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

REPLY IN SUPPORT OF MOTION TO INTERVENE AND TO UNSEAL FIFTH AMENDED COMPLAINT AND ASSOCIATED EXHIBITS (Leave to File Granted on September 10, 2012)

Proposed Intervenor The New York Times Company ("the *Times*"), respectfully submits this reply in support of its motion to intervene and unseal the Fifth Amended Complaint. Defendants misapprehend the common-law and First Amendment right of access to court records as it pertains to so-called "discovery materials" filed with the Court in connection with a judicial document. Additionally, defendants have failed to support their claim that the release of the Fifth Amended Complaint would cause them competitive harm with anything other than generalities, and have thus failed to carry their burden of persuasion for continued sealing. Accordingly, the Fifth Amended Complaint should be unsealed in its entirety. However, to the extent the Court is inclined to entertain any proposed redactions of the Fifth Amended Complaint, it should order defendants to submit them forthwith for the Court's consideration, along with a sufficient explanation of why each such redaction is necessary to prevent harm, and why the potential for such harm outweighs the public's right to know about this important case.

I. THE FIFTH AMENDED COMPLAINT IS A JUDICIAL DOCUMENT TO WHICH THE COMMON LAW AND FIRST AMENDMENT PRESUMPTION OF OPENNESS ATTACHES, NOTWITHSTANDING THE FACT THAT IT QUOTES FROM THE FRUITS OF DISCOVERY.

Defendants' opposition leans heavily on the contention that there is no "presumption of public access to discovery materials," relying on *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986). But neither *Anderson* nor cases like it broadly exempt court-filed "discovery materials" or information from public view, as defendants contend. Rather, *Anderson* merely declined to extend the presumption of openness "to materials used *only in discovery*." *Id.* (emphasis supplied); *see also F.T.C. v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408 (1st Cir. 1987) (holding that "documents which play no role in the adjudication process, however, *such as those used only in discove*ry, lie beyond reach.")(emphasis supplied).

Here, the *Times* is not seeking "materials used only in discovery." *Anderson*, 805 F.2d at 13. Rather, it is seeking the Fifth Amended Complaint – a document used "in the adjudication process," – and any materials filed in this Court that are referenced or quoted in the Fifth Amended Complaint.[1] *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408. These documents constitute "'materials on which a court relies in determining the litigants' substantive rights,'" and are therefore documents to which a presumption of public access applies.[2] *Id., quoting Anderson,* 805 F.2d at 13.

The courts have repeatedly held that where the fruits of discovery are filed in court in connection with a substantive filing, such as a motion for summary judgment, they are presumptively public, even if they had initially been produced under a protective order. *See*

[1] See § II, *infra.*

[2] Defendants fail to cite a single case holding that a civil complaint is *not* subject to a right of access, and outside of the special *qui tam* context, *see Am. Civil Liberties Union v. Holder,* 673 F.3d 245 (4th Cir. 2011), the *Times* is unaware of any such case.

Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 121 (2d Cir. 2006) (holding that documents filed under seal in connection with a summary judgment motion "are – as a matter of law – judicial documents to which a strong presumption of access attaches, under both the common law and the First Amendment."); *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140-142 (2d Cir. 2004) (upholding an order to unseal documents filed as exhibits to an opposition to a motion for summary judgment on the ground that "the presumptive right to 'public observation' is at its apogee when asserted with respect to 'matters that directly affect an adjudication," such as the a court's decision on a motion for summary judgment) (*quoting United States v. Amodeo*, 44 F.3d 141, 145-146 (2d Cir. 1995)); *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134-1135 (9th Cir. 2003) (explaining that the "status" of discovery material changes once such material is filed with the court, and holding that the right of access extends to materials submitted under seal in connection with dispositive motions, such as those for summary judgment.); *Republic of the Philippines v. Westinghouse Electric Corporation*, 949 F.2d 653, 659-662 (3rd Cir. 1991) (holding that the presumptive right of public access applies to discovery materials filed in support of a motion for summary judgment, even if such materials are filed under seal.); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (applying the First Amendment standard to sealed documents filed in connection with a summary judgment motion and stating that "[o]nce the [sealed discovery] documents are made part of a dispositive motion, such as a summary judgment motion, they 'lose their status of being raw fruits of discovery.'" (*quoting In re "Agent Orange" Product Liability Litigation*, 98 F.R.D. 539, 544-545 (E.D.N.Y. 1983)); *Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982) (declaring that "documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.").

The logic of these cases applies with equal force to filed discovery materials or information referenced in the Fifth Amended Complaint, because complaints, like motions for summary judgment, play a "role" in the "adjudication process." *Standard Fin. Mgmt. Corp.*, 830 F.2d at 408. As the *Times* noted in its memorandum, the Court has already issued a ruling on a motion to dismiss portions of the Fifth Amended complaint, an undeniably "adjudicative" determination.[3] (Doc. 616). Moreover, because of the manner in which this case has advanced, with the Court phasing discovery and determining the sufficiency of plaintiffs' evidence of unlawful collusion before permitting amendment of the complaint, the Fifth Amended Complaint reflects this Court's substantive rulings on the evidence adduced in discovery, further enhancing its relevance to the adjudicative process.

