IN THE COURT OF COMMON PLEAS OF WASHINGTON COUNTY, PENNSYLVANIA
CIVIL DIVISION

STEPHANIE HALLOWICH AND
CHRIS HALLOWICH, H/W

Plaintiffs,

vs.

RANGE RESOURCES CORPORATION,
WILLIAMS GAS/LAUREL MOUNTAIN
MIDSTREAM, MARKWEST ENERGY
PARTNERS, L.P., MARKWEST ENERGY
GROUP, L.L.C., AND PENNSYLVANIA
DEPARTMENT OF ENVIROMENTAL
PROTECTION

Defendants.

No. **C-63-CV-201003954**

PROPOSED INTERVENORS' JOINT BRIEF IN SUPPORT OF PG PUBLISHING COMPANY'S AND OBSERVER PUBLISHING COMPANY'S RIGHT TO INTERVENE

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PROPOSED INTERVENORS' JOINT BRIEF IN SUPPORT OF PG PUBLISHING COMPANY'S AND OBSERVER PUBLISHING COMPANY'S RIGHT TO INTERVENE

I. STATEMENT OF FACTS

The matter before the Court arises from the joint petition of the PG Publishing Company, d/b/a The Pittsburgh Post-Gazette ("Post-Gazette") and Observer Publishing Company, d/b/a Observer Reporter ("Observer Reporter") (collectively "Proposed Intervenors") to intervene and open the record in this proceeding.

On May 27, 2010, Stephanie and Chris Hallowich (collectively "Hallowichs") commenced this action by a praecipe to issue a writ of summons against Range Resources Corporation, Williams Gas/Laurel Mountain Midstream, MarkWest Energy Partners, L.P., MarkWest Energy Group, L.L.C. (collectively "Defendants") and the Pennsylvania Department of Environmental Protection ("DEP").

As acknowledged in the Defendants' Joint Brief in Opposition to PG Publishing Company's and the Observer Publishing Company's Petition to Intervene and Motion to Unseal Record ("Defendants' Joint Brief in Opposition"), a settlement was executed in late June 2011 between the Hallowichs, the Hallowichs' two minor children (collectively "Plaintiffs"), and the Defendants. On July 28, 2011, the Hallowichs filed a Petition for Approval of Settlement of Minors' Actions Pursuant to Pa.R.C.P. 2039[1] and Local Rule 2039.1 ("Petition for Approval of Settlement of Minors' Actions") asking this Court to approve a settlement with the Defendants, which was required as the Hallowichs' two minor children (collectively "Children") are parties to the settlement agreement. On the same date, a Joint Motion to File Petition for Approval of Settlement of Minors' Actions under Seal ("Joint Motion to Seal") was filed by the Hallowichs.[2] Upon consideration of these pleadings, the Court scheduled a hearing in closed court chambers for either August 24, 2011 or August 26, 2011.[3]

On August 23, 2011,[4] the Court held a hearing on the Petition for Approval of Settlement of Minors' Actions and the Joint Motion to Seal. Before the hearing commenced, upon noticing two reporters for the Post-Gazette in the courtroom, a court official proceeded into the Court's chambers and informed the Court of their presence. After doing so, the court official proceeded

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[1] Pa.R.C.P. 2039 provides that "[n]o action to which a minor is a party shall be compromised, settled or discontinued except after approval by the court pursuant to a petition presented by the guardian of the minor."

[2] It should be noted that due to the Court's sealing of the record in the above-captioned matter, Proposed Intervenors have been unable to gain access to the full docket in the underlying matter. Proposed Intervenors only have access to a partial copy of the docket in the underlying matter, dated August 23, 2011, attached as Exhibit "A."

[3] As stated *supra*, Proposed Intervenors only have access to a partial docket, dated August 23, 2011, which states in the "Event Summary," under August 11, 2011:

> "Upon consideration of the Joint Motion for Scheduling Order, this Court hereby schedules a hearing in closed court chambers on (I) [Petition for Approval of Settlement of Minors' Actions] and (II) [Joint Motion to Seal] for Wednesday, 08-24-2011, or as soon thereafter as suits the convenience of the Court. Hearing to be held 08-26-2011, at 11:00 a.m."
>
> *See* Exhibit "A."

Due to the sealing of the record, and the ambiguity in the docket, Proposed Intervenors are uncertain when the hearing was scheduled to occur.

