STATE OF RHODE ISLAND AND PROVIDENCE PLANTATIONS

PROVIDENCE, SC. **SUPERIOR COURT**

(FILED: January 23, 2013)

MARY LOU DAURAY	:	
	:	
vs.	:	**C.A. No. PB 10-1195**
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ESTATE OF GABRIELLE D. MEE (a/k/a Gabrielle Malvina Mee), et al.	:	
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	:	
MARY LOU DAURAY, an heir-at-law of GABRIELLE D. MEE, and on behalf of the ESTATE OF GABRIELLE D. MEE	:	
	:	
vs.	:	**C.A. No. PC 11-2640**
	:	
THE LEGION OF CHRIST OF NORTH AMERICA, INC., OCEAN PASTORAL CENTER, INC. d/b/a THE LEGION OF CHRIST (RI) INCORPORATED, THE LEGION OF CHRIST, INCORPORATED, LEGION OF CHRIST INCORPORATED, MATER ECCLESIAE, INC. (MOTHER OF THE CHURCH, INC.), HOMBRE NUEVO (RI), INC. (NEW MAN (RI) INC.), OVERBROOK, INCORPORATED, PASTORAL SUPPORT SERVICES INC., LEGIONS OF CHRIST, LEGION OF CHRIST AND CONSECRATED REGNUM CHRISTI MEMBERS ASSISTANCE FOUNDATION, LEGION OF CHRIST COLLEGE, INC., FR. ANTHONY BANNON, LC, Individually and as Responsible Officer for other Defendants, and XYZ CORPORATION, or other entities not known at this time	:	
	:	
	:	
MARY LOU DAURAY, an heir-at-law of GABRIELLE D. MEE, and on behalf of the ESTATE OF GABRIELLE D. MEE	:	

vs.	:	**C.A. No. PC 11-2757**
BANK OF AMERICA, N.A., as successor-in-interest by merger or otherwise to FLEET NATIONAL BANK, as Trustee of the Timothy J. Mee Foundation Trust and the Timothy J. Mee Charitable Trust, and as co-trustee of the Gabrielle D. Mee Trust, THE LEGION OF CHRIST OF NORTH AMERICA, INC., OCEAN PASTORAL CENTER, INC. d/b/a THE LEGION OF CHRIST (RI) INCORPORATED, THE LEGION OF CHRIST, INCORPORATED, LEGION OF CHRIST INCORPORATED, MATER ECCLESIAE, INC. (MOTHER OF THE CHURCH, INC.), HOMBRE NUEVO (RI), INC. (NEW MAN (RI) INC.), OVERBROOK, INCORPORATED, PASTORAL SUPPORT SERVICES INC., LEGIONS OF CHRIST, LEGION OF CHRIST AND CONSECRATED REGNUM CHRISTI MEMBERS ASSISTANCE FOUNDATION, LEGION OF CHRIST COLLEGE, INC., FR. ANTHONY BANNON, LC, Individually and as Responsible Officer for other Defendants, and XYZ CORPORATION, or other entities not known at this time.	:	

DECISION

SILVERSTEIN, J. Before the Court are three motions relating to a Protective Order that seals discovery documents in the three above-captioned cases. Plaintiff/Appellant Mary Lou Dauray ("Ms. Dauray," or "Plaintiff") filed a "Motion to Lift Protective Order with respect to pleadings and other documents filed in [in all three cases]." The Associated Press, Providence Journal Company, New York Times Company, and National Catholic Reporter (collectively, "Media Entities" or "Intervenors") filed a Motion to Intervene for the limited purpose of challenging the enforcement of the Protective Order. The Media Entities also filed a separate "Motion to Vacate the Sealing Order." The Defendants have opposed all of these motions.

I

Facts and Travel

This Court engaged in an extensive factual discussion in its Decision on the Defendants' Motion for Summary Judgment (the "Decision"). See Dauray v. Estate of Gabrielle D. Mee, et al., C.A. No. PB-10-1195, 2012 WL 4043292 (R.I. Super. Ct. Sept. 7, 2012) (Silverstein, J.). Repetition of those facts is not necessary here.

The significant events that have occurred since the Decision involve procedure. On September 18, 2012, Ms. Dauray filed a Motion to Vacate a Protective Order (the "Order") that the probate court entered on September 16, 2009. The Order granted the Legion Entities' request, "prohibiting the information produced solely in connection with this litigation and preventing it from being disclosed to any third person not a party to this litigation." (Pl.'s Suppl. Mem. Supp. Pl.'s Mo. to Lift Protective Order, Ex. 1, Sept. 16, 2009 Decision, ¶ 32.) The Order also noted that "[b]ecause of the nature and extent of the issues in this case, it would seem that the parties should be protected to insure that they have a fair and impartial trial." Id. The probate court judge later clarified the Order by adding the following: "The attorneys for the objectors are ordered to instruct the objectors that the discovery produced in this case not be disseminated to the press or any other third person." Id. at Ex. 2, Nov. 3, 2009 Addendum. The Legion Entities have vigorously opposed the attempts to vacate the Order. The Court heard argument on Ms. Dauray's Motion to Vacate on September 24, 2012.

On October 23, 2012, the Media Entities filed a Motion to Intervene and a Motion to Vacate the Order. With this additional filing, the Court permitted additional argument on November 5, 2012, addressing both of the Media Entities' motions. The Court now considers these motions.

II

Discussion

A

Media Entities' Motion to Intervene

The Media Entities have moved to intervene under Rhode Island Superior Court Rule of Civil Procedure 24(a). Rule 24(a)(2) addresses intervention as a matter of right:

> "Upon timely application anyone shall be permitted to intervene in an action . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties."[1]

The Media Entities argue that their interests are "not adequately represented by the existing parties" and that the Order "has an immediate and continuing effect on [their] ability to gather information and/or to report on issues of significant public interest and concern . . . ." (Intervenors' Mot. to Intervene 2.) The Defendants respond by asserting three independent reasons to deny intervention. First, the Defendants argue that the Court should deny the Media Entities' Motion to Intervene because the Court ruled that the Plaintiff lacks standing; thus, there is no justiciable case in which the Media Entities may intervene. Second, the Defendants contend that the Media Entities interests are adequately represented by the Plaintiff. And third, the Defendants argue that the Media Entities' motion is untimely.

[1] Both Rule 24(a)(1) and Rule 24(b)(1) refer to rights conferred by statute and are thus not relevant here.

1

The Language of Rule 24 and the Right of Access

The Superior Court Rules of Civil Procedure provide two vehicles for third-party intervention in a civil matter: Rule 24(a) and Rule 24(b).[2] By breaking down the language of Rule 24(a), the Supreme Court describes a four-part test for intervention as a matter of right:

> "[A]n applicant will be granted intervention as of right if [1] the applicant files a timely application, . . . [2] the applicant claims an interest relating to the property or transaction which is the subject matter of the action, [3] the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, and [4] the applicant's interest is not adequately represented by current parties to the action . . . ." Tonetti Enterprises, LLC v. Mendon Road Leasing Corp., 943 A.2d 1063, 1072-73 (R.I. 2008).

