UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

KIRK DAHL, et al., Individually and On Behalf of All Others Similarly Situated, Plaintiffs, v. BAIN CAPITAL PARTNERS, LLC, et al. Defendants.	Civil Action No. 07-12388-EFH

MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE AND TO UNSEAL FIFTH AMENDED COMPLAINT AND ASSOCIATED EXHIBITS

INTRODUCTION

Proposed Intervenor The New York Times Company, publisher of the *New York Times*, (the "*Times*"), respectfully submits this memorandum of law in support of its Motion to Intervene and to Unseal the Fifth Amended Complaint and its Associated Exhibits. The Fifth Amended Complaint is a judicial record that is subject to a "strong and sturdy" presumption of public access under both the common law and the First Amendment. *F.T.C. v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987). Under the law of this Circuit, "'only the most compelling reasons can justify non-disclosure of judicial records.'" *Id.* The basis upon which the parties moved for sealing the document – that it quotes from and references documents designated "confidential" in discovery – is inadequate in and of itself to overcome the presumption of public access. After conducting an appropriate balancing of "the competing interests that are at stake," the Court should unseal the Fifth Amended Complaint in its entirety,

along with each of the exhibits referenced therein. *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).

BACKGROUND

On December 28, 2007, the plaintiffs, who were investors in certain public companies, filed this action against the defendant private equity companies. Plaintiffs alleged that defendants conspired "to rig bids, restrict the supply of private equity financing, fix transaction prices, and divide up the market for private equity services for leveraged buyouts." (Complaint, Doc. 1 at 1). Plaintiffs pleaded counts of "horizontal price fixing" under the Sherman Act and unjust enrichment, and prayed for class certification and damages. (*Id.* at 51-55). The complaint was filed publicly, without redaction. (*Id.*). During the year 2008, plaintiffs amended their complaint three times, filing each new amended complaint publicly.

On December 15, 2008, after denying defendants' motion to dismiss the Third Amended Complaint, the Court allowed a first "phase" of discovery to proceed concerning nine transactions on which the plaintiffs alleged the defendants had unlawfully colluded. (Doc. No. 157). The Court ruled that after the completion of the first stage of discovery, it would determine whether to permit discovery as to additional purportedly suspect transactions. If such a second stage was permitted, the plaintiffs "shall move to amend the complaint in order to add additional transactions and defendants." (*Id.*).

On July 30, 2009, the Court entered a First Amended Stipulated Protective Order to govern discovery in this case. (Doc. 251). The order permits any party or non-party to designate discovery material or information as "confidential" or "highly confidential," to be used only for the purpose of the litigation, and imposes detailed restrictions on the parties' disclosure of such materials. (Doc. 251-2). "Confidential" information is defined as that which the producing party

"has a written independent obligation of confidentiality to a third party or person, that the Party or non-party producing believes in good faith contains confidential research, personal, or commercial information and is not in the public domain. (*Id.* at ¶ 1(c)). "Highly Confidential" information is information that the producing party believes is "competitively or otherwise highly sensitive." (*Id.* at ¶ 1(d)). Where a party decides to file "confidential" or "highly confidential" material with the Court, it must file a motion to impound or a statement asserting that the materials should be kept by the Court under seal. (Doc. 251-2, ¶ 5(a)).

In April 2010, after significant discovery had taken place, the plaintiffs moved under seal to proceed to the second phase of discovery pursuant to the Court's December 15, 2008 Order. (Doc. 295). On August 18, 2010, the Court allowed the motion in part, finding that "for each additional transaction," on which plaintiffs had taken discovery, "the plaintiffs have provided evidence of collusion specific to the transaction that is sufficient to support an additional allegation." The Court ordered the plaintiffs to move for leave to file a Fourth Amended Complaint, to include eight additional transactions. (Doc. 352 at 3).

The plaintiffs then duly moved for leave to file a Fourth Amended Complaint, filing therewith an assented-to motion to file the complaint under seal. (Doc 353, 354). As grounds for sealing, the plaintiffs stated that the proposed complaint contains "information that Defendants and/or third parties have designated as being 'Confidential' or 'Highly Confidential' under the Stipulated Protective Order." (Id., ¶ 2). On September 21, 2010, the Court allowed the motion to seal.

