been raised. *Id.* at 737–38. The Court did note, however, that a district court should consider the "presumption of open access to documents filed in our courts" when initially deciding whether to seal records. *Id.* at 738. Moreover, the Court suggested that, upon remand, the district court might modify its sealing order. *Id.*

Notably, *Geller* was decided before *SEC v. TheStreet.com*, 273 F.3d 222 (2d Cir. 2001) ("*TheStreet.com*"), the holding of which Appellees entirely ignore. In *TheStreet.com*, this Court held that the decision in *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291, 296 (2d Cir. 1979), requiring a "showing of improvidence in the grant of a Rule 26(c) protective order or some extraordinary circumstance or compelling need" applies only to documents that are *not* judicial documents.

TheStreet.com, 273 F.3d at 234. Rather, as the Court held, "there is a presumption *in favor* of public access to 'judicial documents.'" *Id.* (emphasis in original).

Because the sealed settlement-related records at issue here are judicial documents to which the common law and First Amendment rights of access apply, there is a presumption in favor of public access. *Id.* The district court erred in applying a good cause standard under Rule 26(c)—the standard for protective orders governing discovery materials passed between parties in litigation—when it originally sealed those records. And the district court erred again in applying a good cause standard when it considered Appellants' motion to unseal. For these reasons, alone, its decision must be reversed.

CONCLUSION

For the foregoing reasons and those set forth in Appellants' opening brief, the Court should vacate the district court's order and remand with instructions to grant the motion to unseal filed by Time and the Reporters Committee.

Dated: February 24, 2017

Respectfully Submitted,

s/Katie Townsend

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 5,550 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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