This test seems to contemplate the continuing involvement of the intervenor in the main action of the case because it refers to a property or transactional interest in "the subject matter of the action," "the disposition of the action," and the representation "by the parties to the action." Id. (emphasis added). While our Supreme Court has not developed a multi-part test for Rule 24(b), that rule's text also suggests continued involvement in the main case by the intervenor because the rule permits intervention when there is a common question of law or fact between "an applicant's claim or defense" and "the main action." Super. R. Civ. P. 24(b) (emphasis added). Thus, both vehicles to intervention—Rule 24(a) and Rule 24(b)—travel down a road of indefinite intervenor involvement with intervenor input into the main action of the case. Additionally, Rhode Island cases that analyze the interest asserted under Rule 24(a) relate only to

[2] The text of Super R. Civ. P. 24(b) reads as follows:

> "Upon timely application anyone may be permitted to intervene in an action . . . when an applicant's claim or defense and the main action have a question of law or fact in common . . . . In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties."

property or transactional interests in a narrow sense. See e.g., Town of Coventry v. Baird Properties, LLC, 13 A.3d 614, 617-20 (R.I. 2011) (interest in remedy for continuing nuisance stemming from illegal excavation work on abutting property); Tonetti, 943 A.2d at 1074 (interest in mortgaged property); Credit Union Cent. Falls v. Groff, 871 A.2d 364, 368 (R.I. 2005) (interest in funds in Defendant's client trust account).

The interest asserted by the Media Entities in this case—a right of access to judicial records—"does not fit neatly within the literal language of either section." Jessup v. Luther, 227 F.3d 993, 997 (7th Cir. 2000).[3] Here, the subjects of the main actions are a probate court order admitting the will of Gabrielle Mee, inter vivos gifts made by Mee, and multiple trusts of which Mee was a trustee or over which she held certain powers. The Media Entities do not assert a property interest in the estate of Gabrielle Mee, or in Ms. Dauray's challenge to the administration of that estate. They do not assert a "claim or defense" against the estate of Gabrielle Mee, Ms. Dauray, or the Legion Entities. The Media Entities merely seek to intervene to vacate the Protective Order of the probate court as it relates to documents filed in connection with this case: a limited, one-stop intervention with respect to an issue already pending before the Court.

While the language of Rule 24(a) does not seem to jell with the limited involvement sought by the Media Entities, "[o]n its face, [even] Rule 24(b) would appear to be a questionable procedural basis for a third-party challenge to a confidentiality order." E.E.O.C. v. National Children's Center, Inc., 146 F.3d 1042, 1045 (D.C. Cir. 1998). However, every federal circuit

[3] The Court relies upon federal cases in this Decision with the express blessing of the Rhode Island Supreme Court. See Credit Union Cent. Falls, 871 A.2d at 367 ("Because our own precedent in this area is sparse, this Court may properly look to the federal courts for guidance."); see also Tonetti, 943 A.2d at 1073 ("[S]ince Rhode Island precedent is limited, we may properly look to the federal courts for guidance.").

that "has considered the question has come to the conclusion that nonparties may permissively intervene for the purpose of challenging confidentiality orders." Id. (citing cases from the First, Second, Third, Fifth, Sixth, Seventh, Ninth, Tenth Circuits). In general, the reasoning focuses on the limited nature of the intervention and the importance of the right asserted. See Jessup, 227 F.3d at 997-99; see also infra sec. II.A.2. Additionally, the grant of intervention is supported by "the Supreme Court's admonition that we should avoid rigid construction of Rule 24 . . . ." Jessup, 227 F.3d at 997 (citing Missouri-Kansas Pipe Line Co. v. United States, 312 U.S. 502, 505-06 (1941).

Moreover, one court even granted intervention without a formal third-party request for intervenor status. In Public Citizen v. Liggett Group, Inc., 858 F.2d 775, 779 (1st Cir. 1988), a third-party group of public health organizations sought to have a protective order modified without making a formal motion to intervene under Rule 24.[4] Nevertheless, the First Circuit held that the District Court should have granted Rule 24 intervenor status to the third-party group.[5] Id. at 784. Therefore, this Court will consider whether any form of intervention by the Media Entities is appropriate under the specific circumstances of this case. Looking narrowly at the rule referenced in the Media Entities' motion is antithetical to judicial economy when the relief that they are seeking is clear: limited intervention to challenge a protective order.

[4] The court later noted that the third-party group did request "that it be granted intervenor status if the district court thought that intervention was necessary"; however, such a request did not comply with the mandatory, procedural service requirements in Rule 24. Public Citizen, 858 F.2d at 783-84. The court did not view this error as fatal because other federal courts had been "quite lenient in permitting participation by parties who failed to comply strictly with Rule 24." Id. at 784.

[5] The First Circuit did not distinguish between Rule 24(a) and Rule 24(b). See id. at 784-87. The court only addressed the defendant's argument that if the third-party group's request was treated as a motion to intervene, the motion would be untimely. See id. Using a four-part test for timeliness, the court concluded that the motion would not be untimely. See id.

2

Limited Intervention to Challenge Protective Orders

"The right to intervene to challenge a closure order is rooted in the public's well established right to access to public proceedings." Jessup, 227 F.3d at 997. As the District of Columbia Court of Appeals described:

> "Ordinary principles applicable to intervention do not work well here. The filing of a motion to intervene is simply recognized as an appropriate means of raising assertions of public rights of access to information regarding matters in litigation. 'Intervention of this type may properly be termed de bene esse, to wit, action that is provisional in nature and for the limited purpose of permitting the intervenor to file a motion, to be considered separately, requesting that access to proceedings or other matters be granted.'" Mokhiber v. Davis, 537 A.2d 1100, 1104-05 (D.C. 1988) (quoting Commonwealth v. Fenstermaker, 530 A.2d 414, 416 n.1 (Pa. 1987)).

Courts that have granted intervention in similar circumstances have found the limited nature of intervening to challenge a protective order particularly persuasive because of the limited effect on the rights of the original parties. For example, in Public Citizen, the First Circuit held that intervention would not prejudice the existing parties and noted that the motion to intervene "pertain[ed] to a particularly discrete and ancillary issue, as demonstrated by the fact that the merits of the case have been already concluded and are no longer subject to review." 858 F.2d at 786. The First Circuit held that "[b]ecause Public Citizen sought to litigate only the issue of the protective order, and not to reopen the merits, we find that its delayed intervention caused little prejudice to the existing parties in this case." Id. (referring to legal prejudice). The Ninth Circuit has noted that "[t]here is no reason to require such a strong nexus of fact or law when a party seeks to intervene only for the purpose of modifying a protective order." Beckman Industries, Inc. v. International Ins. Co., 966 F.2d 470, 474 (9th Cir. 1992) (noting that

intervenors' claim need not involve the same clause of a policy or the same legal theory when intervenors are not becoming parties to the main action).

Additionally, courts have also focused on the nature of the right asserted when granting intervention. The Seventh Circuit has noted that the right of access to court proceedings and documents is a right of "immediate and contemporary" access. In re Associated Press, 162 F.3d 503, 507 (7th Cir. 1998). The full protection of that right requires an "adequate opportunity" to challenge a limitation on that right and an examination of the issue "in a procedural context that affords the court an opportunity for due deliberation." Id. Additionally, the Sixth Circuit remanded a case that had denied intervention "because the record [did] not reflect the district court's consideration of the strong underlying tradition of open records." Meyer Goldberg, Inc., of Lorain v. Fisher Foods, 823 F.2d 159, 164 (6th Cir. 1987).

Our case fits into the mold of this line of cases. The Media Entities seek to intervene only on the discrete and ancillary issue of the enforcement of the Protective Order. See 858 F.2d at 786. Like Public Citizen, as a practical matter, this Court's review of the merits has concluded, and the Media Entities do not seek to reopen the merits. See id. While the Defendants may claim that they would be pragmatically disadvantaged by intervention because another advocate would be opposing their position, such a disadvantage does not amount to legal prejudice. See id. Additionally, the Media Entities seek to enforce a right of access to court documents, an interest so paramount that any member of the public can assert it. See Mokhiber, 537 A.2d at 1105.

