IN THE COURT OF COMMON PLEAS
OF PHILADELPHIA COUNTY

Joseph L. Feliciani, as Administrator of the Estate of Grace Packer,	:	
	:	**No. 180603829**
v.	:	**Hon. Judge Woods-Skipper**
The Impact Project, Inc., *et al.*	:	

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

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PRELIMINARY STATEMENT

For over three years, The Impact Project, Inc. ("Impact Project"), Pinebrook Family Answers ("Pinebrook"), and Warwick Family Services, Inc. ("Warwick") (together, "Defendants") were named as defendants before this Court for allegedly failing to ensure the physical safety and emotional wellbeing of Grace Packer ("Grace")—a child, now deceased, who was relentlessly abused and brutally murdered by her adoptive family.[1] Proposed Intervenor *Bucks County Courier Times* and other news outlets have reported extensively on Defendants' alleged life-threatening actions and inactions, including how they "failed to intervene at different points in her life despite agency reports suggesting Grace was sexually, emotionally and physically abused in the home of her adoptive parents and the failure of a private foster care agency to follow protocols." Christopher Dornblaser, *Bucks DA, state lawmakers unveil 'Grace's Law' package for more accountability, protection in PA child welfare system*, Bucks County Courier Times (Sept. 15, 2021), https://bit.ly/3HXjLmO. In a five-year retrospective by NBC 10 Philadelphia, a reporting team described a "system failure" wherein Sara Packer, Grace's adoptive mother, was able "to go from Lehigh County to Montgomery County to Bucks

[1] *See, e.g.*, Compl., *Feliciani v. Impact Project, Inc.*, No. 180603829 (Ct. Com. Pl. Phila. Cnty. June 29, 2018) (alleging Defendants failed to intervene to extricate Grace Packer from her adoptive home despite being made aware of the conditions of her abuse, including when her adoptive father pled guilty to sexually assaulting her).

County and effectively skirt detection so that she was free to do whatever she wanted with whomever she wanted to poor Grace Packer[,] and Grace Packer unfortunately suffered the absolute worst." Deanna Durante et al., *5 Years After Grace Packer's Murder, Changes Still Needed to Protect Foster Kids*, NBC 10 Phila. (Feb. 15, 2021), https://bit.ly/3Yqpvwn.

While Grace's Estate alleged in this proceeding that Defendants acted with "negligence, gross negligence, outrageousness and/or reckless indifference" resulting in Grace's "systematic physical and mental torture," *see* Compl. ¶ 99, these allegations were never proven or disproven because this action settled—under seal—before trial, *see* Docket. The *Bucks County Courier Times* therefore seeks to intervene in this wrongful death action to move to unseal the (1) May 4, 2020 petition to settle; (2) July 21, 2020 wrongful death order; (3) June 15, 2021 petition to approve settlement; (4) July 20, 2021 order of deferment; (5) September 9, 2021 order granting petition for wrongful death; and (6) September 14, 2021 settlement order (together, "Settlement Records").

As the Impact Project, Pinebrook, and Warwick are an independent foster care agency, an organization specializing in adoption and foster care services, and a behavioral health organization, respectively, which all provide programs to children and families, their activities are matters of significant public concern. Relatedly, court-ordered settlements involving institutions tasked with ensuring the wellbeing

of children are squarely in the public interest. *See, e.g.*, *Settlement sets up education fund in Pa. school abuse case*, CBS Phila. (Jan. 19, 2023), https://perma.cc/2ZQR-G2H9 (national news wire report on multi-million dollar settlement to establish fund for former students at Glen Mills School as part of lawsuit alleging abuse at the now-shuttered Pennsylvania juvenile justice facility).

While the public and the press have a right to access records that stand to shed light on Defendants' conduct, misconduct, and any course corrections resulting from the instant suit, this presumptively public information has been kept out of view for more than two years because the Settlement Records are under seal. The sealings, which appear to have been ordered without any party asserting a good cause basis for sealing and without any public findings of fact made on the record, fly in the face of the First Amendment and common law requirements that ensure judicial records are open to the public. Indeed, the courts of this Commonwealth have consistently emphasized that the public and press have a presumptive right to access settlement agreements filed in court. *See, e.g.*, *Stenger v. Lehigh Valley Hosp. Ctr.*, 554 A.2d 954, 960 (Pa. Super. Ct. 1989) (citing *Bank of Am. Nat'l Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 342–43 (3d Cir. 1986)); *see also A.A. v. Glicken*, 237 A.3d 1165, 1170 (Pa. Super. Ct. 2020).

