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

NINA M. HARBAUGH, as Administrator of the ESTATE OF BRITTANY ANN HARBAUGH, Plaintiff, v. BUCKS COUNTY, *et al.*, Defendants.	Civil No. 2:20-cv-01685-MMB

MEMORANDUM OF LAW IN SUPPORT OF THE *BUCKS COUNTY COURIER TIMES*' MOTION TO INTERVENE AND UNSEAL

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PRELIMINARY STATEMENT

Bucks County Correctional Facility and its medical contractor PrimeCare Medical, Inc. ("PrimeCare" and, together, "Defendants") have been repeatedly sued in recent years for allegedly failing to provide adequate medical care to inmates.[1] Proposed Intervenor *Bucks County Courier Times* and other news outlets have reported on these suits that include allegations of civil rights violations against individuals suffering from mental health disorders,[2] failure "to properly evaluate and monitor" inmates,[3] "failure to address known weaknesses with its treatment and monitor policies" for inmates experiencing substance withdrawal,[4] and a pattern of "'deliberate indifference' to the care and safety of inmates."[5] According to *Bucks County Courier Times*, in 2022 alone, five Bucks County Correctional Facility inmates died in custody and three wrongful death suits were settled.[6] This case involving the death of Brittany Ann Harbaugh—a pretrial detainee and mother of three—was one of the three settled last year.[7]

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[1] *See, e.g.*, *Medzadourian v. Bucks County et al*, No. 2:19-CV-04752 (E.D. Pa. Oct 11, 2019); *Adami et al v. County of Bucks et al*, No. 2:19-CV-02187, (E.D. Pa. May 20, 2019); *Farrington v. County of Bucks, PA et al*, No. 2:17-CV-05826, (E.D. Pa. Dec. 29, 2017); *Lopez v. Bucks County et al*, No. 2:15-CV-05059 (E.D. Pa. Sep. 10, 2015).

[2] *See* Brett Sholtis, *Bucks County, prison guards sued for pepper spraying, restraining woman with mental illness* (Apr. 27, 2022), https://whyy.org/articles/bucks-county-prison-kim-stringer-lawsuit-mental-illness-retraint/

[3] *See* Jo Ciavaglia, *Settlement unsealed in 2018 inmate suicide at Bucks County jail. Here's what was paid Family of Bucks man who died in jail to receive $1M in settlement with county, medical provider* (Jul. 31, 2023), https://www.phillyburbs.com/story/news/local/2023/07/31/primecare-medical-charles-freitag-lawsuit-jail-wrongful-death-bucks-county-corrections-settlement/70364283007/ https://www.phillyburbs.com/story/news/special-reports/2022/06/28/bucks-county-jail-settlement-frederick-adami-opiate-withdrawal-crime-healthcare-primecare/65360556007/ [hereinafter Ciavaglia, *Settlement unsealed in 2018 inmate suicide*].

[4] Jo Ciavaglia, *Bucks County to pay $300K to settle wrongful death lawsuit filed by family of jail inmate* (Sep. 8, 2022), https://www.phillyburbs.com/story/news/local/2022/09/09/bucks-county-settles-lawsuit-suicide-death-of-jail-inmate/66836332007/ [hereinafter Ciavaglia, *Bucks County to pay $300K*]

[5] Jo Ciavaglia, *Is Bucks County jail unit 'rampant' with drugs? Inmate death blamed on pattern of neglect* (Aug. 24, 2023), https://www.phillyburbs.com/story/news/local/2023/08/24/bucks-county-jail-joshua-patterson-drugs-fentanyl-lawsuit-death-inmate-pa-corrections/70642900007/ [hereinafter Ciavaglia, *Is Bucks County jail unit 'rampant' with drugs?*].

[6] Jo Ciavaglia, *Name of latest Bucks County inmate death released; earlier inmate death a drug overdose* (Mar. 3, 2023), https://www.phillyburbs.com/story/news/local/2023/03/02/bucks-county-jail-reports-second-inmate-death-in-2023/69962567007/ [hereinafter Ciavaglia, *Name of latest Bucks County inmate death released*].

[7] *Id*; Compl. ¶ 1.