Furthermore, in Jessup v. Luther, the original parties to an employment termination dispute settled, and the settlement agreement included a confidentiality clause, prohibiting disclosure of information relating to the terms of the settlement. 227 F.3d at 995. To that effect,

the district court entered an order that also sealed all documents relating to the settlement agreement. Id. After entry of the order, a newspaper sought to intervene, and both original parties opposed intervention. Id. After noting that this kind of situation does not neatly fit into the literal language of Rule 24(a) or Rule 24(b), the Seventh Circuit nonetheless granted intervention. Id. at 997-999. The court reasoned that all other courts to have considered the issue had granted intervention and that granting this type of intervention does not offend Rule 24(b)'s intended purposes. Id.

In applying Rule 24(b) to its facts, Jessup noted that permitting intervention to decide the confidentiality issue did not stretch the wording of the Rule. Id. at 998. The newspaper's "right of access to court proceedings and documents born of the common law and First Amendment" was "directly and substantially related to the litigation." Id. Thus, when a closure order is entered, "the public's interest in open access is at issue and that interest serves as the necessary legal predicate to intervention." Id. At the same time, the parties interest in nondisclosure is "a central aspect of this litigation." Therefore, the confidentiality of the settlement was a "question of law . . . in common" between the parties and the newspaper. Id. at 998-99; Fed. R. Civ. P. 24(b).

Our case fits the Jessup 24(b) analysis. As documents continue to be sealed, the public has an interest in the access to those documents. See Jessup 227 F.3d at 998. The Defendants continue to assert that the sealing of discovery documents in this case is necessary, while the Plaintiff disagrees. Thus, access to filed court documents and of the ability to disclose discovery information have become issues in our case. See id. Therefore, the status of the sealed documents has become a "question of law . . . in common" between the Defendants and the Media Entities. See id. at 998-99; Super. R. Civ. P. 24(b).

The Defendants argue that because this Court ruled that the Plaintiff has no standing, there is no justiciable case in which the Media Entities can intervene. To support this contention, the Defendants point to a number of cases wherein courts have denied intervention when the plaintiffs lack standing or the court otherwise lacks jurisdiction. See, e.g., Interstate Commerce Commission v. Southern Ry. Co., 380 F. Supp. 386, 395- 96 (M.D. Ga. 1974), aff'd 543 F.2d 534 (5th Cir. 1976); Fuller v. Volk, 351 F.2d 323, 328 (3d Cir. 1965) ("It is well-settled that since intervention contemplates an existing suit in court of competent jurisdiction and because jurisdiction is ancillary to the main cause of action, intervention will not be permitted to breathe life into a 'nonexistent" law suit."); Kendrick v. Kendrick, 16 F.2d 744, 745 (5th Cir. 1926) ("An existing suit within the court's jurisdiction is a prerequisite of an intervention . . . .").

This general principle, however, is belied by courts addressing the specific circumstance of intervention for the limited purpose of modifying protective orders: courts routinely grant such an intervention, sometimes even years after a case has ended. See, e.g., Jessup v. Luther, 227 F.3d 993 (7th Cir. 2000) (allowing permissive intervention after the settlement of a court action); Pansy v. Borough of Stroudsburg, 23 F.3d 772 (3d Cir. 1994) (same); Beckman Indus., Inc. v. Intn'l Ins. Co., 966 F.2d 470 (9th Cir. 1992) (same); United Nuclear Corp., 905 F.2d at 1427 (same); Public Citizen, 858 F.2d 775 (allowing permissive intervention after judgment on the merits); Meyer Goldberg, Inc., of Lorain v. Fisher Foods, Inc., 823 F.2d 159 (6th Cir. 1987) (remanding district court's denial of intervention in a settled action because the record did not reflect the district court's consideration of the strong underlying tradition of open records); FDIC v. Ernst & Ernst, 677 F.2d 230 (2d Cir. 1982) (allowing permissive intervention after the settlement of a court action); Mokhiber v. Davis, 537 A.2d 1100 (D.C. 1988) (third-party permitted to intervene four years after a judicially approved consent decree in order to challenge

a protective order); Rosado v. Bridgeport Roman Catholic Diocesan Corp. (Rosado I), 884 A.2d 981, 1014-17 (Conn. 2005) (state court employing federal Rule 24 interpretations to permit intervention over one year after settlement). A prominent federal practice treatise is in accord, stating that a federal district court "may properly consider a motion for permissive intervention, for the limited purpose of modifying a confidentiality order, even after the underlying dispute between the original parties has been resolved." 6 James Wm. Moore et al., Moore's Federal Practice ¶ 24.23[1] (3d ed. 2012). The Court's power to do so, even after judgment, lies not in its jurisdiction over the original case, but in its inherent power to modify protective orders that remain in effect. See Public Citizen, 858 F.2d at 782. This Court finds such reasoning particularly persuasive when such an order directly affects not only the parties' power of use of discovery information, but also the public's access to documents filed with the court. See Mokhiber, 537 A.2d at 1105 (noting that "it is important to consider the specific kind of claim [the intervenor] is making: he asserts a public right of access, that is, a right that any member of the public can assert[]").

While courts routinely grant intervention for the limited purpose of modifying protective orders and our case fits that mold, our inquiry does not end there. The Court must next consider whether intervention is the most appropriate vehicle for the Media Entities to assert their right of access.

3

The Independent Action Alternative

In State v. Cianci, 496 A.2d 139 (R.I. 1985), the Rhode Island Supreme Court considered a Motion to Intervene made by the Providence Journal Company and another media outlet, seeking intervention to challenge an order sealing all discovery material in the criminal case

against the former Mayor of Providence. The Court held that intervention in the criminal proceeding was improper. Id. at 145. Further, the Court stated that "the better practice would be for representatives of the press or the public to institute a separate, independent action against the sealing authority by way of a complaint for declaratory judgment in the Superior Court." Id. at 146. Thus, the question for this Court becomes whether intervention or a separate, independent action is the most appropriate vehicle for the Media Entities to assert their right of access.

The Cianci decision was limited to the criminal context as the court noted that "such a procedural device [i.e., intervention] has no place in a criminal proceeding." Id. at 146 (emphasis added). This ought to be the case. The protections for a criminal defendant are far greater for those of a civil defendant. Cf. Seddon v. Bonner, 755 A.2d 823, 828 (R.I. 2000) (quoting Hopps v. Utica Mutual Insurance Co., 506 A.2d 294, 297 (N.H. 1985)) (noting stronger rationale for applying collateral estoppel against former criminal defendant than party to a prior civil case because criminal defendant had the benefit of the presumption of innocence and the State's burden of proof beyond a reasonable doubt). The Cianci Court was particularly concerned about a criminal defendant's right to a fair trial and the possible interruption to the criminal proceeding. Cianci, 496 A.2d at 146 ("A defendant's right to a fair trial should not be interrupted or side-tracked while the collateral interests of third parties are adjudicated."). Those concerns are not present here. This Court has ruled that the Plaintiff lacks standing to bring her suit; thus, any possible prejudice at trial is remote and would require a reversal of this Court's Summary Judgment finding on appeal. Additionally, intervention would not be an interruption as the merits of the case have concluded; a piecemeal challenge via a separate action would further complicate any potential appeal. Finally, "Intervention owes its origin to civil law . . ."; thus, it should be considered in the context of a civil proceeding. Id. at 145.

Furthermore, other courts have "recognized intervention as the logical and appropriate vehicle by which the public and the press may challenge a closure order." Jessup, 227 F.3d at 997. Indeed, some courts have stated that "intervention is 'the procedurally correct course' for third-party challenges to protective orders." Public Citizen, 858 F.2d at 783 (quoting In re Beef Industry Litigation, 589 F.2d 786, 789 (5th Cir. 1979) (emphasis added by Public Citizen); see also Associated Press, 162 F.3d at 507 ("[T]he most appropriate procedural mechanism by which to accomplish this task is by permitting those who oppose the suppression of the material to intervene for that limited purpose."). "This method not only guarantees the public's right to be heard, it also ensures that 'the issue [of closure will] be examined in a procedural context that affords the court an opportunity for due deliberation.'" Jessup, 227 F.3d at 997 (quoting Associated Press, 162 F.3d at 507).