The *Bucks County Courier Times*, therefore, respectfully seeks permission to intervene for the limited purpose of vindicating the public and press's First

Amendment and common law rights to access important judicial records like the Settlement Records at issue here.

PROCEDURAL HISTORY

Joseph Feliciani, as Administrator of the Estate of Grace Packer, filed a wrongful death action in this Court in June 2018. *See* June 29, 2018 Docket Entry. Defendants are the Impact Project, Pinebrook, and Warwick. The last docket entry in this action is from October 2022 reflecting a *praecipe* to settle, discontinue, and end the case. *See* Oct. 18, 2022 Docket Entry.

FACTUAL BACKGROUND

I. Proposed Intervenor *Bucks County Courier Times*

The *Bucks County Courier Times* is a Pennsylvania news outlet dedicated to reporting news, sports, entertainment, and obituaries in Bucks County and Eastern Montgomery County, Pennsylvania.[2] It has frequently reported on issues of accountability and protection in Pennsylvania's foster care system, and has focused on Grace Packer's death, which occurred in Bucks County.[3] Of particular interest

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[2] *See generally* Bucks County Courier Times (last accessed Feb. 13, 2023), https://www.phillyburbs.com.

[3] *See, e.g.*, Dornblaser, *Bucks DA, state lawmakers unveil 'Grace's Law'*, *supra*; Jo Ciavaglia, *Report: Agencies missed 'red flags' with Grace Packer*, Bucks County Courier Times (Apr. 2, 2019), https://www.phillyburbs.com/story/news/crime/2019/04/02/report-agencies-missed-red-flags/5557174007/; Jo Ciavaglia, *Do children, families need child welfare watchdog?*, Bucks County Courier Times (June 19, 2018),

to the *Bucks County Courier Times* are the actions taken in the Commonwealth's courts and legislature to hold the entities and persons responsible for Grace Packer's final, painful hours to account, and related efforts to bolster oversight infrastructure to prevent a tragedy like hers from happening again.

II. The Aftermath of Grace Packer's Murder

In 2021, five years after Grace Packer was raped and murdered by her adopted mother, Sara Packer, and her live-in boyfriend, Jacob Sullivan, Bucks County District Attorney Matt Weintraub and state lawmakers unveiled three pieces of legislation in a push for more accountability and protection in the foster care system.[4] In the 2021–22 legislative session, Representatives Craig Staats, R-145, of Richland Township, and Chris Quinn, R-168, of Delaware County, introduced three bills as part of the "Grace Packer Memorial Legislation."[5] The bills did not advance from committee, and in February 2023, Representative Staats circulated a co-sponsorship memo signaling his intention to reintroduce the same package of bills in the 2023–24 legislative session.[6] Additionally, the Pennsylvania Office of the Inspector

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https://www.phillyburbs.com/story/news/state/2018/06/19/do-children-families-need-child/11935278007/.

[4] *See* Dornblaser, *Bucks DA, state lawmakers unveil 'Grace's Law'*, *supra*.

[5] *See id*.; *see also* Pa. State Rep. Craig Staats, *Staats, Quinn Unveil Child Welfare Reform Legislation in Memory of Grace Packer* (Sept. 15, 2021), https://repstaats.com/News/21464/Latest-News/Staats,-Quinn-Unveil-Child-Welfare-Reform-Legislation-in-Memory-of-Grace-Packer-.

[6] Pa. House of Reps., Memorandum re: Protecting Children in Foster Care/Adoption – Grace Packer (Former House Bills 1843, 1844 and 1845) (Feb. 6, 2023),

General ("OIG") has stated it has been investigating the Department of Human Service's handling of Grace's case since 2019.[7]

As of the date of this filing, none of the aforementioned bills have passed, and the OIG's report has not been published.

A. The Wrongful Death Suit Against the Impact Project, Pinebrook, and Warwick

On June 29, 2018, Joseph Feliciani, as Administrator of Grace's Estate, initiated the instant suit against Impact Project, Pinebrook, and Warwick. *See generally* Compl. Feliciani alleged that Defendants were confronted with numerous facts and indicia that Grace was facing egregious abuse at the hands of her adoptive family yet failed to take precautionary measures to extricate and protect Grace from further abuse. *See* Compl. ¶¶ 20–32, 45–91. Specifically, Feliciani alleged, *inter alia*, that "[d]espite allegations of physical and sexual abuse" Defendants "made no attempt" to assess the competency of Grace's adoptive family to parent her. *See* Compl. ¶¶ 58, 70.

