IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ERIC HOUSEKNECHT,	:	
Plaintiff,	:	
v.	:	CIVIL ACTION NO.
	:	4:20-CV-1233-MWB
DAVID YOUNG, DONALD MAYES,	:	(Hon. Matthew W. Brann)
JODY MILLER AND DUSTIN REEDER,	:	
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF *THE PATRIOT-NEWS/PENNLIVE'S* MOTION FOR LEAVE TO INTERVENE AND FILE REPLY TO DEFENDANTS' MOTION FOR COURT DETERMINATION THAT THE SETTLEMENT AGREEMENT EXECUTED BETWEEN ALL PARTIES IS CONFIDENTIAL

PRELIMINARY STATEMENT

Petitioner *The Patriot-News/PennLive* ("PennLive") is the largest newspaper serving the Harrisburg, Pennsylvania metropolitan area with print and digital news. It is owned by Advance Local Media LLC. Its headquarters are in Cumberland County, located at 1900 Patriot Drive, Mechanicsburg, PA 17050. The news outlet routinely covers criminal and civil court proceedings in state and federal court and uses public records requests in support of its reporters' newsgathering efforts. PennLive also supports its newsgathering efforts through litigation, when necessary. *See In re application of PennLive, York Daily Record, and York Dispatch to Unseal Court Records*, M.D. of PA (1:22-mc-00756-SES).

PennLive's coverage area extends beyond the Harrisburg regional area to more northern communities, including the City of Williamsport. PennLive has been reporting for years on the City of Williamsport's police department and various struggles within the department.[1] To shed further light on this matter of deep public concern, PennLive through its reporters, and with agreement from the City of Williamsport, has sought information regarding the City of Williamsport's police department, including seeking records about settlement agreements through the state's Right to Know Law.

PROCEDURAL HISTORY

In July 2020 Eric Houseknecht, a Williamsport police officer, sued other Williamsport police officers, via a complaint lodged under the instant caption. After several years, a docket entry of June 7, 2023 shows "settlement reached." As a result,

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[1] John Beauge, *Williamsport cop on paid suspension received $61,591 the past nine months,* PennLive (June 4, 2018) https://www.pennlive.com/news/2018/06/williamsport_cop_continues_on.html; John Beauge, *Williamsport fires police corporal who was paid $77,888 while on suspension*, PennLive (July 20, 2018) https://www.pennlive.com/news/2018/07/williamsport_fire_cop_who_was.html

PennLive reporter John Beauge filed a Right to Know Law request on June 12, 2023 with the City of Williamsport. On June 27, 2023 the City of Williamsport's Right to Know Law officer denied Mr. Beauge's request, citing an email from counsel for Defendants in the instant action.

On July 24, 2023, counsel for defendants filed a "Motion for Court Determination that the Settlement Agreement Reached Between All Parties is Confidential." Defendants also submitted a brief in support. Despite mentioning by name the newspaper reporter seeking the settlement agreement, Defendants did not provide notice of this motion to PennLive, a real party in interest.

ARGUMENT

This Court should grant PennLive's motion to intervene and deny Defendants' Motion for the following reasons. First, PennLive has standing to intervene in this proceeding to oppose sealing of the settlement record. Second, both the First Amendment and common law rights of access entitle the public and the press to access this filed settlement agreement. Third, the disputed settlement agreement cannot be sealed, as no party can make the requisite factual showing of good cause. Therefore, PennLive's motion to intervene should be granted and Defendants' Motion for Confidentiality should be denied.

I. PENNLIVE HAS STANDING TO INTERVENE

PennLive seeks to intervene in this proceeding to vindicate the public's constitutional and common law rights to access judicial records. Third parties have standing in the Third Circuit to intervene and challenge the improper sealing of judicial records. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 777 (3d Cir. 1994). This intervention for the limited purpose of modifying a sealing order is permissible "even after the underlying dispute between the parties has long been settled." *See id.* at 779 (quoting *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 n.5 (3d Cir.1993)). Third parties' standing allows them to intervene and challenge improper confidentiality orders that "interfere[] with their attempt to obtain access . . . pursuant to the Pennsylvania Right to Know [Law]." *See Pansy*, 23 F.3d at 777.