Finally, judicial economy and the nature of the interest asserted by the Media Entities support intervention as opposed to the filing of an independent action. The most efficient way to resolve the issue is in the context of the current litigation. Cf. City of Chicago Federal Emergency Management Agency, 660 F.3d 980, 987 (7th Cir. 2011) ("Rule 24(b) is about economy in litigation."); Public Citizen, 858 F.2d at 783 (noting that "where intervention is available, (i.e., civil cases), it is an effective mechanism for third party claims of access to information generated through judicial proceedings"). The issue of the propriety of the Protective Order has already been raised by the Plaintiff and was under consideration at the time the Media Entities sought intervention. The Media Entities are simply seeking to be heard on the same issue. Additionally, any appeal of this Decision could easily be joined with any appeal on the Decision on Summary Judgment. Finally, an efficient resolution to this issue is of the utmost

importance because "[t]he operations of the courts and the judicial conduct of judges are matters of utmost public concern." Landmark Comm. v. Virginia, 435 U.S. 829. 839 (1978).

Because courts routinely grant intervention to third-parties for the limited purpose of challenging protective orders, particularly when the right of access to judicial records is implicated, and because intervention is the most appropriate vehicle for third-parties to seek such relief, the Court grants the Media Entities' Motion to Intervene.[6] The Court will now consider both the Plaintiff and Media Entities' Motions to Vacate the Protective Order.

B

Motions to Vacate the Protective Order

Both the Media Entities and Ms. Dauray have filed Motions to Vacate the Protective Order entered by the probate judge.[7] As the motions seek the same relief—public access to judicial documents—and revolve around similar concepts, this Court will discuss the merits together. See Pl.'s Mem. in Supp. of Mot. to Lift Protective Order, Sept. 18, 2012, at 2 ("Dauray requests that this Honorable Court unseal all pleadings and other judicial documents in the instant litigation, so that she and the public can have access to the documents."); Intervenors' Mem. in Supp. of Mot. to Vacate Sealing Order, at 14 ("[T]he Intervenors respectfully submit

[6] The Defendants also argued that "[t]he Media Entities cannot intervene to seek access to discovery materials that were not attached to the pleadings." (Defs.' Obj. to Media Entities Mot. to Intervene 9.) The Media Entities do not seek access to "nonfiled discovery information." (Hearing Transcript, Nov. 5, 2012, at 6:9-7:3.) For further discussion on the scope of information that the right of access encompasses, see infra sec. II.B.

[7] The Moving Parties have requested primarily that the Court vacate the Protective Order issued by the probate judge, and secondarily that the court modify the Order. Because vacation of an order would essentially be a more specific form of modification, the Court will employ the term "modification" to refer to any change to the status quo. Additionally, the parties have most directly framed the issue as seeking to vacate the Order of the probate court. This Court, however, has also made separate determinations that seal specific filings. As the Court sealed those documents with allegiance to the probate court's Protective Order, the Court deems those separate sealing orders as also the subject of this motion.

that this Court should vacate the Sealing Order.") Ms. Dauray has presented the additional argument that the Order infringes upon her First Amendment right to disseminate information that she already has; that issue is connected to the initial issue and is thus discussed at the end of this section.

1

Preliminary Jurisdictional Issues

In their Supplemental Jurisdictional Memorandum and at the November 5, 2012 hearing, the Defendants presented two jurisdictional arguments as to Ms. Dauray's Motion to Lift the Protective Order.[8] First, because this Court found that Ms. Dauray lacks standing to assert her claims; thus, she cannot file further pleadings. Second, the Defendants argue that the Court has no jurisdiction over Ms. Dauray's Motion to Lift the Protective Order because Ms. Dauray did not list the entry of the Protective Order in her reasons of appeal to the Superior Court.

Ms. Dauray's Motion to Lift the Protective Order does not fail because the Court ruled that she does not have standing. "[A] protective order, like any ongoing injunction, is always subject to the inherent power of the [trial] court to relax or terminate the order, even after judgment." Polquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993); see also Public Citizen, 858 F.2d at 782 (noting that "courts and commentators seem unanimous in finding such an inherent power to modify discovery-related protective orders, even after judgment, when circumstances justify[]"). This inherent power "provides a safety valve for public interest concerns, changed circumstances or any other basis that may reasonably be offered for later adjustment." Polquin, 989 F.2d at 535. Further, it is "consistent with, if not mandated by, two

[8] In its Supplemental Jurisdictional Memorandum, the Defendants also argued that the Court should deny Ms. Dauray's motion because the discovery record includes inadmissible evidence. This argument is not jurisdictional in nature and will be discussed as part of the merits, specifically, to which documents the right grants access. See infra Section II.B.2.

important and well established principles. First, courts retain supervisory authority over documents in their possession. Second, the public has a presumptive right of access to court proceedings and documents." Rosado I, 884 A.2d at 1008-09. Here, the Protective Order still affects both public access to the discovery documents, and, more specifically, Ms. Dauray's ability to speak about produced discovery. Accordingly, Ms. Dauray's lack of standing has no bearing on whether the continuing Protective Order should be modified or on her right to raise the issue.

Similarly, Ms. Dauray's failure to raise the issuance of the Protective Order in her reasons of appeal does not cause her motion to fail. Rhode Island General Laws § 33-23-1(a)(2) does restrict the appeal of a probate court order to the reasons stated in the filing with the Superior Court. Id. ("[T]he appellant shall file in the Superior Court a certified copy of the claim and record and the reasons of appeal specifically stated, to which reasons the appellant shall be restricted, unless, for cause shown, and with or without terms, the Superior Court shall allow amendments and additions thereto."). But as stated above, courts always retain the inherent power to modify protective orders. See Polquin, 989 F.2d at 535; Public Citizen, 858 F.2d at 782. Additionally, the Rhode Island Supreme Court has held that only probate court orders containing an element of finality—"including the appointment of an executor, an administrator C.T.A., or an administrator, or an order admitting or refusing to admit a will to probate"—are appealable to the Superior Court; discovery orders are not. Burford v. Estate of Skelly, 699 A.2d 854, 856 (R.I. 1997). Finally, this Court entered multiple orders sealing documents in discovery of this case; such documents did not even exist at the time of appeal to the Superior Court. Therefore, Ms. Dauray's failure to raise the Protective Order in her reasons

for appeal to the Superior Court is not a jurisdictional bar to her new challenge to the order that restricts her ability to disseminate information.

Therefore, these preliminary jurisdictional issues do not prevent Ms. Dauray from challenging the Protective Order and do not prevent the Court from considering the motion. Accordingly, the Court will continue to its analysis of the merits.

2

Public Access to Judicial Documents

Ms. Dauray and the Media Entities (collectively, the "Moving Parties") argue that the Defendant' assertion that release of the sealed documents will taint the jury pool is insufficient to establish good cause. Further, they assert that that judicial documents are presumed to be public records, and the right of access and the public interest outweigh the minimal risk that the Defendant's right to an impartial jury will be jeopardized. The Defendants argue that the Order was entered upon the good cause that the Order was necessary to ensure the Defendant's constitutional right to a fair and impartial trial and jury and that Ms. Dauray has no First Amendment right to disseminate discovery materials to the public. Additionally, the Defendants argue that their constitutional right to a fair and impartial jury outweighs any public interest in this private lawsuit.