The parties reached a settlement agreement after initiating the settlement process in May 2020. On July 21, 2020, September 9, 2021, and September 14,

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https://www.legis.state.pa.us/cfdocs/Legis/CSM/showMemoPublic.cfm?chamber=H&SPick=20230&cosponId=39719.

[7] Dornblaser, *Bucks DA, state lawmakers unveil 'Grace's Law'*, *supra*; Michael Rubinkam, *State government watchdog to probe teen's murder*, Bucks County Courier Times (Apr. 18, 2019), https://www.phillyburbs.com/story/news/2019/04/18/state-government-watchdog-to-probe/5402812007/.

2021, respectively, the Court, upon consideration of various petitions related to wrongful death and survival actions, granted the respective petitions. All such records, including those related to the settlement of this case are sealed—some by agreement of the parties, and at other times without any indication of a party having moved to seal—and certainly without any on the record showing as to why sealing was necessary. *See* Docket. Accordingly, Proposed Intervenor seeks to unseal the (1) May 4, 2020 petition to settle; (2) July 21, 2020 wrongful death order; (3) June 15, 2021 petition to approve settlement; (4) July 20, 2021 order of deferment; (5) September 9, 2021 order granting petition for wrongful death; and (6) September 14, 2021 settlement order, as the Settlement Records are not accompanied by any publicly available justification for their sealing. *See* May 6, 2020 Stipulation to Seal Petition for Leave to File Partial Settlement (providing no bases for stipulating to seal); *see also* May 7, 2020 Docket Entry (approving Stipulation to Seal; similarly making no on the record findings in support of sealing).

QUESTION PRESENTED

Whether the *Bucks County Courier Times* should be permitted to intervene for the limited purpose of unsealing the Settlement Records.

Suggested answer: Yes.

ARGUMENT

This Court should grant the *Bucks County Courier Times*' motion to intervene and unseal for the following reasons. ***First***, the *Bucks County Courier Times* has standing to intervene in this proceeding to seek the unsealing of the Settlement Records. ***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 Records were improperly sealed, with no party making the requisite factual showing of good cause. Indeed, as demonstrated *infra*, ***no*** party can make such a showing in this case. Therefore, the *Bucks County Courier Times*' motion to intervene and unseal should be granted.

I. The *Bucks County Courier Times* Has Standing to Intervene.

The *Bucks County Courier Times* seeks to intervene in this proceeding for the limited purpose of vindicating 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, e.g.*, *United States v. Antar*, 38 F.3d 1348, 1350 (3d Cir. 1994) (granting third-party news organization intervenors' request for access to a *voir dire* transcript); *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987) (newspaper properly intervened to request access to arrest warrant affidavit).

This intervention for the limited purpose of modifying a sealing order or otherwise moving to unseal is permissible "even after the underlying dispute

between the parties has long been settled." *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 779 (3d Cir. 1994) (permitting news media to move to unseal six months following settlement and dismissal) (quoting *Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 n.5 (3d Cir. 1993)); *see also, e.g.*, Order, *Reilly v. York Cnty.*, No. 1:18-cv-01803-MCC (M.D. Pa. Aug. 5, 2022) (granting *York Daily Record*'s motion to intervene and unseal settlement records between medical and correctional facilities and deceased inmate's estate). Accordingly, the *Bucks County Courier Times* has the right to intervene for the limited purpose of unsealing the improvidently sealed records.

II. The First Amendment and Common Law Rights of Access Apply to the Settlement Records.

The United States Supreme Court, the United States Court of Appeals for the Third Circuit, and the courts of this Commonwealth 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 Court*, 478 U.S. 1, 13–14 (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." (citation and internal quotation marks omitted)).

Both the common law and First Amendment rights of access attach to the Settlement Records at issue here.

A. The Public Has a Common Law Right of Access to the Settlement Records.

Under the common law, there is a "strong presumption of openness" of judicial proceedings to the press and public. *In re Avandia Mktg., Sales Pracs. & Prods. Liab. Litig.*, 924 F.3d 662, 672 (3d Cir. 2019) (citation omitted). "[A]ntedat[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 v. BIC Corp.*, 851 F.2d 673, 677–78 (3d Cir. 1988)). 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 183, 192 (3d Cir. 2001). 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 record filed in a judicial proceeding is a judicial record subject to the

common law right's strong presumption of openness. *See, e.g.*, *LEAP Sys.*, 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[.]'" (first quoting *Rittenhouse*, 800 F.2d at 344; then quoting *Enprotech Corp. v. Renda*, 983 F.2d 17, 20 (3d Cir. 1993))); *Rittenhouse*, 800 F.2d at 345 ("Disclosure of settlement documents serves as a check on the integrity of the judicial process.").