Accordingly, PennLive has the right to intervene for the limited purpose of seeking to block a sealing order. Recent decisions of the U.S. District Courts for the Western, Middle and Eastern Districts of Pennsylvania have affirmed media organizations' efforts to intervene and unseal judicial records. *See In re Forbes Media LLC*, 21-MC-52, 2022 WL 17369017 (W.D. Pa. Dec. 2, 2022), *Reilly v York County*, 1:18-cv-01803 (Aug. 5, 2022 order granting motion to intervene and unseal signed by Magistrate Judge Martin C. Carlson), and *Frietag v Bucks County*, 2:19-cv-05750-JMG (June 28, 2023 order by Judge John Gallagher).

II. THE FIRST AMENDMENT AND COMMON LAW RIGHTS OF ACCESS APPLY TO THE DISPUTED SETTLEMENT RECORDS

Both the United States Supreme Court and Third Circuit recognize First Amendment and common law rights of access to judicial proceedings and their records. When evaluating these rights, courts generally conduct a two-step inquiry: determining first whether the right attaches to the document or proceeding at issue, and, if so, whether the strong presumption of openness is overridden in a particular case. *See Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 13 (1986) ("Since a qualified First Amendment right of access attaches to preliminary hearings . . . the proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." (internal quotations omitted)).

It is well established that both rights of access apply to judicial records. The Third Circuit has explicitly found that settlement agreements filed with a court are judicial records under the common law. Further, experience and logic counsel that the First Amendment right of access also extends to settlement agreements. Thus, because the settlement records sought here are judicial records filed with the Court, both the common law and First Amendment rights of access attach to the settlement records.

a. First Amendment Right of Access

The First Amendment right of access was first recognized over forty years ago when the Supreme Court held that news outlets like PennLive have a First Amendment right of access to criminal trials. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). The Third Circuit has since extended this right beyond criminal trials to civil trials and their records. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984).[2] While neither the Supreme Court nor the Third Circuit have definitively held that there is a First Amendment right to access settlement agreements, such a holding is compelled by the Supreme Court's test for determining whether the First Amendment right of access attaches to a given judicial proceeding or document: the experience and logic test. *See Press-Enter. Co.*, 478 U.S. at 8.

1. The Experience Prong

The first prong of the Supreme Court's test—the experience prong—"asks 'whether the place and process have historically been open to the press.'" *In re*

[2] Every circuit to examine the issue has done the same. *See, e.g.*, *Doe v. Pub. Citizen*, 749 F.3d 246, 269 (4th Cir. 2014) (expanding the First Amendment right of access to civil docket sheets); *Newman v. Graddick*, 696 F.2d 796, 801–02 (11th Cir. 1983) (expanding the right to civil pretrial, trial and post-trial proceedings on the release or incarceration of prisoners and their confinement).

Avandia Mktg., Sales Pracs. & Prod. Liab. Litig., 924 F.3d 662, 673 (3d Cir. 2019) (quoting *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 429 (3d Cir. 2016)). Precedent from both the Third Circuit and federal courts nationwide demonstrates that this prong is satisfied due to the longstanding open history of settlement agreements and similar judicial records.

While the Third Circuit has never directly addressed whether the First Amendment right of access applies to settlement agreements, *see, e.g., In re Avandia*, 924 F.3d at 675-76, 679, settlement agreements fall neatly within the Third Circuit's parameters for finding a First Amendment right of access. The Third Circuit has previously held that the First Amendment right of access applies to civil proceedings and transcripts, *see Publicker*, 733 F.2d at 1066, 1070, and has subsequently extended the First Amendment right of access to civil judicial records. *See, e.g.*, *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (noting that "we have stated that the First Amendment, independent of the common law, protects the public's right of access to the records of civil proceedings," despite deciding the case on common law grounds); *see also In re Gabapentin Pat. Litig.*, 312 F. Supp. 2d 653, 663 (D.N.J. 2004) ("The Third Circuit has also recognized that the First Amendment, independent of the common law, protects the public right of access to records of civil proceedings (citing *Westinghouse*, 949 F.2d at 659)). Any document in the Third Circuit that "has been

filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings" is a judicial record. *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). Because settlement agreements filed with a court are judicial records, they, too, should be entitled to a First Amendment right of access.