In March 2020, Ms. Harbaugh's Estate filed the instant suit against the Defendants, alleging that she died "as a result of the conduct of the Defendants in failing to monitor and treat her while going through heroin withdrawal at the Bucks County Correctional Facility."[8] Specifically, the suit alleges Ms. Harbaugh died as "[a] direct result of the conduct of the individual and institutional defendants who were aware of the insufficiency of their policies and procedures and had allowed multiple prior inmates to die of opioid withdrawal at the Bucks County Correctional Facility."[9] However, those allegations were never tested at trial because the parties settled; as a result, much of the information about Ms. Harbaugh's death remains shrouded in secrecy. The *Bucks County Courier Times* therefore seeks to intervene and moves this Court to unseal the full settlement, including the agreement between the Estate and PrimeCare and any related records. *See* Dkt. Nos. 78-80.

PROCEDURAL HISTORY

In March 2020, Nina M. Harbaugh, as Administrator of decedent Brittany Ann Harbaugh's Estate, filed a wrongful death and survival action in this Court against Bucks County, PrimeCare, and various individual defendants. Docket entry number 80 in this case reflects the Court's order on January 20, 2023, to docket plaintiff's petition to settle wrongful death and survival action under seal.

FACTUAL BACKGROUND

a. The Wrongful Death Suit

In recent years, the *Bucks County Courier Times*, "the most widely read daily newspaper . . . in the Philadelphia suburbs,"[10] has repeatedly reported on Bucks County Correctional Facility

[8] Compl. ¶ 1.
[9] *Id.*
[10] *See* Bucks County Courier Times, *About*, FACEBOOK, https://www.facebook.com/buckscouriertimes/about/ (last visited September 29, 2023).

and the quality of medical and mental health care administered there by its private medical contractor PrimeCare.[11] The *Bucks County Courier Times* is particularly interested in the inmate deaths allegedly caused by Defendants' deficient care, including the death of Brittany Ann Harbaugh.[12]

Ms. Harbaugh, a first-time offender, died due to complications of opiate withdrawal.[13] In its complaint, Ms. Harbaugh's Estate alleged her death was a result of Defendants' failure to properly monitor and care for her while she was detoxing in the Bucks County Correctional Facility.[14] The complaint alleges she died despite a clear record of her opiate use and her imminent withdrawal, factors which had already placed her on "medical watch,"[15] and that she died despite Defendants' representations that policies, procedures, and practices for treating and monitoring individuals experiencing withdrawal were a "number one priority."[16] Defendants' representations notwithstanding, the complaint alleges that Ms. Harbaugh—and others—were victims of a Bucks County Correctional Facility policy that placed much of the monitoring responsibilities on untrained "inmate monitors [or] 'babysitters'" and corrections officers, who failed to respond to her rapidly deteriorating health.[17] Ms. Harbaugh's Estate alleges that she often did not receive the medications she was prescribed to take daily and "was not seen by a physician during the five days

[11] *See, e.g.*, Ciavaglia, *Settlement unsealed in 2018 inmate suicide*, *supra* note 3.
[12] Jo Ciavaglia, *Family files wrongful death suit against Bucks County over prison suicide* (Dec. 6, 2019), https://www.phillyburbs.com/story/news/2019/12/06/family-files-wrongful-death-suit/2137120007/ [hereinafter Ciavaglia, *Family files wrongful death suit*]; Jo Ciavaglia, *Judge: Wrongful death suit against Bucks County jail can proceed* (June 29, 2020), https://www.phillyburbs.com/story/news/2020/06/29/judge-wrongful-death-suit-against-bucks-county-jail-can-proceed/112814702/ [hereinafter Ciavaglia, *Wrongful death suit can proceed*]; Ciavaglia, *Bucks County to pay $300K*, *supra* note 3.
[13] Compl. ¶¶ 1, 105-06.
[14] Compl. ¶¶ 1, 105-06.
[15] *Id*. ¶¶ 52-53.
[16] *See id.* at ¶¶ 20-27, 39-48, 105-06.
[17] *Id*. at ¶¶ 53-64.

she was at [Bucks County Correctional Facility] despite exhibiting severe withdrawal symptoms."[18] Ms. Harbaugh died less than a week after her arrest.[19]