[4] Proposed Intervenors are unaware of any order of court that re-scheduled the hearing for August 23, 2011, or any reason as to why the hearing was held on August 23, 2011.

back into the courtroom and informed the Plaintiffs, Plaintiffs' Attorneys, Defendants and Defendants' Attorneys to follow him into the Court's chambers. Despite Defendants claims in Defendants' Joint Brief in Opposition, the Court never stated the confidential nature of the proceedings, as the Court was not present in the courtroom at any time during the incident at issue. The proceedings had yet to start before the court official moved the parties into chambers.

Contrary to the Defendants' assertions in the Defendants' Joint Brief in Opposition, the reporters for the Post-Gazette did not subsequently attempt to "follow the parties into chambers," rather the reporters proceeded into the outer office of the Court's chambers and asked the court official if they could enter the chambers. When the court official denied their request, the reporters informed the court official that they were objecting to the closing of the court proceeding on behalf of the Post-Gazette. Upon hearing this, the court official went into the chambers and returned shortly after to inform the reporters that the Post-Gazette's objection had been noted on the official record by the Court. *See* Post-Gazette's Petition to Intervene and Motion to Unseal Record, pp. 13 - 15.

After holding the closed court proceeding, the Court entered an Order of Court, dated August 23, 2011, attached as Exhibit "B," approving the settlement as to the minors' claims and sealing the record "indefinitely in its entirety." The Post-Gazette reporters were not provided with a copy of the Order at that time. The Post-Gazette only obtained a copy of the Order when its counsel obtained it from the Prothonotary's office on August 24, 2011. On August 31, 2011, the Post-Gazette served its Petition to Intervene and Motion to Unseal Record on the parties for presentation on September 6, 2011. In advance of the scheduled presentation date, counsel for the Hallowichs and the DEP both sent letters to the Court stating that they were taking no

position on the Post-Gazette's Petition to Intervene and Motion to Unseal Record. *See* Exhibits "C" and "D."

In response to the Post-Gazette's petition, the Court entered an order on September 6, 2011 scheduling argument on the petition for October 4, 2011 (attached as Exhibit "E") and directing that twenty days before the argument "all parties seeking to seal the record in the above-captioned case shall serve on all other parties, including the Proposed Intervenor, and the Court, an answer to Intervenor's motion setting forth the basis in law and in fact why the record should be sealed." The Observer Reporter then filed its separate Petition to Intervene and Joinder in the PG Publishing Company's Motion to Unseal Records and the Court scheduled argument on the Observer Reporter's petition at the previously scheduled October 4, 2011 argument.

Consistent with their correspondence to the Court, neither the Hallowichs nor the DEP filed an answer or any response to the Proposed Intervenors' petitions to intervene and motions to unseal the record. The Defendants did not file an answer to the motions as directed by the Court, but filed Defendants' Joint Brief in Opposition instead. In response, Proposed Intervenors filed Intervenors' Joint Brief in Support of PG Publishing Company's and Observer Publishing Company's Petition to Intervene and Motion to Unseal Record ("Proposed Intervenors' Joint Brief in Support").

The Defendants' Joint Brief in Opposition did not challenge the Proposed Intervenors right to intervene in the matter before the Court. Defendant's Joint Brief in Opposition only addressed the Proposed Intervenors request to unseal the records in the above-captioned case. [5]

[5] In addition to the Defendants' acknowledgment, *sub silentio*, of the Proposed Intervenors' right to intervene in Defendants' Joint Brief in Opposition, in footnote 2 of the Defendant's Joint Brief in Opposition, the Defendants indicate that the parties had agreed to lift the seal for all filings except for the settlement agreement. Indeed, counsel for Defendant, Range Resources, emailed counsel for the Post-Gazette on September 12, 2011, indicating that he

At the October 4, 2011 argument before the Court on the Post-Gazette's and the Observer Reporters' Petitions (collectively "Joint Petition to Intervene and Motion to Unseal Record"), the Court raised the issue of the Proposed Intervenors' right to intervene. The Court requested that all parties file briefs regarding the right to intervene by November 7, 2011.

II. ARGUMENT

The Court should grant the Joint Petition to Intervene and Motion to Unseal Record, as the Proposed Intervenors have the right to intervene in the above-captioned action.