Based on the interests asserted and the arguments of the parties, this case requires the Court to address three uniquely interrelated concepts: the right of access to judicial records (both under First Amendment and common law principles), the rules of discovery (including the coordinate filing requirements, and the use and retention of documents), and Rule 26(c) regarding protective orders. These concepts are elaborated upon below, first in their own right, then as they apply together to this situation.

a

The Right of Access and Its Limits

"It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978). While the United States Supreme Court was describing a common law right in Nixon, it is unclear whether the right at issue here should be considered solely a common law right, whether there is a separate First Amendment right, or whether both the common law and the First Amendment describe the same right coordinately.[9] At least one Circuit has analyzed this situation as encompassing a separate First Amendment right of access and common law right of access. See Chicago Tribune v. Bridgestone/Firestone, Inc., 263 F.3d 1304, 1310-13 (11th Cir. 2001). Another Circuit, however, has described the right of access as, "derived from the common-law principle that courts are public institutions that operate openly . . . and judicially imposed limitations on this right are subject to the First Amendment." Bond v. Utreras, 585 F.3d 1061, 1073 (7th Cir. 2009); see also Grove Fresh Distributors, Inc. v. Everfresh Juice Co.., 24 F.3d 893, 897 (7th Cir. 1994) ("Justified originally by common-law traditions predating the enactment of our Constitution, the right of access belonging to the press and the general public also has a First Amendment basis."). What is clear, however, is that courts afford a right of access to the public, and it has both First Amendment

[9] The parties' memoranda refer at various times to both the common law and First Amendment. See Intervenors' Mem. in Supp. of Mot. to Vacate Sealing Order, at 2 (contending that the Order "violates the First Amendment, the common law, and Rule 26 of the Superior Court Rules of Civil Procedure"); Pl.'s Mem. in Supp. of Mot. to Lift Protective Order, Sept. 18, 2012, at 4 (arguing Order "frustrates Dauray's First Amendment rights"); Pl.'s Suppl. Mem. in Supp. of Mot. to Lift Protective Order, Oct. 1, 2012, at 4 (citing common law right recognized in Nixon). At the hearing, when the Court pressed counsel for the Media Entities, "What is it you claim here? First Amendment right or common law right?," counsel responded that "there are First Amendment aspects to our argument," but "[c]andidly, I don't think it makes a difference." (Hearing Transcript, Nov. 5, 2012, at 8:4-16.)

and common law undertones. Therefore, this Court will refer to the right at issue as a general right of access to judicial records, encompassing both the common law and First Amendment traditions associated with it.

The right of access permits "members of the media and the public [to] bring third-party challenges to protective orders that shield court records . . . from public view." Bond, 585 F.3d at 1073. There is no requirement that the third party requesting the record have a proprietary interest in the document or a need for its use as evidence in a lawsuit. Nixon, 435 U.S. at 597. A right of access not tied to such an interest allows the public to scrutinize the court system, serving to "(1) promote community respect for the rule of law, (2) provide a check on the activities of judges and litigants, and (3) foster more accurate fact finding." Grove Fresh, 24 F.3d at 897; Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (plurality opinion) (quoting 1 J. Bentham, Rationale of Judicial Evidence 524 (1827)) ("Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.").

The right of access is rooted in the common law tradition of open trials. See Rosado v. Bridgeport Roman Catholic Diocesan Corp. (Rosado II), 970 A.2d 656, 676 (Conn. 2009). As the Supreme Court described: "[T]he historical evidence demonstrates conclusively that at the time when our organic laws were adopted, criminal trials both here and in England had long been presumptively open. This is no quirk of history; rather, it has long been recognized as an indispensible attribute of an Anglo-American trial." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 569 (1980) (plurality opinion) (holding that "the right to attend criminal trials is implicit in the guarantees of the First Amendment"). The Court went on to say that "[t]he Bill of Rights was enacted against the backdrop of the long history of trials being presumptively open."

Id. at 581. Building off that history, the Court later noted that "to the extent that the First Amendment embraces a right of access to criminal trials, it is to ensure that this constitutionally protected 'discussion of governmental affairs is an informed one.'" Globe Newspaper Co. v. Superior Court for Norfolk County, 457 U.S. 596, 604-05 (1982) (holding that State could not require trial judges to exclude the press and general public from the courtroom during the testimony of that a minor, sexual offense victim).

"Though its original inception was in the realm of criminal proceedings, the right of access has since been extended to civil proceedings because the contribution of publicity is just as important there. In fact, mistakes in civil proceedings may be more likely to inflict costs upon third parties, therefore meriting even more scrutiny." Grove Fresh, 24 F.3d at 897. Thus, the traditional openness of public trials "evolved into a presumption of public access to court proceedings and records that remains a fundamental part of our judicial system today." Rosado II, 970 A.2d at 676.

There are many reasons to grant a right of access to the public; many of those reasons cut to the core of our republican form of government and the role of the judiciary in it. Describing the rationale, the Connecticut Supreme Court stated:

> "Public monitoring of the judicial process through open court proceedings and records enhances confidence in the judicial system by ensuring that justice is administered equitably and in accordance with established procedures. The bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury and fraud. Furthermore, the very openness of the process should provide the public with a more complete understanding of the judicial system and a better perception of its fairness." Rosado II, 970 A.2d at 676 (internal quotations and citations omitted).

As one prominent commentator has summarized, the right of public access "exists to enhance popular trust in the fairness of the judicial system, to promote public participation in the

workings of the government, and to protect constitutional guarantees." Arthur R. Miller, Confidentiality, Protective Orders, and Public Access to the Courts, 105 Harv. L. Rev. 427, 429 (1991).

The right of public access, however, is not absolute. See Nixon, 435 U.S. at 598. In Nixon, after describing the clear right of access, the Court cautioned that "access has been denied where court files might have become a vehicle for improper purposes." Id. at 598. Referring to a court's supervisory power of its own records, the Supreme Court described examples of state courts refusing to let their records promote public scandals, detail of certain divorce cases, or serve as reservoirs of libelous statements or business information that may hurt a litigant's competitive standing. Id.

The most relevant United States Supreme Court case for our consideration of the right of public access is Seattle Times v. Rhinehart. In Seattle Times, a spiritual leader of a dubious religious group sued the Seattle Times and other media entities (collectively, the "defendants"),[10] on behalf of the group and himself (collectively, the "plaintiffs"), for defamation and invasions of privacy. 467 U.S. at 22-23. The defendants initiated extensive discovery and received a number of financial documents, including the leader's income tax returns. Id. at 24. The trial court also granted a motion to compel more discovery into the financial affairs of the religious group and initially denied a motion for a protective order. Id. at 24-25. In a renewed motion, however, the trial court issued a protective order prohibiting the defendants from "publishing, disseminating, or using the [financial] information in any way except where necessary to prepare for and try the case." Id. at 27.

[10] The Walla-Walla Union-Bulletin, the authors of relevant articles, and the spouses of the authors were also named defendants. Seattle Times, 467 U.S. at 23.

The United States Supreme Court held that where "a protective order is entered on a showing of good cause as required by Rule 26(c), is limited to the context of pretrial civil discovery, and does not restrict the dissemination of the information if gained from other sources, it does not offend the First Amendment." Id. at 37. The thrust of the Court's analysis, however, concerned the discovery process and its function within the judicial system. See id. at 31-36. Although the court admitted that there was a public interest in knowing more about the plaintiffs, "[i]t does not necessarily follow, however, that a litigant has an unrestrained right to disseminate information that has been obtained through pretrial discovery." Id. at 31; cf. Miller, supra, at 441. ("[T]he function of the judicial system is to resolve private disputes, not to generate information for the public."). The Court noted that "pretrial depositions and interrogatories are not public components of a civil trial"; they were not open to the public at common law and are generally conducted in private in modern practice. Seattle Times, 467 U.S. at 33. Furthermore, much of the information obtained during discovery "may be unrelated, or only tangentially related, to the underlying cause of action." Id. Therefore, restraints placed on discovered, but not yet admitted, information are not a restriction on a traditionally public source of information." Id. Finally, while raising the significant potential for abuse of the discovery process, the Court noted that "[b]ecause of the liberality of pretrial discovery . . . it is necessary for the trial court to have the authority to issue protective orders." Id. at 34.