In response to the allegedly deficient care and Ms. Harbaugh's death, the administrator of her estate filed suit against Defendants in March 2020. *See* Compl. at ¶¶ 2–12. The suit alleged that PrimeCare and Bucks County Correctional Facility officials were acutely aware of the "epidemic of opioid and heroin addiction" and "their destructive wake." *Id*. at ¶¶ 18-23. The suit also alleged that Defendants were aware that failure to provide adequate care to someone experiencing opiate withdrawal poses a fatal risk. *Id*. at ¶¶ 51-52. Still, the suit alleged Defendants' inaction and inadequate care caused Brittany to suffer "[c]ardiac arrest;" "[p]ain and suffering;" "[m]ental anguish;" and "[d]eath[,]" among other conditions. *Id*. at ¶ 106. The suit ultimately alleged that the inaction and inadequate care Brittany suffered is a pattern of Defendants' behavior. *Id*. at ¶¶ 21-38.

The suit also sought to ensure the situation would not continue to repeat.[20] The complaint recounts the circumstances surrounding three other inmates' deaths before focusing on Brittany's death.[21] The complaint alleges that all four deaths were a result of the Defendants' "fail[ure] to provide adequate policies, procedures, and practices in treating and monitoring inmates going through heroin and opiate withdrawal." *Id*. at ¶¶ 21-38. In Ms. Harbaugh's case, her Estate's efforts culminated in a settlement agreement between the parties.[22]

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[18] *Id*. at ¶¶ 65, 75-86.
[19] *See* Compl. at ¶¶ 1, 105-06.
[20] Again, in 2022 alone, five Bucks County Correctional Facility inmates died in custody. *See* Ciavaglia, *Name of latest Bucks County inmate death released*, *supra* note 4.
[21] Compl. at ¶¶ 28-38.
[22] *See* Dkt. No. 77 at ¶¶ 1-3; Ciavaglia, *Name of latest Bucks County inmate death released*, *supra* note 6 ("In December Bucks County agreed to pay $250,000 to the family of Brittany Ann Harbaugh, 28, who died as a result of complications from opiate withdrawal in October, 2018. PrimeCare also entered into a settlement with the family but the amount was sealed by the federal court.").

On January 10, 2023, the administrator of Ms. Harbaugh's Estate filed a motion to seal this settlement agreement. *See* Dkt. No. 77. In the motion, the Estate argues that "Ms. Harbaugh's children have [a privacy] interest in not having the amount of money they will receive disclosed" and that the distribution of settlement funds amongst PrimeCare and Bucks County is not a matter of public interest. *Id*. at ¶¶ 6, 7. Days later, the Court issued an order granting the motion to seal. Dkt. No. 80.

b. News Outlets' Attempts to Access the Settlement Records

On February 2, 2021, because these are matters of public concern, the *Bucks County Courier Times* filed a state public records request pursuant to the Right to Know Law ("RTKL"), 65 P.S. §§ 67.101 *et seq*., seeking all settlement documents in which the Defendants were party over a seven-year period. *See* Final Determination, *Ciavaglia v. Bucks County*, No. AP 2021-0876, at *1 (Pa. Off. Open Recs. July 26, 2021), available at https://www.openrecords.pa.gov/Appeals/DocketGetFile.cfm?id=72079 [hereinafter "OOR Final Determination"]. On appeal, the state Office of Open Records ("OOR") rightly held that PrimeCare performed a governmental function, but wrongly held that its settlement agreements do not "directly relate" to that governmental function. *Id*. at *5–7 (citing *Allegheny Cnty. Dep't of Admin. Servs. v. A Second Chance, Inc*., 13 A.3d 1025, 1039 (Pa. Commw. Ct. 2011); 65 P.S. § 67.305(a)). To determine if such records "directly relate," courts look to whether the records are relevant to the third-party contractor's performance of its governmental function. *See Buehl v. Office of Open Records*, 6 A.3d 27 (Pa. Commw. Ct. 2010); *Giurintano v. Dep't of Gen. Servs*., 20 A.3d 613, 615 (Pa. Commw. Ct. 2011). The OOR read *Buehl* "for the proposition that a vendor's costs [paid for commissary goods] to perform its contractual obligations are not directly

related to the underlying contract," when the government did not review or approve of those costs. OOR Final Determination at *7.