A. Governing Legal Standards

Intervention is allowed under Rule 2327 of the Pennsylvania Rules of Civil Procedure, which states:

> "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if
> (1) the entry of a judgment in such action or the satisfaction of such judgment will impose any liability upon such person to indemnify in whole or in part the party against whom judgment may be entered; or
> (2) such person is so situated as to be adversely affected by a distribution or other disposition of property in the custody of the court or of an officer thereof; or
> (3) such person could have joined as an original party in the action or could have been joined therein; or
> (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action."

The Superior Court has held that the media asserting its constitutional and common law right of access to judicial records has "a legally enforceable interest" pursuant to Pa.R.C.P. 2327(4). *See Hutchinson v. Luddy*, 581 A.2d 578, 581 – 82 (Pa. Super. 1990), *rev'd on other grounds*, 594 A.2d 307 (Pa. 1991).

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was circulating a joint motion and proposed order to amend the Court's August 23, 2011 order to lift the seal on certain documents and asked the Post-Gazette to join the joint motion. The joint motion was presented to the Court on October 4, 2011, but the Court declined to enter the motion because the Plaintiffs had not consented.

Generally, members of the media are allowed to intervene when seeking to open a sealed record. *See Capital Cities Media, Inc. v. Toole*, 483 A.2d 1339, 1344 (Pa. 1984) ("In Pennsylvania there is a procedure for obtaining expedited review which affords complete relief where an alleged abridgment of the rights of the media is at issue. The first step in this procedure would have been for the applicants to petition the trial court to intervene for the purpose of challenging the legality of the [orders]").

Caselaw is replete with instances where members of the media have sought to intervene and access a closed record or judicial proceeding. The appellate courts consistently have held intervention was proper, even in instances where the appellate court ultimately found that the members of the media were not allowed access to the sealed record. *See Commonwealth v. Upshur*, 924 A.2d 642 (Pa. 2007); *Commonwealth v. Long*, 922 A.2d 892 (Pa. 2007); *Commonwealth v. Fenstermaker*, 530 A.2d 414 (Pa. 1987); *Commonwealth v. Hayes*, 414 A.2d 318 (Pa. 1980); *Commonwealth v. Martinez*, 917 A.2d 856 (Pa. Super. 2007); *Hutchinson by Hutchinson v. Luddy*, 611 A.2d 1280 (Pa. Super. 1992); *P.G. Pub. Co. v. Com. By and Through Dist. Atty. of Erie County*, 566 A.2d 857 (Pa. Super. 1989); and *Commonwealth v. Buehl*, 462 A.2d 1316 (Pa. Super. 1983).

The filing of a petition to intervene in order to open proceedings and records by the news media, in a civil proceeding, is the appropriate means of raising assertions of public rights of access, It is so well established that this Court should grant the Proposed Intervenors status as intervenors.

B. The Court Should Grant the Joint Petition to Intervene and Motion to Unseal Record, Because the Proposed Intervenors are Allowed to Intervene as a Matter of Law

At the time of argument, this Court raised the issue of whether intervention may be allowed in the instant matter, in light of the language of Pa.R.C.P. 2327, which allows intervention "at any time during the pendency of an action." As hereafter set forth, caselaw is clear that where the media seeks to intervene to open a judicial record the action remains pending because the order continues to impact the constitutional and common law rights of the media.

Alternatively, Proposed Intervenors' assert that the issue was raised prior to the sealing of the record, but they were not afforded their full opportunity to be heard, as required under caselaw.

i. Proposed Intervenors are Allowed to Intervene After the Entrance of an Order of Court Sealing the Record

In *Capital Cities Media, Inc.,* the Supreme Court stated: "We recognize the legitimacy and importance of the interest of the news media in judicial proceedings." *See Capital Cities Media, Inc.,* 483 A.2d at 1344. The media's right of expression must necessarily include the right to be heard when that interest is adversely affected." For the purpose of challenging the legality of an order closing judicial proceedings or sealing the record, the proper procedure is for the media applicant to petition the trial court to intervene. *Id.*

As stated *supra*, Pa.R.C.P. 2327 states: "At any time during the pendency of an action, a person not a party thereto shall be permitted to intervene therein, subject to these rules if: . . . (4) the determination of such action may affect any legally enforceable interest of such person whether or not such person may be bound by a judgment in the action."