Not only have courts of this Commonwealth held settlement records are presumptively open for public inspection, *see Glicken*, 237 A.3d at 1170 (ruling that a plaintiff's petition for approval of a settlement is presumptively open and should not be sealed); *Stenger*, 554 A.2d at 960, but courts throughout the United States similarly trend toward 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 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."); *Xue Lian Lin v. Comprehensive Health Mgmt., Inc.*, No. 08-CV-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.").

Here, the *Bucks County Courier Times* seeks access to the sealed Settlement Records. As judicial records, the common law right of access attaches and they are subject to a strong presumption of openness.

B. The Public Also Has a First Amendment Right of Access to the Settlement Records.

The First Amendment likewise guarantees presumptive public access to the Settlement Records. To determine whether the First Amendment supports a presumption of access to a particular class of judicial records, courts look to two complementary considerations: "experience and logic." *Press-Enter. Co.*, 478 U.S. at 9. Here, both favor presumptive access to the Settlement Records.

i. The Experience Prong

The first prong of the Supreme Court's framework—the experience prong—"asks 'whether the place and process have historically been open to the press.'" *In re Avandia*, 924 F.3d at 673 (quoting *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 429 (3d Cir. 2016)). Precedent from the Third Circuit, other federal courts, and the courts of this Commonwealth suggests that this prong is satisfied with respect to settlement records due to their longstanding openness. *Cf. Streett Est. v. Gen. Motors Corp.*, 17 Pa. D. & C.4th 37, 40 (Ct. Com. Pl. York Cnty. 1992) (declining to seal settlement terms upon consideration of both the First Amendment

and the common law presumption of access); *cf. 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 *Republic of Phil. v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3d Cir. 1991))). Because the instant Settlement Records 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 Third Circuit 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 Publ'g Co. v. U.S. District Court*, 920 F.2d 1462, 1465 (9th Cir. 1990)). That basis for 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. *See, e.g.*, *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1066–70 (3d Cir. 1984) (holding that common law and First Amendment

apply to records of civil trials). 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, too, extend to settlement records.

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) (citation and internal quotation marks omitted)—and settlement records have long been considered open for public inspection in this country. *See, e.g.*, *Rutherford's Heirs v. Clark's Heirs*, 1873 WL 11091, at *2 (Ky. Jan. 15, 1873) ("The returned settlements, when approved, were adjudications of an indebtedness . . . spread on the public records, to be sent and read by all who would take the trouble to examine them."); *see also In re Hayes*, 59 Misc. 3d 543, 72 N.Y.S.3d 358 (N.Y. Surr. Ct. 2018), *aff'd as modified sub nom.*, *In re Est. of Quigley*, 172 A.D.3d 1516 (N.Y. App. Div. 2019) (settlement agreement, including the amount of gross settlement, was a court record for purposes of both common law and qualified First Amendment rights to access court records in wrongful death action). As settlement agreements "have historically been open to the press," *In re Avandia*, 924 F.3d at 673 (quoting *N. Jersey Media Grp. Inc.*, 836 F.3d at 429), the experience prong supports finding a First Amendment right to access the Settlement Records.

Finally, the Third Circuit has recognized that the common law right of access, discussed *supra*, "played a crucial role in the development of First Amendment jurisprudence" on access to judicial records. *Antar*, 38 F.3d at 1361. As a result, the fact that settlement records are presumptively accessible under the common law reinforces the conclusion that the judgment of experience favors access for purposes of the First Amendment. *See id*.

ii. The Logic Prong

Logic supports a constitutional presumption of access, too, because press and public access to settlement records advances the core values that underlie the right, including by promoting "informed discussion of governmental affairs by providing the public with [a] more complete understanding of the judicial system," and promoting the "public perception of fairness which can be achieved only by permitting full public view of the proceedings." *Rittenhouse*, 800 F.2d at 345 (citation omitted). "Disclosure of settlement documents" in particular "serves as a check on the integrity of the judicial process." *Id.* Public access to settlement records—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 (citation

omitted). 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. Courts have noted that there is a strong "public interest in finding out how decisions to spend public funds are formulated and in insuring governmental processes remain open and subject to public scrutiny," and have found "these considerations clearly outweigh any public interest served by conducting settlement of tort claims in secret, especially in light of the policies of disclosure and openness in governmental affairs."[8] *Reg'l Div. of Freedom Newspapers, Inc. v. Cnty. of Orange*, 158 Cal. App. 3d 893, 909 (Ct. App. 1984). As experience and logic both counsel in favor of finding a First Amendment right to access settlement records, this Court should find that the First Amendment right of access attaches to the Settlement Records sought by the *Bucks County Courier Times*.