Defendants offer no legal support for their assertion that the Fifth Amended Complaint is somehow less of a judicial document "because plaintiffs have quoted and cited [discovery materials] in the complaint." (Opposition at 6). Nor does the fact that the quoted materials were disclosed pursuant to a protective order relieve the defendants of their burden of demonstrating compelling reasons for continuing to seal it. In *Lugosch*, 435 F.3d 110, the defendants, like those here, argued that the intervening newspapers were "improperly trying to modify the confidentiality order pursuant to which the contested documents were disclosed in discovery," and that "that without the confidentiality order, discovery would have come to a complete stand-still." *Id.* at 125 (see Opposition at 6). The Second Circuit, quoting from an earlier District Court decision, roundly rejected the argument:

[3] It is of no moment that the Court did not have occasion to reference some of the material in the Fifth Amended Complaint in ruling on defendants' partial motions to dismiss. (Opposition at 7). The First Circuit has held that "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." *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 409 (1st Cir.1987). As the Second Circuit has noted, this "framing" of the access right "has nothing to do with how a court ultimately comes out on a motion." *Lugosch*, 435 F.3d at 122.

> '[T]he argument that the defendants' reliance on [the confidentiality order] during years of discovery shields them now from the burden of justifying protection of the documents ignores the fact that civil litigants have a legal obligation to produce all information "which is relevant to the subject matter involved in the pending action," Fed.R.Civ.P. 26(b)(1), subject to exceptions not involved here. Thus, defendants cannot be heard to complain that their reliance on the protective order was the primary cause of their cooperation during years of discovery: even without [the confidentiality order], I would eventually have ordered that each discoverable item be turned over to the plaintiffs. Umbrella protective orders do serve to facilitate discovery in complex cases. However, umbrella protection should not substantively expand the protection provided by Rule 26(c)(7) or countenanced by the common law of access. To reverse the burden in this situation would be to impose a significant and perhaps overpowering impairment on the public access right.'

Lugosh, *id.* at 125-126, *quoting In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litig.*, 101 F.R.D. 34, 44 (C.D. Cal. 1984).[4]

II. THE PUBLIC ACCESS RIGHT EXTENDS TO ANY DOCUMENTS FILED IN COURT THAT ARE REFERENCED OR QUOTED IN THE FIFTH AMENDED COMPLAINT.

Defendants argue that the *Times'* request for access to the exhibits to the Complaint should be denied because the documents referenced in the Fifth Amended Complaint were not filed along with it. (Opposition at 5). However, the *Times* notes that the previous iteration of plaintiffs' complaint quoted extensively from documents filed in this Court in connection with another pleading – namely, plaintiffs' motion to proceed to the second phase of discovery. (Doc. No. 487 at 2 n. 4 (noting that exhibits cited throughout Fourth Amended Complaint refer to those attached to Declarations of David W. Mitchell and Christopher Burke in support of plaintiffs' motion to proceed to second phase of discovery)). The happenstance of whether a document is physically attached to a complaint or is merely referenced in the complaint and contained

[4] Defendants' reliance on cases concerning the issuance of protective orders to govern discovery under the Rule 26 "good cause" standard are inapposite. (Opposition at 10 and n. 2). As the cases above demonstrate, the mere fact that an umbrella protective order was previously issued over discovery exchanged between the parties does not satisfy the specific showing of harm necessary to seal pleadings in this Court.

elsewhere in the Court's file makes no difference in the analysis of whether it constitutes a document "submitted to, and accepted by, a court of competent jurisdiction in the course of adjudicatory proceedings." *Standard Fin. Mgmt. Corp.*, 830 F.2d at 409. Accordingly, to the extent the Fifth Amended Complaint references or quotes from any documents contained elsewhere in the court's file, the *Times* requests that each such document be unsealed along with the Fifth Amended Complaint.

III. DEFENDANTS HAVE FAILED TO CARRY THEIR BURDEN OF PERSUASION.

The defendants have failed to carry their "devoir of persuasion" to keep any portion of the Fifth Amended Complaint under seal. *Standard Fin. Mgt. Corp.*, 830 F.2d at 410. Despite the fact that they bore the burden of showing "with specificity" that they will suffer injury absent the proposed redactions, defendants have not even filed an affidavit in support of their opposition. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). Absent such an affidavit or other proof of their claims, the Court is left with defendants' bare assertion that the release of the Fifth Amended Complaint would permit a "sophisticated and motivated person" to "copy critical aspects of defendants' business" with the information therein. (Opposition at 10). This contention is simply insufficient to demonstrate the kind of "compelling reasons" that "can justify non-disclosure of judicial records." *Standard Financal Mgmt. Co.*, 830 F.2d at 410.