Here, while PrimeCare is not ultimately "required to consult or seek the County's approval to engage in settlement discussions or agreements," *id*., Bucks County and PrimeCare are co-defendants who reached a joint settlement with Plaintiff. Unlike in *Buehl*, in which the government failed to participate in the wholesale purchasing of commissary goods, Bucks County actively participated in the inadequate medical care and wrongful death litigation and settlement process and agreed to the joint settlement. And also unlike in *Buehl*, where the wholesale prices affected the vendor alone, PrimeCare's alleged failure to perform its obligations "directly relat[ed]" to its contract cost Bucks County taxpayers $250,000.

Although the OOR Final Determination granted a portion of the RTKL request seeking settlement records with Bucks County, it denied attempts to gain access to records concerning PrimeCare, effectively stymying access through the state public records law.

Then, in a separate attempt to access these documents, Proposed Intervenor sent PrimeCare a letter on October 24, 2023, asking it to produce the sealed settlement records in this case as well as sealed settlement records in dozens of other cases brought by inmates or their estates against PrimeCare. But PrimeCare failed to respond to the request and did not concur in the filing of this motion. Proposed Intervenor thus moves this Court to allow it to intervene to seek unsealing of the settlement records.

Bucks County Courier Times previously successfully moved to intervene and unseal settlement records in other cases concerning PrimeCare's allegedly inadequate medical care. *See*

Reilly v. York County, No. 1:18-cv-01803 (M.D. Pa.); *Freitag v. Bucks County*, No. 2:19-cv-05750-JMG (E.D. Pa.). Notably, no party in those cases filed an opposition to intervenor's motion.

QUESTION PRESENTED

Should the Court allow the *Bucks County Courier Times* to intervene and move to unseal settlement records related to Bucks County Correctional Facility's medical contractor?

Suggested answer: Yes.

ARGUMENT

This Court should grant the *Bucks County Courier Times*' motion to intervene and unseal the settlement agreement for the following reasons. First, the *Bucks County Courier Times* has standing to intervene. See Dkt. Nos. 78-80. Second, both the First Amendment and common law rights of access entitle the public and the press to access filed settlement agreements. Third, the settlement agreement and its related records were improperly sealed because no party made the requisite factual good cause showing. The *Bucks County Courier Times*'s motion to intervene and unseal should thus be granted.

I. THE *BUCKS COUNTY COURIER TIMES* HAS STANDING TO INTERVENE.

The *Bucks County Courier Times* seeks to intervene to vindicate the public's constitutional and common law rights to access judicial records. Third parties have standing 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 is permissible "even after the underlying dispute between the parties has long been settled." *Id.* at 779. Accordingly, the *Bucks County Courier*

Times has the right to intervene for the limited purpose of seeking a modification of the improvidently granted sealing order.

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

As recognized by the United States Supreme Court and the Third Circuit, the public has rights of access to judicial proceedings and their records under common law and the First Amendment. When evaluating these rights, courts 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 overcome in a particular case. *See Press-Enter. Co. v. Superior Ct. of California for Riverside Cnty.*, 478 U.S. 1, 13 (1986).

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 United States Supreme Court first recognized a First Amendment right of access to court records over forty years ago. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980). While originally limited to criminal proceedings, the Third Circuit has since extended this right to civil proceedings and their records. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059,

1070 (3d Cir. 1984).[23] Neither the Supreme Court nor the Third Circuit have directly held that this First Amendment right applies to settlement agreements. Yet, these settlement agreements pass the "tests of experience and logic," and therefore compel finding that "a qualified First Amendment right of public access attaches." *See Press-Enter. Co.*, 478 U.S. at 9; *see also PG Pub. Co. v. Aichele*, 705 F.3d 91, 104 (3d Cir. 2013). Because both prongs are clearly satisfied here, the *Bucks County Courier Times* has a constitutional right to access the sealed settlement records.

1. The Experience Prong

The experience prong supports attachment of a right of public access when "the place and process have historically been open to the press." *In re 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)). Here, the Third Circuit and other federal courts' practice of ensuring that settlement agreements and similar judicial records are publicly available satisfy this prong.