III. The Settlement Records Should Be Unsealed Because No Party Has Overcome the High Burden to Justify Their Sealing.

While the right of access "is not absolute," *LEAP Sys.*, 638 F.3d at 221, once either the First Amendment or common law right of access attaches to a document, the party opposed to disclosure bears the burden of demonstrating that a document should nonetheless be withheld from the public. *See Rittenhouse*, 800 F.2d at 344.

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[8] Defendants' services are purchased and utilized by the Commonwealth. *See* Compl. ¶ 34 ("Under the Child Protective Services Law, Pennsylvania counties may purchase and utilize the services of any public or private agency, such as Impact Project, Pinebrook and Warwick, to provide foster, pre-adoptive and adoptive services." (citing 23 Pa. C.S.A. § 6364)).

Because the presumption of openness attaches to the Settlement Records, any proponents of sealing bear the burden of demonstrating why the Settlement Records should nonetheless be sealed in this case. *See id*.

Here, the record on the issue of sealing is sparse: Grace's Estate put forth no particularized evidence in support of sealing, *see* Docket, nor did Defendants provide any evidence in support of sealing that would outweigh the strong interest of the public in access to open court proceedings and records. The parties' stipulation to seal their settlement does not contain any particularized justification for sealing, *see* May 6, 2020 Docket Entry. And, notably, as to the remainder of the Settlement Records, those judicial documents were sealed without any party appearing to have moved for such sealings, *see* Docket. On this record, the parties cannot satisfy the First Amendment's high bar—strict scrutiny—to justify sealing the Settlement Records. *In re Avandia*, 924 F.3d at 673 (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" (quoting *Publicker Indus., Inc.*, 733 F.2d at 1073)). Indeed, the parties cannot even satisfy the lower common law standard "to show that the interest in secrecy outweighs the presumption" of openness. *See Rittenhouse*, 800 F.2d at 344. Therefore, the sealing order of May 7, 2020 was improvidently granted and should be vacated, and the remaining sealed Settlement Records should, too, be unsealed.

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 (quoting *Pansy*, 23 F.3d at 787); *see also Fenstermaker*, 530 A.2d at 421 (explaining that trial courts must create a record "articulati[ng] the factors taken into consideration" in determining whether there is a right of access and whether that right has been rebutted by countervailing interests). In doing so, 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.'" *In re Avandia*, 924 F.3d at 672–73 (quoting *In re Cendant Corp.*, 260 F.3d at 194); *see also Commonwealth v. Upshur*, 924 A.2d 642, 651 (Pa. 2007) ("[T]he trial court . . . must . . . place on the record its reasoning and the factors relied upon in reaching its decision."). "[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; *see also Commonwealth v. Curley*, 189 A.3d 467, 473 (Pa. Super. Ct. 2018) ("[T]he court should issue individualized, specific, particularized findings on the record that closure is essential to preserve higher values and is narrowly tailored to that interest.").

Here, there is no evidence that this Court found, or even considered, whether an overriding interest in closure existed prior to ordering the sealing of the partial settlement agreement.[9] The stipulation to seal filed by Feliciani only states that the parties "stipulate and agree that the Petition for Leave for Partial Settlement of Compromise of Survival Action shall be sealed as it contains un-redacted confidential settlement information." *See* May 6, 2020 Stipulation. It provides no further detail as to why the document should be sealed. *See id.* The one sealing order listed in the Docket reads simply that the parties' stipulation to seal their settlement petition was approved. *See* May 7, 2020 Docket Entry. Thus, far from articulating specific findings, the order contains no discussion whatsoever of the considerations that influenced the petition's sealing. *Cf. Curley*, 189 A.3d at 473 (explaining that courts may not merely "issue[] a blanket conclusion" on sealing). And finally, with respect to the subsequent sealing of additional Settlement Records, they were sealed without ***any*** accompanying motions or orders related to their sealing.