Indeed, the Third Circuit has relatedly extended the First Amendment right of access in the criminal context to "plea hearings and, by extension, to documents related to those hearings." *See United States v. Thomas*, 905 F.3d 276, 282 (3d Cir. 2018). In finding there is a First Amendment right of access to plea agreements, the Court relied on a sister circuit's precedent for the proposition that "[j]ust as there exists a first amendment right of access in the context of criminal trials, it should exist in the context of the means by which most criminal prosecutions are resolved, the plea agreement." *Id.* (quoting *Oregonian Publishing Co. v. U.S. District Court for the District of Oregon*, 920 F.2d 1462, 1465 (9th Cir. 1990)). That logic extending the right of access to plea agreements in the criminal context applies with equal force to settlement agreements in the civil context, which are the means by which the vast majority of civil cases are resolved. Thus, implicit in the Third Circuit's prior precedent finding a First Amendment right to access civil judicial records and an analogous right to access criminal plea agreements is the conclusion that the First Amendment right of access should also extend to settlement agreements.

The experience prong does not just "look to the particular practice of any one jurisdiction, but instead to the experience in that type or kind of hearing throughout the United States." *El Vocero de Puerto Rico v. Puerto Rico*, 508 U.S. 147, 150 (1993) (internal quotations omitted). Courts throughout the United States have trended towards finding a right to access court-filed settlement agreements under the common law. *See, e.g.*, *Sec. & Exch. Comm'n v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) ("Once a settlement agreement is filed in district court, it becomes a judicial record."); *Calderon v. SG of Raleigh*, No. 5:09-CV-00218-BR, 2010 WL 1994854, at *1 (E.D.N.C. May 18, 2010) ("A settlement agreement filed and submitted for court approval is a judicial record, and thus the presumption of access arises."); *Lin v. Comprehensive Health Mgmt., Inc.*, No. 08 Civ. 6519(PKC), 2009 WL 2223063, at *1 (S.D.N.Y. July 23, 2009) ("Any document reflecting the terms of the settlement and submitted to the Court is a 'judicial document' to which the presumption of access likely applies."). Similarly, the Second Circuit relied on the experience of courts around the country in finding that the First Amendment right of access applied to the reports of monitors appointed pursuant to settlement agreements in institutional-change litigation. *United States v. Erie Cnty., N.Y.*, 763 F.3d 235, 241–42 (2d Cir. 2014). Thus, both Third Circuit and nationwide precedent demonstrates that settlement agreements "have historically been open to the press."

In re Avandia Mktg., 924 F.3d at 673. Accordingly, the experience prong supports finding a First Amendment right to access settlement agreements.

2. The Logic Prong

The second prong—the logic prong—"evaluates 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* As the Third Circuit has repeatedly recognized, public access to court proceedings "promotes informed discussion of governmental affairs by providing the public with [a] more complete understanding of the judicial system and the public perception of fairness which can be achieved only by permitting full public view of the proceedings." *Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986) (internal quotation marks omitted). "Disclosure of settlement documents" in particular "serves as a check on the integrity of the judicial process." *Id.* Public access to settlement agreements—the ultimate disposition of the vast majority of civil cases—"furthers several societal interests" in the same way that access to plea agreements does, including by "promoting the 'public perception of fairness,' 'exposing the judicial process to public scrutiny,' and 'providing the public with the more complete understanding of the judicial system.'" *See Thomas*, 905 F.3d at 282. Therefore, logic counsels that, in a time where our judicial system has become a system of settlements as opposed to trials, these settlements must be made public.

Third Circuit precedent, experience, and logic all counsel in favor of finding a First Amendment right to access settlement agreements. Therefore, this Court should find that the First Amendment right of access attaches to the settlement agreement and reject Defendants' attempts to shield the document from public scrutiny.

b. Common Law Right of Access

The common law right of access likewise attaches to the settlement records. Under the common law right of access, there is a "strong presumption of openness" of judicial proceedings to the press and public. *In re Avandia Mktg.*, 924 F.3d at 672. "Antedat[ing] the Constitution," its "purpose is to 'promote[] public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court.'" *LEAP Sys., Inc. v. Moneytrax, Inc.*, 638 F.3d 216, 220 (3d Cir. 2011) (quoting *Littlejohn*, 851 F.2d at 677–78). This presumption of openness extends beyond judicial proceedings to judicial records. *Id.*; *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978).