The Third Circuit has yet to address whether the First Amendment right of access applies to settlement agreements. *See, e.g.*, *PG Pub. Co. v. Aichele*, 705 F.3d at 104-06; *In re Avandia*, 924 F.3d at 675-76, 679. Nonetheless, settlement agreements fall neatly within the Third Circuit's precedents for finding such a right. Indeed, the Third Circuit has held that the right applies to a bevy of records similar to settlement agreements involving government contractors. S*ee, e.g.*, *Publicker*, 733 F.2d at 1066, 1070 (civil proceedings and transcripts); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991) (civil judicial records). Indeed, any document "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

[23] And the Third Circuit is not alone. Indeed, 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); *Newman v. Graddick*, 696 F.2d 796, 801–02 (11th Cir. 1983).

Cir. 2001). Settlement agreements, which are filed with a court, are thus judicial records with an attendant First Amendment right of access.

Similarly, the Third Circuit has extended the First Amendment right of access in the criminal context to "plea hearings and . . . documents related to those hearings." *See United States v. Thomas*, 905 F.3d 276, 282 (3d Cir. 2018). In doing so, 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)).

Taken together, the Third Circuit's treatment of civil judicial records and criminal plea agreements illustrate that a First Amendment right of access should apply with equal force to the settlement agreements that resolve most civil cases.

The experience prong requires more than merely "look[ing] 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). Here, the Third Circuit's implicit support for a First Amendment right of access to civil settlement agreements follows a national trend. Throughout the United States, courts favor finding a right of access extends to court-filed settlement agreements. *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) (same); *Lin v. Comprehensive Health Mgmt., Inc.*, No. 08 Civ. 6519(PKC), 2009 WL 2223063, at *1 (S.D.N.Y. July 23, 2009) (same). In an analogous case about substandard medical care, the Second Circuit relied on that

nationwide trend to find that the First Amendment right of access applied to the reports of compliance consultants appointed pursuant to a settlement reached in institutional-change litigation. *United States v. Erie Cnty.*, N.Y., 763 F.3d 235, 241–42 (2d Cir. 2014).

Pennsylvania courts, the Third Circuit and a nationwide trend show that settlement agreements "have historically been open to the press." *In re Avandia*, 924 F.3d at 673 (citation omitted). The experience prong thus supports a First Amendment right of access.

2. The Logic Prong

Under the logic prong, courts "evaluate[] 'whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (internal quotation marks omitted). Public access to settlement agreements "furthers several societal interests" in the same way that access to plea agreements does. *See Thomas*, 905 F.3d at 282. Their disclosure "serves as a check on the integrity of the judicial process." *Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 345 (3d Cir. 1986). Such a check is enabled by "promoting the 'public perception of fairness'" and acknowledging the value of "'public scrutiny'" over "'the judicial process.'" *See Thomas*, 905 F.3d at 282. Thus, logic supports the conclusion that, when most cases resolve via settlements instead of trials, these settlements must be made public.

Ultimately, Third Circuit precedent and its experience-and-logic tests support a First Amendment right of access to the settlement records in this case. Because the Bucks County Courier Times' request to access the settlement records here meets the experience and logic test, a First Amendment right to access the settlement records applies here and the settlement documents must be unsealed accordingly.

b. Common Law Right of Access

The common law likewise supports the public's right of access. The common law right of access—a right that "antedates the Constitution"—aims "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) (internal quotation marks omitted). It thus embraces a "strong presumption of openness" of judicial proceedings and their records. *In re Avandia Mktg.*, 924 F.3d at 672. Indeed, the common law embraces a "mandate of openness" that "becomes particularly important in actions that concern public money[.]" *PA ChildCare LLC v. Flood*, 887 A.2d 309, 312 (Pa. Super. 2005).

Once a document is "filed with the court, or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings," the document is "clearly establishe[d]" as a judicial record and subject to this strong presumption of openness. *In re Cendant Corp.*, 260 F.3d at 192. Settlement agreements thus qualify as judicial records subject to this presumption. *Rittenhouse*, 800 F.2d at 344 ("[T]he common law presumption of access applies to . . . settlement agreement[s]."); *see also LEAP Sys., Inc.*, 638 F.3d at 220 ("'[T]he court's approval of a settlement . . . 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[.]'") (quoting *Rittenhouse*, 800 F.2d at 344).