Yet, even if the parties had attempted to meet their burden of demonstrating why the Settlement Records should be sealed, no potential rationale could justify

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[9] Just as vexing is the fact that some of the Settlement Records in this case are evidently ***redacted*** and yet they remain entirely sealed. *See* June 15, 2021 Docket Entry (noting a redacted Petition to Approve Settlement with Warwick was filed with the Court); May 4, 2020 Docket Entry (noting a redacted Petition to Settle was filed with the Court).

closure in this case because the public interest in access would undoubtedly override any argument in favor of sealing. In balancing the countervailing public and private interests at stake when a litigant seeks to seal a judicial record, there are 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 (citation omitted). Here, the *Bucks County Courier Times* is not simply seeking settlement records involving wholly private entities. Rather, it is seeking settlement records involving child welfare agencies—Defendants—and a deceased child's estate, where the agency-defendants' services are purchased and utilized by the Commonwealth. *See* Compl. ¶ 34 ("Under the Child Protective Services Law, Pennsylvania counties may purchase and utilize the services of any public or private agency, such as Impact Project, Pinebrook and Warwick, to provide foster, pre-adoptive and adoptive services." (citing 23 Pa. C.S.A. § 6364)). This case therefore implicates matters of significant public concern—namely, the accountability of child welfare agencies when they fail to adequately protect vulnerable minors, and the distribution of public monies via settlement decrees. *Compare id.*, *with LEAP Sys.*, 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").

No mitigating factors support the sealing of these records. While Defendants could attempt to argue that the settlement agreement contains "sensitive" information, this argument would not suffice. 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 (citation omitted). It is difficult to imagine any tangible competitive disadvantage that would arise for Defendants that would amount to more than mere embarrassment in these records.

To justify sealing, Defendants would also need to establish that releasing the settlement records would result in a ***current*** harm or disadvantage, more than two years after the settlement was reached, because "[e]ven 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. Ind. Hosp.*, 16 F.3d 549, 551–52 (3d Cir. 1994). To the extent that there is any genuinely confidential information included in the Settlement Records, the more

appropriate, narrowly tailored solution would be for this Court to redact that information rather than seal the judicial records in their entirety. *Cf. Commonwealth v. Long*, 922 A.2d 892, 906 (Pa. 2007) ("[C]losure must be supported by specific findings demonstrating that there is a substantial probability that an important right will be prejudiced by publicity and that reasonable alternatives to closure cannot adequately protect the right.").

Accordingly, the Settlement Records' sealing can withstand neither strict scrutiny nor the common law's less stringent standard. The Court's sealing order of May 7, 2020 with respect to the May 4 petition to settle articulates no findings on the record from which a reviewing court can conduct an adequate review, and no other sealing orders exist with respect to the remaining Settlement Records. 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. *Cf. Commonwealth v. Buehl*, 462 A.2d 1316, 1323 (Pa. Super. Ct. 1983) (emphasizing that the on-the-record articulation of reasons for closure must be done "*before* ordering closure"). 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 and seek unsealing to vindicate these rights.

CONCLUSION

For the foregoing reasons, the *Bucks County Courier Times* requests permission to intervene for the limited purpose of seeking the unsealing of the Settlement Records. The *Bucks County Courier Times* further respectfully requests that the Court enter an order vacating its May 7, 2020 sealing order and directing the Clerk of the Court to unseal the Settlement Records. Should this Court decline to release the Settlement 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.

Date: March 24, 2023

Respectfully submitted,

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CERTIFICATE OF WORD COUNT COMPLIANCE

I, Paula Knudsen Burke, Esq., certify that the foregoing brief complies with the word-count limit of Local Rule 7.8(b)(2) and contains 5369 words. In making this count, I have relied upon the word-count feature of Microsoft Word, which was used to prepare this brief.

STATEMENT OF PARTIES' CONCURRENCE OR NON-CONCURRENCE

I, Paula Knudsen Burke, Esq., certify that on March 10, 2023, I emailed counsel of record for all parties in this matter, listed below, to seek the parties' concurrence or non-concurrence regarding the instant Motion to Intervene and Unseal; Counsel for Defendant Pinebrook Family Answers stated they do not concur; counsel for Defendants Warwick Family Services and The Impact Project stated that they oppose unsealing. Counsel for Plaintiff Joseph Feliciani, Administrator of the Estate of Grace Packer, stated they take no position on the instant Motion.

CERTIFICATE OF COMPLIANCE WITH PUBLIC ACCESS POLICY

I certify that this filing complies with the provisions of the *Case Records Public Access Policy of the Unified Judicial System of Pennsylvania* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Paula Knudsen Burke
Signature: */s/ Paula Knudsen Burke*
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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 March 24, 2023 to counsel of record as follows:

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