Whether the common law right of access attaches to a document depends on whether it is a "judicial record." *In re Cendant Corp.*, 260 F.3d at 192. If a document is "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings," then precedent "clearly establishes" that it is a judicial record. *Id.* Therefore, it is undisputed that a settlement agreement filed

in a judicial proceeding is a judicial record subject to the common law right's strong presumption of openness. *See LEAP Sys., Inc.*, 638 F.3d at 220 ("'[T]he court's approval of a settlement or action on a motion are matters which the public has the right to know about and evaluate.' Thus, 'settlement documents can become part of the public component of a trial . . . when a settlement is filed with a district court.'" (quoting *Rittenhouse*, 800 F.2d at 344) (internal citations omitted)); *Rittenhouse*, 800 F.2d at 344 ("Disclosure of settlement documents serves as a check on the integrity of the judicial process.").

Here, PennLive seeks access to preserve access to settlement records which were integrated into the district court's adjudicatory proceedings. As judicial records, the common law right of access attaches to them and they are subject to a strong presumption of openness.

III. THE SETTLEMENT RECORDS SHOULD REMAIN ACCESSIBLE BECAUSE NO PARTY CAN OVERCOME THE HIGH BURDEN TO JUSTIFY SEALING

While the right of access "is not absolute," *LEAP Sys., Inc.*, 638 F.3d at 221, once either the First Amendment or common law rights of access attach to a document, the party opposed to disclosure bears the burden of demonstrating that a document should nonetheless be withheld from disclosure. *See Rittenhouse*, 800 F.2d at 344. Because the presumption of openness has attached to the settlement records here, any proponents of sealing bear the burden of demonstrating why the

settlement records should nonetheless be sealed in this case. *See id*. The record on the issue of sealing is straightforward (but flawed): the Defendants argue that the settlement should be sealed so as to avoid scrutiny under the state's Right to Know Law. *See* Defendants' July 24, 2023 brief at page 5.

Based on the assertion that a confidentiality order is necessary to shield the parties' agreement and subvert the Right to Know Law, the Defendants certainly cannot satisfy the First Amendment's high bar—strict scrutiny—to justify sealing the agreement. Indeed, Defendants cannot even satisfy the lower standard of cause required under the common law right of access.

If the First Amendment right of access attaches to a judicial document, as it does to the settlement record here, the proponent of sealing must satisfy strict scrutiny. *In re Avandia*, 924 F.3d at 673. Therefore, the party seeking closure must demonstrate "an overriding interest [in closure] based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (internal quotations omitted).

The common law standard, although less stringent, still imposes a heavy burden on the party opposed to disclosure "to show that the interest in secrecy outweighs the presumption" of openness. *See Rittenhouse*, 800 F.2d at 344 (internal quotations omitted). The parties cannot satisfy even the lower standard demanded by the common law right of access, so they certainly fail to overcome the

presumption of openness under both the common law and First Amendment rights of access.

To overcome both rights of access, a reviewing court "must balance the requesting party's need for information against the injury that might result if uncontrolled disclosure is compelled." *In re Avandia*, 924 F.3d at 671. The court must thus "articulate 'the compelling, countervailing interests to be protected,' make 'specific findings on the record concerning the effects of disclosure,' and 'provide[] an opportunity for interested third parties to be heard.'" *Id.* at 672–73. "[S]pecificity is essential" in conducting such a balancing test, and "[b]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *In re Cendant Corp.*, 260 F.3d at 194.

The public interest in access overrides any potential arguments that the parties could make to justify sealing. In balancing the countervailing public and private interests at stake when a litigant seeks to seal a judicial record, the Third Circuit has recognized a number of factors to consider, including two that are particularly relevant here: (1) "whether a party benefitting from the order of confidentiality is a public entity or official"; and (2) "whether the case involves issues important to the public." *In re Avandia*, 924 F.3d at 671.