Pennsylvania courts have likewise routinely applied the common law right of access to various settlement records. *See, e.g.*, *Storms v. O'Malley*, 779 A.2d 548, 568-70 & n.12 (Pa. Super. 2001) (affirming order denying request to seal settlement in a medical malpractice action involving a minor in part because "confidentiality clause could never be an essential term of an agreement" that "requires court approval[,]" given "court proceedings are a matter of public record"); *A.A. v. Glicken*, 237 A.3d 1165, 1170 (Pa. Super. 2020) (affirming order denying motion to seal petition

to approve a minor's settlement agreement in part because "the chilling effect on settlements is insufficient, standing alone, to overcome the compelling interest in open records"); *Korczakowski v. Hwan*, 68 Pa. D. & C.4th 129,138 (Com. Pl. 2004) (denying motion to seal petition to approve settlement of wrongful death action where "litigants simply have not demonstrated the requisite 'good cause' to justify the sealing of this settlement involving public funds").

Here, the *Bucks County Courier Times* seeks access to the improperly sealed settlement records. The common law right of access attaches to these judicial records; they are thus presumed open to the public.

III. THE SETTLEMENT RECORDS SHOULD BE UNSEALED BECAUSE NO PARTY HAS OVERCOME THE HIGH BURDEN TO JUSTIFY SEALING THEM.

While neither the common law nor the First Amendment right of access are "absolute," *LEAP Sys., Inc.*, 638 F.3d at 221, there is a high burden to overcome the presumption that such rights are inapplicable. *See Rittenhouse*, 800 F.2d at 344. In assessing either, courts "must balance the [public's] need for information against the injury that might result if uncontrolled disclosure is compelled." *In re Avandia*, 924 F.3d at 671. Further, courts must "articulate 'the compelling, countervailing interests to be protected,' make 'specific findings on the record,' and 'provide[] an opportunity for interested third parties to be heard.'" *Id.* at 672–73. "[S]pecificity is essential" and "[b]road allegations of harm, bereft of specific examples or articulated reasoning, are insufficient." *In re Cendant Corp.*, 260 F.3d at 194.

To overcome the First Amendment right of access, the movant must satisfy strict scrutiny. *In re Avandia*, 924 F.3d at 673. That showing requires a movant to demonstrate "an overriding interest [against openness] based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Id.* (internal quotations omitted). To overcome the

presumption of openness from the common law right of access, a movant must "show that the interest in secrecy outweighs the presumption" of openness. *See Rittenhouse*, 800 F.2d at 344.

Here, no party can demonstrate either an overriding interest against openness or an interest in secrecy that outweighs the presumption that judicial records are open to the public. In fact, attempts to defeat the First Amendment or common law rights of access would be in vain, as defeating both rights of access requires specificity that is absent from the unopposed motion to seal.

Here, the record contains no evidence that PrimeCare argued for or that the Court found an overriding interest in closure prior to sealing the settlement agreement. And while Plaintiff's motion to seal offers some explanation for sealing (s*ee* Dkt. No. 77), it only states that "[t]here is a privacy interest in the amount of settlement funds that Ms. Harbaugh's children will receive . . . ." Dkt. No. 77 at ¶ 6. Such explanation is precisely the type of broad allegation of harm that is "insufficient" to defeat the presumptions of openness surrounding settlement agreements. *See In re Cendant Corp.*, 260 F.3d at 194. Even if this Court had articulated findings on the record, none would be sufficient to justify closure, because the public interest in access overrides any arguments to justify sealing. In balancing the countervailing interests at stake in sealing, the Third Circuit recognizes several 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, these records do not concern private parties alone. *Compare LEAP Sys., Inc.*, 638 F.3d at 222–23 (holding that privacy interest in sealing outweighed public's interest in openness in part because "[t]he parties are private entities" and "their dispute has no impact on the safety and health of the public") *with In re Cendant Corp.*, 260 F.3d at 194 (applying a heightened level

of scrutiny because members of the public were parties to the action). Rather, they concern Commonwealth counties, their contractor performing a governmental function, and inmates or their estates. As the Chief Judge in the Middle District of Pennsylvania recently wrote in a similar case, "[e]ntering into a settlement agreement with a public entity involves the inherent risk that the agreement may be disclosed if it is subsequently requested under the RTKL." *Houseknecht v. Young*, No. 4:20-CV-01233, 2023 WL 5004050, at *3 (M.D. Pa. Aug. 4, 2023).