The Superior Court has found that even if the underlying action has concluded or been dismissed in a proceeding during which the trial court ordered parts of the judicial record sealed, the controversy is not moot, as the judicial records remained sealed to the public. *See Commonwealth v. Frattarola*, 485 A.2d 1147, 1149 – 50 (Pa. Super. 1984). As such, it is a "controversy capable of repetition, yet evading review." *Id.* at 1149. Stating that closure orders are often not subject to review until after the underlying action is completed, the Superior Court in *Frattarola* stated:

> "To deny review because those underlying proceedings have come to an end would make it difficult for this court ever to review orders that are of great importance to fundamental rights, yet that are by their nature often of short duration. Thus, we believe that the order of the court closing the hearing and sealing the record is one capable of repetition in other cases, yet one that evades review in the specific instance."
> *Id.* at 1149 – 50

See also Buehl, 462 A.2d at 1319.

Pennsylvania has recognized the media's right of access to civil proceedings under the First Amendment of the United States Constitution, as well as under the Pennsylvania Constitution and at common law. *See Hutchinson*, 581 A.2d at 582 (discussing First Amendment analysis applied to attempts to achieve closure); *see also Hutchinson by Hutchinson*, 611 A.2d at 1289 – 91. It is the judicial policy of Pennsylvania to defer to the United States Court of Appeals for the Third Circuit concerning the interpretation of federal questions. *See Commonwealth v. Bowden*, 838 A.2d 740 (Pa. 2003).

In *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3rd Cir. 1994), the United States Court of Appeals for the Third Circuit found that the procedural device of permissive intervention is appropriately used to enable a newspaper-litigant who was not an original party to an action to

challenge orders sealing the record in an action.[6] The Third Circuit reversed the district court's denial of intervention as untimely due to the filing of the petition to intervene six and a half months after the date of the settlement and entrance of the confidentiality order. The Third Circuit found that intervention by a party for the limited purpose of modifying a confidentiality order is appropriate, even after the underlying dispute has been settled.[7] *Id.* at 778 – 79. As stated in *Pansy*, "intervention to challenge confidentiality orders may take place long after a case had been terminated." *Id.* at 779. Further, in denying the contention that litigation of the ancillary issue of intervention would work a prejudice on the original parties, the Third Circuit stated, "to preclude third parties from challenging a confidentiality order once a case had been settled would often make it impossible for third parties to have their day in court to contest the scope or need for confidentiality."[8]

In the instant matter, Proposed Intervenors are newspaper-litigants, who were not an original party to the underlying action, and who seek to challenge the sealing of the record in this matter. In addition, Proposed Intervenors sought to intervene through their objection to the Court on the day that the Court entered the sealing order in the above-captioned matter, as discussed *infra*. After acquiring the August 23, 2011 Order of Court from the Washington

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[6] The Third Circuit, in *Pansy*, states that "confidentiality order," which is the term of art used by the *Pansy* Court, is used to "denote any court order which in any way restricts access to or disclosure of any form of information of proceeding, including but not limited to . . . 'sealing orders.'" *Pansy*, 23 F.3d at 777, n. 1.

[7] By way of reference, the Third Circuit in *Pansy* cited two cases in which intervention was not found to be untimely despite a extended period of time between the settlement of the action and the time the intervention was sought. In these cases, intervention was allowed, even though intervention was sought three and two years, respectively, after the settlement of the action. *See Pansy*, 23 F.3d at 780; *citing United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990), *cert. denied*, 498 U.S. 1073 (1991) and *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 471, 473 (9th Cir. 1992), *cert. denied*, 506 U.S. 868 (1992).

[8] Caselaw throughout the United States is replete with instances where members of the media are granted intervention after the settlement of the underlying claims and subsequent sealing of the record. *See Van Etten v. Bridgestone/Firestone, Inc.*, 117 F. Supp. 2d 1375 (S.D. Ga. 2000), *vacated on other grounds*, 263 F.3d 1304 (11th Cir. 2001)(intervention allowed more than nine months after settlement and entrance of sealing order); *Davis v. Jennings*, 405 S.E.2d 601 (S.C. 1991) (intervention allowed when motion to intervene was filed less than four weeks after record was sealed); and *C.L. v. Edson*, 409 N.W.2d 417 (Wis. Ct. App. 1987) (intervention allowed four months after settlement and entrance of sealing order).

County Prothonotary on August 24, 2011, the Post-Gazette served their Petition to Intervene on August 31, 2011. Subsequently, due to the Labor Day holiday and the notice requirements of the this Court's local rules, the Post-Gazette presented their Petition on the first available day that it could be heard by the Court, September 6, 2011.