From what appears on the record, the Fourth Amended Complaint remained entirely under seal for nearly one year, until September 8, 2011, when a heavily-redacted version appeared on PACER. (Doc. 487). The redactions to the complaint cover many pages of

allegations, and eliminate any indication of the nature of the exhibits referenced in the complaint.[1]

On June 7, 2012, plaintiffs moved for leave to file a Fifth Amended Complaint under seal, again on the ground that it "references and quotes from documents and depositions that Defendants and/or third parties have designated as being 'Confidential' or 'Highly Confidential' under the Stipulated Protective Order." (Doc. 581, 582 at 2). The Court allowed the motion to seal on June 12, 2012, and granted leave to file the Fifth Amended Complaint on June 14, 2012. No publicly-available version of the Fifth Amended Complaint appears on PACER, and the clerk's office has confirmed to the *Times* that no version of the document is otherwise available to the public.

ARGUMENT

I. THE *TIMES* IS ENTITLED TO INTERVENE UNDER FED. R. CIV. P. 24 TO ASSERT THE PUBLIC'S RIGHT OF ACCESS.

It is well-settled that a third party seeking to challenge the sealing of a court document or the scope of a protective order in a civil case may move to intervene for that limited purpose pursuant to Fed. R. Civ. P. 24(b). *Pub. Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 783 (1st Cir. 1988) (holding that intervention is procedurally correct course for third-party challenges to protective orders); *Standard Fin. Mgt. Corp.*, 830 F.2d at 407 (newspaper permitted to intervene to challenge sealing of court documents); *Jessup v. Luther*, 227 F.3d 993, 997 (7th Cir. 2000) (noting that "every court of appeals to have considered the matter has come to the conclusion that Rule 24 is sufficiently broad-gauged to support a request of intervention for the purposes of challenging confidentiality orders."); *E.E.O.C. v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1046

[1] The Exhibits referenced in the Fourth Amended Complaint are those attached to the Declarations of David W. Mitchell (Doc. 296), and Christopher M. Burke (no docket entry), filed in support of plaintiffs' motion to proceed to the second phase of discovery – both affidavits were filed under seal. (See Fourth Amended Complaint, Doc. 487 at n. 4; Doc. 296-1).

(D.C. Cir. 1998) (holding under "longstanding tradition of public access to court records," Rule 24(b) is "an avenue for third parties to have their day in court to contest the scope or need for confidentiality, and that "third parties may be allowed to permissively intervene under Rule 24(b) for the limited purpose of seeking access to materials that have been shielded from public view either by seal or by a protective order.") (internal citations and quotations omitted). Accordingly, the *Times* respectfully seeks leave to intervene for the limited purpose of asserting the public's right of access to judicial documents in this case.

II. THE FIFTH AMENDED COMPLAINT AND ITS ASSOCIATED EXHIBITS SHOULD BE UNSEALED.

A. The Fifth Amended Complaint Is a Presumptively Public Document Under the Common Law.

The courts have long recognized a "strong and sturdy" common-law presumption of public access to judicial documents. *Federal Trade Commission v. Standard Fin. Mgt. Corp.*, 830 F.2d 404, 410 (1st Cir. 1987); *see Nixon v. Warner Communications*, 435 U.S. 589, 597 (1978) ("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."). The presumption of access exists in part to allow the public serve its essential function of monitoring the judiciary, fostering "the important values of quality, honesty and respect for our legal system." *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 9-10 (1st Cir. 1998), *internal quotations omitted.* While the access right is "not unfettered," *Id.* at 10, "[t]he citizens' right to know is not lightly to be deflected," and "'[o]nly the most compelling reasons can justify non-disclosure of judicial records.'" *Standard Fin. Mgt.*, 830 F.2d at 410, *quoting In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983). "The mere fact that judicial records may reveal potentially

embarrassing information is not in itself sufficient reason to block public access." *Siedle*, 147 F.3d at 10.