Here, PennLive is not simply seeking settlement records involving private parties. *Compare LEAP Sys., Inc.*, 638 F.3d at 222–23 (holding that the parties'

privacy interest in maintaining a sealed settlement agreement outweighed the public's interest in openness because "[t]he parties are private entities, their dispute has no impact on the safety and health of the public, and their settlement agreements demonstrate a clear intent to maintain confidentiality") *with In re Cendant Corp.*, 260 F.3d at 194 (applying a heightened level of scrutiny to a confidentiality order entered by a lower court because members of the public were also parties to the action). Rather, it is seeking a settlement record in a civil rights case in which every party is a government employee— both the defendants and plaintiff are municipal police officers. In addition, the entire case revolves around public employee claims of retaliation and First Amendment violations. The defendants' counsel was paid for through the city's insurance policy, which in turn will impact Williamsport's future premiums. Such information strongly weighs in favor of disclosure as it implicates the ability of an informed electorate to evaluate the expenditure of taxpayer funds by its public officials. This case therefore implicates matters of significant public concern and PennLive seeks access to the settlement record to shed further light on this matter. Further, the City of Williamsport has assented to PennLive's access to the records. Therefore, the public interest factors weigh heavily in favor of disclosure.

No mitigating factors support the sealing of this record. While Defendants attempt to argue that this is a "personal dispute" and flippantly dismiss the important

public interest in this matter ("quenches the thirst of the curious who have no perspective on the factual disputes which gave rise to the settlement, and equally important, no need to know." Defendants' brief at page 6) their argument does not merit consideration. As the Third Circuit noted in *Publicker*, "sensitive" business information is not generally the type of information that qualifies as an overriding interest in confidentiality. *See* 733 F.2d at 1074. While a court may seal records "where they are sources of business information that might harm a litigant's competitive standing," these allegations must be sufficiently specific and must amount to a more tangible harm than "[m]ere embarrassment." *In re Avandia*, 924 F.3d at 679. It is difficult to imagine any discernable harm that would arise to Defendants that would amount to more than mere embarrassment in these records, particularly when all the parties involved are taxpayer-funded city employees and the case involved allegations of conduct in the parties' government roles.

Defendants' argument that the Agreement should remain confidential as the parties entered into an express understanding that all terms would remain confidential is not persuasive. A deal among litigants is not enough to overcome a constitutional requirement to the distribution of information, as provided in both the First Amendment and common law rights of access. "In other words, a generic determination or conclusory statements are not sufficient to justify the exemption of

public records." *Manchester v. Drug Enforcement Administration, U.S. Department of Justice*, 823 F.Supp. 1259, 1265 (E.D.Pa.1993).

To justify sealing, Defendants also need to establish that releasing the settlement records would result in a *current* harm or disadvantage, more than a month after the settlement was reached, because "even if the initial sealing of documents was justified," a court "should closely examine whether circumstances have changed sufficiently to allow the presumption allowing access to court records to prevail.'" *Miller v. Indiana Hosp.*, 16 F.3d 549, 551-52 (3d Cir. 1994). To the extent that there is any genuinely confidential information included in the settlement agreement, the more appropriate, narrowly tailored solution would be for this Court to redact that information rather than seal the entirety of the agreement.

Thus, the settlement agreement's sealing can withstand neither strict scrutiny nor the common law's less stringent standard. No party has demonstrated an overriding interest in sealing. And, even if a party articulates some post-hoc interest in confidentiality, sealing is not a solution that is narrowly tailored to accommodate any such interest. Because both the First Amendment and common law rights of access mandate that these settlement records be accessible to the public, PennLive requests permission to intervene and block sealing to vindicate these rights.

CONCLUSION

For the forgoing reasons, PennLive requests permission to intervene for the limited purpose of seeking to block sealing of the settlement agreement. In addition, PennLive respectfully requests that the Court deny Defendants' Motion.

Date: July 31, 2023

By: */s/Paula Knudsen Burke*

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CERTIFICATE OF SERVICE

I, Paula Knudsen Burke, hereby certify that on this 31st day of July, 2023, a copy of the foregoing was served upon the following via ECF Notification:

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