PrimeCare performs a governmental function because it exclusively provides medical care to the Bucks County Correctional Facility. *See Buehl v. Off. of Open Recs.*, 6 A.3d 27, 30 (Pa. Commw. Ct. 2010) (holding that providing prison commissary services qualifies as a governmental function subject to the RTKL). PrimeCare's actions here impact public tax expenditures and the health and safety of incarcerated individuals. Thus, the settlement records involve important matters of public interest, health, and safety. Yet, because the settlement records were sealed, questions remain concerning PrimeCare's portion of the settlement as it continues to serve as the prison's health care contractor. To answer these questions, the *Bucks County Courier Times* seeks access to the settlement records to shed further light on this matter of significant public concern. The public interest factors weigh heavily in favor of disclosure.

Further, no mitigating factors support sealing. While PrimeCare could attempt to argue that the settlement agreement contains "sensitive" information, this argument fails. "[S]ensitive" business information does not generally qualify as an overriding interest in confidentiality. *See Publicker*, 733 F.2d at 1074. While a court may seal business information "that might harm a litigant's competitive standing," this harm must amount to more than "[m]ere embarrassment." *In re Avandia*, 924 F.3d at 679. No tangible harm of unsealing could exist for PrimeCare that would

amount to more than mere embarrassment. Similarly, Plaintiff's concern over the risk of embarrassment is insufficient to support Plaintiff's argument for sealing the settlement records.

Plaintiff's concern for potential embarrassment is insufficient to justify nondisclosure in the face of the strong presumption for public access. To justify nondisclosure, there must be a "showing that disclosure will work a clearly defined and serious injury to the party seeking closure." *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir.1994) (quoting *Publicker*, 733 F.2d at 1071). Nondisclosure for embarrassment must be "particularly serious[.]" *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir.1986). A finding of particularly serious embarrassment must necessarily meet a high bar, because "[i]f mere embarrassment were enough, countless pleadings as well as other judicial records would be kept from public view." *Dombrowski v. Bell Atlantic Corp.*, 128 F.Supp.2d 216, 219 (E.D. Pa. 2000).

Moreover, "even if the initial sealing . . . 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 in the records, the Court should redact that information rather than seal their entirety.

Thus, the settlement agreement's sealing cannot withstand strict scrutiny or the common law's less stringent standard. The Court's sealing order articulates no on-the-record findings from which a reviewing court can conduct an adequate review. *See* Dkt. No. 80. 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, the *Bucks County Courier Times* requests permission to intervene to unseal these records and vindicate these public rights.

CONCLUSION

For the forgoing reasons, the *Bucks County Courier Times* requests permission to intervene for the limited purpose of seeking the unsealing of the settlement agreements and related records in Dkt. Nos. 78-80. Should this Court decline to release these records, the *Bucks County Courier Times* requests that the Court make findings on the record explaining why the settlement records do not fall within the First Amendment and common law rights of access.

Dated: October 31, 2023

Respectfully submitted,

/s/ Paula Knudsen Burke

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[24] Clinic intern Connor Flannery drafted portions of this brief. The Clinic is housed within Cornell Law School and Cornell University. Nothing in this brief should be construed to represent the views of these institutions, if any.

CERTIFICATE OF COMPLIANCE PURSUANT TO LOCAL RULE 7.1

I hereby certify that pursuant to Local Rule 7.1, I sought concurrence from counsel for each of the parties to this action to determine their concurrence or nonconcurrence in the instant Motion to Intervene and Unseal.

The following counsel do not concur in the motion:

- John R. Ninosky, counsel for PrimeCare Medical, Inc.
- David Inscho, counsel for Ms. Harbaugh's Estate

The following counsel take no position on the motion:

- Jeffrey Scott, counsel for Bucks County

CERTIFICATE OF SERVICE

The undersigned hereby certifies that she served the above Memorandum of Law via the District Court's Electronic Filing System and via electronic mail on October 31, 2023, to counsel of record as follows:

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