Moreover, it is axiomatic that a Pennsylvania Rule of Civil Procedure cannot frustrate either a United States or Pennsylvania constitutional claim. As such, the Proposed Intervenors have the right to intervene as a newspaper-litigant seeking to modify a sealing order; the issue being a controversy capable of repetition, yet one that will continue to evade review. Proposed Intervenors should be granted the right to intervene in the above-captioned matter.

ii. Proposed Intervenors are Allowed to Intervene Because the Post-Gazette's Timely Objection Was Made During the Pendency of the Action

The Pennsylvania Supreme Court has held that where a member of the media seeks access to a judicial record, the media must be given an opportunity to be heard. After hearing on the media's request, the record must contain an articulation of the factors taken into consideration in determining that the record should be sealed. *See Fenstermaker*, 530 A.2d at 421.

The Superior Court has determined that when a timely objection is made to the granting of a motion to close, the trial court must give the objectors a reasonable opportunity to be heard prior to the effectiveness of the closure order. *See Buehl*, 462 A.2d at 1321 - 22. In *Buehl*, counsel for the criminal defendant asked the trial court to close a hearing, which was granted by the trial court. *Id.* at 1318. During the now-closed court proceeding, a news reporter entered the courtroom and requested that the media have access to the proceeding. *Id.* After the trial court

stated that it had already made its decision and denied the news reporters request, the news reporter stated to the trial court "for the record, our attorney will be in touch with the Court." *Id.* Subsequently, the news reporter was escorted from the courtroom. *Id.*

In finding that a timely objection was made by the news reporter, the Superior Court, in *Buehl*, held that the trial court did not provide a sufficient opportunity for review of the public's first amendment rights. The hearing just had begun and there was no reason why a recess could not have been taken to allow counsel for the media to argue against closure. *Id.* at 1322. The Superior Court found further that the trial court failed to articulate the reasons for closure on the record. *See Buehl*, 462 A.2d at 1322 – 23.

The Superior Court determined that the trial court's filing of an opinion which articulated the reasons for closure, only after appeal by the proposed intervenor, "cannot satisfy the court's obligation to articulate its reasons for ordering closure, for it comes too late. It is in essence an after-the-fact, *ex parte*, statement. If the public's first amendment right of access is to be effectively protected, the court must state *before* ordering closure why it considers alternatives to closure unsatisfactory. Only in that way will those who oppose closure be able to respond." *Id.* at 1323 (emphasis in original).

In the matter before the Court, no opportunity for the reporters to be heard was allowed. Upon noticing reporters in the courtroom, a court official asked the Plaintiffs, Plaintiffs' Attorneys, Defendants and Defendants' Attorneys to follow him into the Judge's chambers. Rather than explain on the record why the proceeding was being closed, or allow the reporters to be heard through counsel, the Court, through the court official denied the reporters request without any explanation or hearing. Subsequently, the reporters noted their objection to the

closure, especially without a hearing in which they could be heard through counsel, to the court official, who assured the reporters it would be put on the official record.[9]

Thus, before the record was sealed, a timely objection was made during the "pendency of the action" which effectively acted as a request to intervene in the above-captioned proceeding. Rule 126 of the Pennsylvania Rules of Civil Procedure, "Liberal Construction and Application of the Rules," permits liberal construction of the rules "to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable."[10] In view of Pa.R.C.P. 126, one cannot exalt form over substance in regards to the critical constitutional rights which are involved with the issues at hand.

[9] As the proceedings in the above-captioned case have been sealed in their entirety, the Proposed Intervenors are unable to verify that the Post-Gazette's objection was noted on the official record as requested.

[10] Pa.R.C.P. 126 provides "The rules shall be liberally construed to secure the just, speedy and inexpensive determination of every action or proceeding to which they are applicable. The court at every stage of any such action or proceeding may disregard any error or defect of procedure which does not affect the substantial rights of the parties."

As the Court has not articulated a countervailing interest that requires closure of the record, did not state before closure why it considers alternatives to closure unsatisfactory, and did not hold a hearing on Proposed Intervenors' timely objection before closure, Proposed Intervenors are allowed to intervene and a hearing must be held on their objections to the closure of the record in this proceeding.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Frederick N. Frank, Esquire, hereby certify that a true and correct copy of the foregoing PROPOSED INTERVENORS' JOINT BRIEF IN SUPPORT OF PG PUBLISHING COMPANY'S AND OBSERVER PUBLISHING COMPANY'S RIGHT TO INTERVENE was served upon the following, this _____ day of November, 2011, via the manner indicated below:

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