The right of access "extends, in the first instance, to 'materials on which a court relies in determining the litigants' substantive rights.'" *Standard Fin. Mgt.*, 830 F.2d at 408, *quoting Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986). Civil complaints obviously meet this standard – indeed, complaints provide the very foundation upon which Courts base their determination of the rights of the parties before them. Accordingly, courts have routinely held that complaints are "judicial documents" to which a common law presumption of access applies. *See Hansen v. Rhode Island's Only 24 Hour Truck & Auto Plaza, Inc.*, -- F. Supp. 2d --, 2012 WL 1701581, (D. Mass. May 14, 2012) ("There is a well-established presumption that the public has a right of access to judicial documents such as civil complaints."); *United Air Lines, Inc. v. Allen*, 645 F.Supp.2d 34, 36 (D.Mass. 2009) (same); *Keenan v. Town of Gates*, 414 F.Supp.2d 295 (N.D.N.Y. 2006) (declining to seal complaint and other court documents).[2] Because the complaint is a judicial document, right of access also extends to its exhibits. *Standard Fin. Mgmt. Corp.,* 830 F.2d at 409 ("relevant documents which are submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings, become documents to which the presumption of public access applies."); *In re "Agent Orange" Product Liability Litig.,* 98 F.R.D. 539, 545 (E.D.N.Y.1983) ("Clearly, then, documents attached to and referred to in the parties' papers on the summary judgment motions are part of the court record and are entitled to the presumption of public access.").

[2] The substantive nature of complaints places them in stark contrast to the kinds of court-filed documents as to which there is no presumption of public access, such as discovery motions. *See Anderson*, 805 F.2d at 13.

B. The Parties Cannot Sustain Their Burden to Demonstrate that Sealing is Proper Under the Common Law.

Where the presumption of access applies, the Court must "weigh the presumptively paramount right of the public to know against the competing private interests at stake." *Standard Fin. Mgt. Corp.*, 830 F.2d at 410. Such balancing must take place "in light of the relevant facts and circumstances of the particular case." *Nixon,* 435 U.S. at 599. The burden of persuasion rests with "those seeking to keep the datum hidden from view," not with the party seeking access. *Standard Fin. Mgt. Corp.*, 830 F.2d at 411.

The parties are unlikely to carry their burden to maintain sealing here. As far as the record reveals, the Fifth Amended Complaint has been sealed simply because it references or attaches discovery materials or information designated "confidential" under the First Amended Stipulated Protective Order. (Doc. Nos. 353, 582). The mere fact that one party or another designated documents or testimony "confidential" under the protective order is insufficient to overcome "the presumptively paramount right of the public" to monitor court proceedings. *Standard Fin. Mgt. Corp.*, 830 F.2d at 410. By the very terms of the protective order, all such designation proves is that some party represented that it "believes in good faith" that the discovery material constitutes "commercial information," and "is not in the public domain." (Doc. 251-2). Moreover, the Stipulated Protective Order itself recognizes that the parties' mere designation of materials as "confidential" is not binding on the Court:

> In its consideration of whether any pleadings or documents may be filed under seal, the Court is not bound by the designation of any material as 'Confidential' or 'Highly Confidential' and any such designation shall not create any presumption that documents so designated are entitled to confidential treatment pursuant to Federal Rule of Civil Procedure 26(c). If the Court determines that the Confidential or Highly Confidential Discovery Material is not entitled to confidential treatment to Federal Rule of Civil Procedure 26(c), or does not permit the pleadings or other documents which contain such Confidential or

> Highly Confidential Material to be filed under seal, such pleadings or other documents may be filed in open court.

(Doc. No. 251-2, First Amended Stipulated Protective Order, ¶ 5(c)). Accordingly, the mere designation of documents as confidential under the protective order does not satisfy the need for "compelling reasons" to block public access. *Standard Fin. Mgt.*, 830 F.2d at 410.

On the other side of the ledger, the public has a heightened interest in the documents sought by this motion because of the significant public interest in this litigation. The prior iterations of the complaint have alleged that the defendant private equity firms colluded to deprive shareholders of some of the nation's largest and best-recognized public companies of a fair price for their stock, in violation of federal law. The allegations, if proven, suggest a distortion of the market affecting thousands of ordinary shareholders. The fact that the case involves Bain Capital Partners, a firm that is the subject of intense scrutiny because of its close association with Mitt Romney, the presumptive Republican nominee for the presidency, only amplifies the public interest in the evidence in this case.

Moreover, the complete sealing of the Fifth Amended Complaint has deprived the public of a meaningful ability to monitor the Court's actions in this case. As just a few examples, on July 18, 2012, the Court granted a motion to dismiss several defendants under the Fifth Amended Complaint for particular transactions, yet the public has never had access to the Fifth Amended Complaint or what it might say about those defendants. (Doc. 616). Similarly, unsealing the Fifth Amended Complaint will allow the public to understand the factual basis for the Court's decision on August 18, 2010 to permit the plaintiffs to add the eight additional transactions to the case. (Doc. 352 at 2). Simply put, the "important values of quality, honesty and respect for our legal system" demand that the complaint and its exhibits be made open for public inspection, in their entirety. *Siedle,* 147 F.3d at 9-10.