While instructive in general, Seattle Times—considered with the principles of openness delineated in the preceding cases—does not provide a specific answer for our case for two reasons. First, our case is past pretrial discovery; this Court ruled upon a dispositive Motion for Summary Judgment. While information obtained during discovery is at issue, the facts relevant to the lawsuit were excerpted and presented to the Court for consideration in its application of

the law. Second, discovery procedure has changed since Seattle Times. For more context of our situation, the Court must next look at the current procedure with respect to discovery.

b

The Change in Discovery Practice

i

Foreign Authority

Until 2000 in the federal system, and 2006 in Rhode Island, the default rule required that all discovery be filed with the court unless otherwise ordered.[11] See Bond, 585 F.3d at 1076 (discussing amendments to Fed. R. Civ. P. Rule 5(d)); In re Agent Orange Product Liability Litigation, 821 F.2d 139, 146 (2d Cir. 1987) (discussing prior Fed. R. Civ. P. Rule 5(d)); Super R. Civ. P. 5(d) 2006 Committee Notes (discussing Rhode Island's 2006 amendment). When the Court decided Seattle Times, federal district courts were merely permitted to flip that default rule and adopt a rule that discovery not be filed with the court unless otherwise ordered. Seattle Times, 467 U.S. at 33 n.19. The current Fed. R. Civ. P. 5(d)(1) states that "disclosures under Rule 26(a)(1) or (2) and the following discovery requests and responses must not be filed until they are used in the proceeding or the court orders filing: depositions, interrogatories, requests for documents or tangible things or to permit entry onto land, and requests for admission." Thus, the current default rule is that, absent court order, discovery is not filed with the court until it is "used in the proceeding." See id.

Why is this difference significant? Seattle Times was written in the context of changing discovery filing requirements. Thus, when combining Nixon and Seattle Times, judges are essentially left with only two circumscriptions on their ability to control discovery: on one hand,

[11] For a specific discussion of the Rhode Island Rule, see infra section II.B.2.b.ii.

court documents (i.e., judicial records) are open to the public and cannot be withheld, and on the other hand, discovery is not a public component at trial, even when the discovery documents must be filed with the court. But discovery later introduced as evidence at a public trial clearly is a court document. So at what point does a discovered document become part of the judicial record? Modern discovery practice further molds the answer to this question.

In analyzing the effect of the rule change in the context of protective orders, the Seventh Circuit noted that "Rule 5(d) separates discovery material . . . into two categories: (1) that which is filed with the court (because it is used in a court proceeding or is ordered to be filed); and (2) that which remains unfiled and therefore not part of the public court record." Bond, 585 F.3d at 1076. Accordingly, the court concluded that "this amendment eliminated any implied right of public access to unfiled discovery emanating from the procedural rules." Id. (agreeing with S.E.C. v. TheStreet.com, 273 F.3d 222, 233 n.11 (2d Cir. 2001)) (emphasis in original). In sum, the court formulates the right of access as follows:

> "while the public has a presumptive right to access discovery materials that are filed with the court, used in a judicial proceeding, or otherwise constitute 'judicial records,' the same is not true of materials produced during discovery but not filed with the court. Generally speaking, the public has no constitutional, statutory (rule-based), or common-law right of access to unfiled discovery." Bond, 585 F.3d at 1073 (emphasis in original).

The Connecticut Supreme Court has expounded upon what constitutes a judicial record, i.e., what it would mean for a document to be "filed with the court, used in a judicial proceeding, or otherwise constitute 'judicial records.'"[12] See Rosado II, 970 A.2d at 677-83; compare id. at

[12] The court's use of the phrase "filed with the court" came not from a Connecticut parallel to Fed. R. Civ. P. 5(d), but from its Practice Book, which states: "[e]xcept as otherwise provided by law, there shall be a presumption that documents filed with the court shall be available to the public." Rosado II, 970 A.2d at 681 (quoting Conn. Practice Book § 11-20A(a)). However, the court simply held that § 11-20A "codifies the common-law presumption of public access to judicial documents only." Id. at 682. Thus, the question of "what constitutes a judicial

681-82 with Bond, 585 F.3d at 1073. The court framed the question as one between two approaches. Under the narrower approach, judicial documents are "limited to those documents relied upon to determine a litigant's 'substantive rights.'" Rosado II, 970 A.2d at 678 (quoting Anderson v. Cryovac, Inc., 805 F.2d 1, 13 (1st Cir. 1986) (emphasis removed)). Under the broader approach, "documents that are filed with the court that reasonably may be relied upon in support of any part of the court's adjudicatory function are judicial documents."[13] Id. (quoting United States v. Amodeo, 44 F.3d 141, 145 (2d Cir. 1995)). The Connecticut Supreme Court decided to follow the broader approach based on Connecticut law, the majority rule across all jurisdictions, and the public interest. See id. at 682-83.

The Connecticut Supreme Court also took up an application of the broader approach to the question of "whether discovery related motions and their associated exhibits should be considered judicial documents." Id. at 683. The court held that discovery related motions and their associated exhibits were judicial documents because the court could reasonably rely on such documents in the performance of its adjudicatory function. Id. The court also noted the impact that discovery motions could have a significant impact on the litigation. Id. This analysis, however, is rebutted by other cases that hold that it would be illogical to grant a public right of access merely because the documents were attached to a discovery motion when discovery is not a traditionally a public part of litigation. See e.g., S.E.C., 273 F.3d at 233

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document" was analyzed as a common law question, not as an interpretation of a unique Connecticut statute or rule of procedure. Id. at 682-3. Therefore, it is still instructive for our Rhode Island case.

[13] The court also noted, but did not later address, "what arguably could be deemed a third approach" where "the act of filing a document with the court in connection with a pending matter renders it a judicial document." Rosado II, 970 A.2d at 679. The rationale for this approach is that "the public's interest in judicial monitoring extends not only to whether the judiciary reaches legally sound results but also to the entire judicial process itself, which includes 'all records the court has considered in making any ruling . . . .'" Rosado II, 970 A.2d at 679 (quoting Rufer v. Abbott Laboratories, 114 P.3d 1182, 1191 (Wash. 2005) (emphasis in original.)).

(proposed rule "would transform every document that a court reviews into a 'judicial document' presumptively open to the public . . . ."). Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 163-65 (3d Cir. 1993); Anderson, 805 F.2d at 12-13; see also Seattle Times, 467 U.S. at 33 (noting discovery not traditionally open to the public).

Thus, our question becomes what is a judicial record under Rhode Island law.

ii

Rhode Island Rule 5(d) and The Scope of "Judicial Records" in Rhode Island

Rhode Island Super R. Civ. P. 5(d), as amended in 2006, provides:

> "the following discovery requests and responses shall not be filed with the court until they are used in the proceeding or the court orders their filing: (i) interrogatories; (ii) requests for documents or to permit entry upon land; (iii) requests for admission; (iv) answers and responses to items (i)-(iii) above; (v) notices of deposition; and (vi) transcripts of depositions."

Although the wording is slightly different, this section of the rule is essentially coterminous with the Fed. R. Civ. P. 5(d). On this point, the Committee Notes state that the 2006 amendment to Rule 5(d) "harmonizes it with Federal Rule 5(d) in eliminating the requirement of filing discovery materials absent a court order that papers not be filed." Super R. Civ. P. 5(d), 2006 Committee Notes. While it does harmonize the Rhode Island Rule with the Federal Rule in that it changes the default setting to not filing discovery with the court, the Rhode Island Rule adds significant language to its Rule:

> "The court, on motion generally or in a specific case, or on its own initiative, may order the filing of such discovery materials. Notwithstanding anything in this Rule 5(d), any party pressing or opposing any motion for relief under Rules 26(c) or 37 shall file copies of the relevant portions of discovery materials with the court as exhibits to any such motion or opposition. If any moving party under Rule 56 or any opponent relies on discovery documents, copies of the pertinent parts thereof shall be filed with the motion or opposition." Super R. Civ. P. 5(d).

Thus, unlike the Federal Rule, the judge can order filing of discovery sua sponte, parties must file relevant discovery materials with motions and oppositions under Rules 26(c) and 37, and discovery relied on in summary judgment motions must be filed. See id.

Rhode Island law on the right of access is sparse. However, our Supreme Court has stated that "[c]ourt records are generally public documents and are subject to supervision by the court. . . . Basically, all court documents are public." Providence Journal Co. v. Clerk of Family Court, 642 A.2d 210, 211 (R.I. 1994). This still leaves the question of what are court documents, i.e., judicial records.

This Court finds the broader approach—documents that are filed with the court that reasonably may be relied upon in support of any part of the court's adjudicatory function are judicial documents—is the most appropriate approach to determine the scope of judicial records in Rhode Island. This standard strikes the appropriate balance between the rights of a party or parties and the rights of the public in the workings of the court. The additional portion of Super. R. Civ. P. 5(d) that is not in the Federal Rule demonstrates that Rhode Island seeks broader access because more documents must be filed with the court. The fact that a judge may require discovery to be filed sua sponte shows that Rhode Island seeks more control over documentary exchange that occurs as a result of litigation in its courts. See Super. R. Civ. P. 5(d). Additionally, the majority rule across all jurisdictions and the trend of the common law is to allow access to documents related to a court's adjudicatory function. Rosado II, 970 A.2d at 682. Finally, the narrower approach would limit the traditional openness of the judiciary to only the dispositive portion of the case. Such an approach disregards the rationale that the right of access protects the legitimacy of the judicial system as a whole, not just the final ruling.

Additionally, the public has a right of access to discovery-related motions and their exhibits under this approach. When presented with such a motion, the court must perform its adjudicatory function by ruling on the motion. Thus, the court is resolving a conflict between the parties to the litigation and the public has a substantial interest in such motions being decided properly. This is supported by the fact that Rule 5(d) requires "any party pressing or opposing any motion for relief under Rules 26(c) or 37 shall file copies of the relevant portions of discovery materials with the court as exhibits to any such motion or opposition." Super. R. Civ. P. 5(d). Despite this grant of access to pre-trial material, this rule does not "transform every document that a court reviews into a 'judicial document' presumptively open to the public" because of the adjudicatory function limitation. S.E.C., 273 F.3d at 233. For example, if a judge requested that discovery be filed with the Court, as permitted by Super. R. Civ. P. 5(d), that filed discovery would not automatically be a judicial document because the court is not performing its adjudicatory function. However, if all or part of that filing was later used by the court in connection with a decision, it would then become a judicial record open to public inspection.

c

The Mechanism for Limitation: Rule 26(c)

Super R. Civ. P. 26(c) governs protective orders. It provides: "Upon motion by a party or by the person from whom discovery is sought . . . and for good cause shown, the court in which the action is pending . . . may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ." Thus, through Rule 26(c), the court may directly limit party's access to or disclosure of certain discovery materials and indirectly affect outside access to such material. Protective orders are

usually noncontroversial; however, when there is a public interest in the case, a protective order that shields judicial records brushes up against the right of access.

d

The Interplay of these Concepts: Balancing

The right of access is limited to judicial records—as defined supra with reference to discovery filing requirements and the Court's consideration of the documents—and is procedurally addressed through Rule 26(c). This complex intertwining of significant public rights, court filing requirements, and procedural rules, ultimately requires the court to balance the competing interests of the public's access to the documents against the reason for the protective order. Chicago Tribune, 263 F.3d at 1311 ("[T]he common law right of access requires a balancing of competing interests."); Miller, supra, at 432-33 (noting that courts "have gradually developed a balancing process" when considering protective orders). Whether to call this a "good cause balancing test" (referencing the Rule 26(c) aspects) or some other "balancing test" is only a matter of nomenclature. But once the court determines that a document falls within the right of access, it must balance in accordance with the standard described below to determine the continued efficacy of a sealing order.

3

Standard of Review for Modifying a Protective Order

a

The Standard: An Issue of First Impression

The Rhode Island Supreme Court has not addressed that standard for modifying a protective order. Faced with similar darkness, the Connecticut Supreme Court described the possible standards. Courts have adopted two basic tests to determine whether to vacate or

modify a protective order: the extraordinary circumstances test and the balancing of the interests test. Rosado II, 970 A.2d at 691-92. Under the extraordinary circumstances test, "when a party reasonably has relied on a sealing order, it may not be modified 'absent a showing of improvidence in the grant of [the sealing] order or some extraordinary circumstance or compelling need . . . .'" Id. (quoting Martindell v. International Telephone & Telegraph Corp., 594 F.2d 291, 296 (2d Cir.1979)). Essentially, this test establishes a presumption that information that was properly sealed in the first instance should remain sealed when a party has reasonably relied upon the sealing order. Id. at 692. Under the balancing of the interests test, first, "the moving party bears the burden of demonstrating why modification is appropriate." Id. Grounds for modification include: "the original basis for the sealing orders no longer exists; the sealing orders were granted improvidently; or the interests protected by sealing the information no longer outweigh the public's right to access." Id. at 693. The final ground "permits the trial court to consider situations in which the original basis for the sealing orders still exists to some degree but has been altered because of a change in circumstances." Id. Upon a showing of grounds for modification, the second part of the balancing of the interest test requires the court to "balance[] the interests of the party moving to unseal the information with the countervailing interests presented by the party seeking to keep the information sealed." Id. at 692. The Connecticut Supreme Court held that the balancing of the interest test was the proper legal standard. Id. at 693.

This Court finds that the balancing of the interests test is the best standard of review for the situation where the public's right of access and protective orders are at issue. This test properly accounts for the relevant interests in issues of this type. The test accounts for the public's static right of access to judicial records against a party's shifting basis for a protective

order during a lengthy litigation. Likewise, the standard does not allow a party to the case, or a third party, to simply request a modification of a protective order every day: the party must show grounds for modification before the court can rebalance the interests. Conversely, the extraordinary circumstances test does not sufficiently account for the changing nature of the interests over the course of a case because it sets an extraordinarily high burden for modification. As such, that test infringes upon the court's inherent authority to modify its protective orders and control its records. See Polquin v. Garden Way, Inc., 989 F.2d 527, 535 (1st Cir. 1993); Public Citizen, 858 F.2d at 782; see also infra sec. II.B.3.b.

b

The Discretion of Trial Court

While much of the law at the intersection of protective orders and the right of access is unclear, courts clearly grant broad discretion to trial court judges to rule on these issues. As the Supreme Court pointed out in Nixon, "Every court has supervisory powers over its own records and files . . ." Nixon, 435 U.S. at 598. The Seattle Times Court noted that Rule 26 "confers broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." 467 U.S. at 36. And the First Circuit has shown its district judges "great deference . . . in framing and administering such orders." Polquin, 989 F.2d at 532. Finally, our Supreme Court has applied an abuse of discretion standard when reviewing of an order unsealing documents. Providence Journal Co. v. Clerk of Family Court, 642 A.2d 210, 211 (R.I. 1994) ("Although records of the court may be sealed for good cause, the decision by the chief judge that good cause had not been shown for the sealing of these documents was certainly not an abuse of discretion on his part.")