C. The Public and the Press Have a First Amendment Right of Access to the Complaint.

In addition to the common-law right of access discussed above, several federal Courts of Appeal have held that there is a First Amendment right of access to certain civil court records and proceedings. *In re Guantanamo Bay Detainee Litig.*, 624 F. Supp. 2d 27, 36 (D.D.C. 2009) (noting that the courts have "uniformly held that the public has a First Amendment right of access to civil proceedings and records), *and collecting cases*; *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-20 (2d Cir. 2006) (holding that summary judgment papers were subject to the "qualified First Amendment right to attend judicial proceedings and to access certain judicial documents."); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir. 1984) ("Therefore, we hold that the First Amendment embraces a right of access to civil trials to ensure that [the] constitutionally protected discussion of governmental affairs is an informed one."), *internal citations and quotations omitted*. To determine whether the First Amendment right applies to particular judicial documents, the courts employ a two-part test that considers: (1) "experience," whether the document has historically been available to the press and the public, and (2) "logic," whether "public access plays a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court of California*, 478 U.S. 1, 8 (1986) ("*Press-Enterprise II*").[3] Where a First Amendment right of access applies, the right may only be overcome if the Court makes "specific, on the record findings . . . demonstrating that 'closure is essential to preserve higher values and is narrowly tailored to serve

[3] The First Circuit has not yet decided whether the First Amendment right of access applies to civil proceedings, as it does to criminal matters. *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 502 (1st Cir. 1989) ("This circuit, along with other circuits, has established a First Amendment right of access to records submitted in connection with criminal proceedings."); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 11-12 (1st Cir. 1986) (applying "experience" and "logic" test to discovery pleadings in civil case without deciding whether a First Amendment right to civil documents applies); *Standard Fin. Mgt. Co., Inc.*, 830 F.2d at 408 n. 3 (reserving question of whether First Amendment right of access applies to civil documents).

that interest.'" *Id.*, *quoting Press-Enter. Co. v. Superior Court of California, Riverside County*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*").

As to the "experience" prong of the analysis, access to complaints has long been the norm in the courts – indeed, there is no history of sealing complaints upon which defendants could rely. Moreover, where a common law right of access exists, the courts have tended to conclude that there is a history of openness that satisfies the "experience" prong of the First Amendment test, because the common law right "is firmly rooted in our nation's history." *Lugosch*, 435 F.3d at 119.

The "logic" prong is easily met here as well. The public has a compelling interest in monitoring the proceedings of this lawsuit, which involves allegations of conduct in restraint of trade that affected not only the parties, but thousands of other ordinary investors as well. *See Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) (noting, in its holding that First Amendment right of access applies to documents in civil cases, that "[c]ivil cases frequently involve issues crucial to the public-for example, discrimination, voting rights, *antitrust issues*, government regulation, bankruptcy, etc.")(emphasis supplied). Only through access to the complaint can the public understand the scope of the plaintiffs' allegations and properly evaluate whether justice is being done in this important case.

If the Court determines that there is a First Amendment right of access to the Fifth Amended Complaint, defendants must shoulder a heavier burden than that imposed by the common law: they must demonstrate that sealing is "necessary to preserve higher values" and that the sealing order "is narrowly tailored to achieve that aim." *Lugosch*, 435 F.3d at 124, 126. For the reasons discussed above defendants are unlikely to be able to do so. *Id.* at 126.

CONCLUSION

For the foregoing reasons, The New York Times Company respectfully requests that its Motion to Intervene and to Unseal the Fifth Amended Complaint and its Associated Exhibits be granted.

Respectfully Submitted,

THE NEW YORK TIMES COMPANY

By Its Attorneys,

/s/ Jeffrey J. Pyle
Robert A. Bertsche (BBO #554333)
Jeffrey J. Pyle (BBO #647438)
PRINCE LOBEL TYE LLP
100 Cambridge Street, Suite 2200
Boston, MA 02114
(617) 456-8000 (tel.)
(617) 456-8100 (fax)
jpyle@PrinceLobel.com

CERTIFICATE OF SERVICE

I, Jeffrey J. Pyle, hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing ("NEF") and paper copies will be sent to those indicated as non-registered participants on August 13, 2012.

/s/ Jeffrey J. Pyle
Jeffrey J. Pyle