Commentators are also in accord. Responding to proposals seeking to limit judicial discretion with respect to protective orders, Arthur Miller advocated, "Discretion should be left with the court to evaluate the competing considerations in light of the facts of individual cases." Miller, supra, at 492. Finally, confronting news media criticism of United States Supreme Court rulings regarding freedom of the press, Rhode Island Supreme Court Chief Justice Joseph R. Weisberger interjected support for the role of the judiciary in a 1981 law review article:

> "In essence, the privileges accorded to newspersons have been created by the law; they are also limited by the law in the same way as the privilege accorded to the President of the United States is created by the law and limited by the law. Neither privilege constitutes an absolute license to the holder to determine the parameters of his own legal responsibility. Ultimately, as the Supreme Court determined in United States v. Nixon, and more than a century earlier in Marbury v. Madison, the judiciary must decide what the law is." Joseph R. Weisberger, A Tale of Two Privileges, 15 Suffolk. U. L. Rev. 191, 216 (1981).

4

Application to this Case

a

To Which Documents Do the Moving Parties Have a Presumed Right of Access?

Consistent with Seattle Times and subsequent precedent described above, the Moving Parties do not have a right of access to unfiled discovery. See supra sec. II.B.2.a, 2.b. The Moving Parties, however, clearly do have a right of access to the exhibits filed with the Motion for Summary Judgment because the Court relied on those documents as part of its adjudicating function. See id. Additionally, as described above, the Moving Parties have a right of access to discovery motions and their related exhibits. See id.

The Defendants have argued that, to the extent the Plaintiff and the Intervenors have a right of access in summary judgment documents, the right only runs to documents essential to

the Court's holding, i.e., exhibits cited in the section of the Decision on standing. As just indicated, because Rule 5(d) requires filing of pertinent parts of discovery with a motion for summary judgment, the documents are clearly judicial records and thus should be unsealed. Nevertheless, the court notes that it would be impractical to create a rule for these situations where the court would need to make a sentence-by-sentence determination of what is necessary to the holding and what is technically dicta, and therefore decide what may be unsealed on that basis.

b

Balancing of Interests

Having established the documents to which the Moving Parties having a presumed right of access, the Court must next consider whether they properly remain under seal. Under the balancing of the interests test adopted above, the Moving Parties must first put forth grounds for modifying the order. See Rosado II, 970 A.2d at 693. This can be done by showing that the situation serving as the original basis for the sealing order "still exists to some degree but has been altered because of a change in circumstances." Id. Here, such a change has occurred because the Court has ruled on a dispositive motion. The Defendants' right to a fair trial still exists to some degree because this Court's Decision could be overturned by our Supreme Court, causing a trial to be conducted on remand. However, the impact of the release of documents is now significantly more remote as case in the Superior Court is essentially over.

Because of the change in circumstances, the court "must balance the countervailing interests, if any, introduced by the party favoring continuation of the sealing orders against the public's interest in access to judicial documents." Id. at 693. Here, the Defendants argue that the unsealing of the documents will taint the jury pool if the Supreme Court overturns this

Court's Decision, and the case proceeds to trial on remand. Accordingly, the unsealing of the documents would infringe upon the Defendant's right to a fair trial – a heavy interest. Further, the Defendants claim that they relied on the Order when they filed discovery documents with the Court. The Defendants also claim that the public has little or no interest in a private litigation; thus, their interest in a fair trial outweighs the public's interest in the documents.

On the other side, the Moving Parties argue that the Defendants' interest in a fair trial is minimal because (1) the prospect of a trial and connected jury taint is remote and speculative, and (2) if there is a trial, the effect of pre-trial publicity can be quelled by voir dire. At the same time, the Moving Parties allege that the public has a significant interest in the documents because (1) the court has rendered a decision in reliance on sealed documents, and (2) the media has an interest in reporting about judicial activity relative to allegations that a religious group, and one leader in particular, improperly induced an elderly woman to give the group millions of dollars. Thus, the Moving Partiers argue that the public interest and the right of access outweigh any risk that the Defendants' right to a fair trial would be jeopardized.

The Court finds that the interest of the Moving Parties and the public remains paramount, even when weighed against the risk that the Defendants would be prejudiced at a trial. It is unlikely that this case will ever proceed to a jury trial, and to the extent that the Defendants are concerned about the jury pool and their right to a fair trial, those concerns can be alleviated through voir dire. In re Application of National Broadcasting Co., Inc., 635 F.2d 945, 953 (2d Cir. 1980) ("The opportunity for voir dire examination still remains a sufficient device to eliminate from jury service those so affected by exposure to pre-trial publicity that they cannot

fairly decide issues of guilt or innocence.").[14] While the Defendants claim that they relied on the Court's sealing of documents, the sealing was clearly tied to their assertion of their right to a fair trial. Accordingly, once that interest is diminished, it does not follow that the documents would continue to be sealed. Therefore, the Defendants' interest is of diminished significance. The public interest, on the other hand, is extremely significant. The public has a great interest in the openness of its courts. As described above, public scrutiny of the courts provides a check on the judiciary and "diminishes the possibilities for injustice, incompetence, perjury and fraud." Rosado II, 970 A.2d at 676. This interest has great weight as it relates the legitimacy of a particular decision and of the judiciary as a whole. Therefore, the Protective Order should be modified to allow the unsealing of documents filed under seal.

c

Other Theories

The only interest asserted by the Defendants is their right to a fair trial. As such, the Court does not pass on the possibility that some documents, or portions of some documents, may be protected for some other reason, such as religious reasons, or trade secrets. Given that concerns about a tainted jury pool can be addressed through voir dire examination, this Decision finds only that, in the circumstances presented in this case, the public's right of access remains paramount.

[14] Though more frequently arising in the criminal context, the right to a fair trial is equally pertinent in a civil trial. Publicity has the same potential to affect a jury pool, regardless of whether the case is civil or criminal.

d

Dauray's Right to Disseminate

Ms. Dauray has presented the added question of her ability to speak about the sealed documents. To the extent that this Decision unseals those documents, Ms. Dauray is permitted to speak about them. A continued restriction as to those documents would amount to a prior restraint on her First Amendment right to the freedom of speech. See Nebraska Press Assn. v. Stuart, 427 U.S. 539 (1979). It would also be illogical to grant the general public a right to see such documents and thereafter speak about them, but restrain Ms. Dauray from doing so. However, to the extent that this Decision continues to restrict public access to unfiled discovery materials, Ms. Dauray must continue to comply with the protective order because "[a] litigant has no First Amendment right of access to information made available only for purposes of trying his suit." Seattle Times Co., 467 U.S. at 32 (citing Zemel v. Rusk, 381 U.S. 1, 16–17 (1965) ("The right to speak and publish does not carry with it the unrestrained right to gather information")).

III

Conclusion

The legitimacy and integrity of a court's action depend on the public's ability to scrutinize the basis for that action. Polquin, 989 F.2d at 533 ("Open trials protect not only the rights of individuals, but also the confidence that justice is being done by its courts in all matters, civil as well as criminal."). In this case, this Court relied on a number of documents that have been shielded from public view. Now that the Court has ruled on a fully dispositive motion, the public should be allowed to fully scrutinize that Summary Judgment Decision and other Court decisions made in reliance upon discovery filed with the court.

The Court grants the Media Entities' Motion to Intervene. Consistent with the discussion above, the Court grants the Motions to Modify the Protective Orders, both as to Ms. Dauray and to the Media Entities. Prevailing counsel may present an Order consistent herewith which shall be settled after due notice to counsel of record.