Indeed, there is substantial reason to be skeptical of defendants' assertion of competitive harm. The defendants assert that unsealing would reveal the "identity of investors in defendant funds," valuation information, "potential investment opportunities," and "business, investment, and bidding strategies," among other things. (Opposition at 9). However, even if the release of such categories of information could cause harm to a private equity company in theory, there is

no explanation of how the specific information at issue would harm *these* defendants in practice. It is highly likely that some of the information, which dates from as far back as 2003, is so stale that it no longer has competitive value. (Fourth Amended Complaint, Doc. No. 487, at 3 (defining "Conspiratorial Era" as "2003 through the present")). Other such information may already be publicly known, or may simply be unlikely to cause any harm to defendants other than potential embarrassment. *Siedle*, 147 F.3d at 10 ("The mere fact that judicial records may reveal potentially embarrassing information is not in itself sufficient reason to block public access."). Absent an explanation of exactly how harm could occur, the Fifth Amended Complaint must be unsealed.

Moreover, even if defendants could make a true showing of potential harm, the Court must balance that showing against the clear public interest in monitoring this case. Defendants' protestations to the contrary, questions concerning the business practices of the nation's largest private equity companies are of inherent interest to the public, particularly where, as here, the companies are alleged to have deprived thousands of ordinary investors in public companies of a fair price for their shares, distorting the market. (Fourth Amended Complaint, Doc. No. 487 at 3 (alleging that, "[f]rom the perspective of shareholders who rely on the integrity of the free market, Defendants' collectivist scheme is disastrous.")). Nor does the fact that this case concerns a period of time after Mitt Romney left day-to-day control of Bain Capital render this matter irrelevant to the Presidential election, as defendants contend, since Romney continues to receive income from his interest in Bain. *See, e.g.* Nicholas Confessore, Julie Creswell and David Kocieniewski, "Inquiry on Tax Strategy Adds to Scrutiny of Finance Firms," *New York Times*, September 1, 2012 (noting, in article concerning New York Attorney General's investigation of tax strategies of private equity firms including Bain Capital, that "[a]s a retired

partner, Mr. Romney continues to receive profits from Bain Capital."). The *Times* respectfully submits that the balance tips strongly in favor of public disclosure of the Fifth Amended Complaint and the court-filed documents it references.

IV. ANY PROPOSED REDACTIONS MUST BE MADE BY THE COURT, NOT THE DEFENDANTS.

Because defendants have failed to carry their burden of persuasion, the Fifth Amended Complaint should be unsealed in its entirety. However, to the extent the Court is inclined to entertain defendants' proposal for the public filing of a redacted version of the Fifth Amended Complaint, it should reject their offer to redact the document themselves, with no oversight from the Court. (Opposition at 13). The First Circuit has held that in disputes of this nature, "it falls to the *courts* to weigh the presumptively paramount right of the public to know against the competing private interests at stake."[5] *Standard Fin. Mgt. Corp.*, 830 F.2d at 410 (emphasis supplied). Similarly, the Second Circuit has held: "While we think that it is proper for a district court, after weighing competing interests, to edit and redact a judicial document in order to allow access to appropriate portions of the document, we consider it improper for the district court to delegate its authority to do so." *United States v. Amodeo*, 44 F.3d 141, 147 (2d Cir. 1995) (holding that district court "should make its own redactions, supported by specific findings, after a careful review of all claims for and against access."); *see ATI Indus. Automation, Inc. v. Applied Robotics, Inc.*, 801 F. Supp. 2d 419, 424 (M.D.N.C. 2011) (noting that "the legal

[5] The First Circuit's decision in *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998), does not somehow permit defendants unilaterally to decide what portions of the complaint may be redacted, as defendants appear to suggest. (Opposition at 11). In *Siedle*, the First Circuit ruled that the information contained in various pleadings "appears to fall within the attorney-client privilege," and that the defendant had made an "unrebutted prima facie showing that the attorney-client privilege applies." *Id.* at 10, 12. Here, by contrast, defendants have made no showing of any harm to their competitive position that would justify the sealing of the Fifth Amended Complaint, in whole or in part. Unless and until they do so, the presumption of public access must control.

framework for sealing documents . . . applies to determine whether a party may file a redacted document, i.e., a document sealed in part" and approving limited redactions to protect defined trade secrets); *In re Gushlak*, 11-MC-0218 NGG JO, 2012 WL 3683514 (E.D.N.Y. July 27, 2012) (analyzing proposed redactions to judicial document by category and recommending their rejection). Accordingly, if the Court is inclined to consider a redacted version of the Fifth Amended Complaint, it should require defendants to show, "with specificity," that they will suffer injury absent the proposed redactions, and it should make findings justifying such redactions. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984).

Additionally, defendants, if they are permitted to suggest redactions, must be required to do so immediately. District courts are expected to rule on motions to unseal judicial documents "quickly." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 126 (2d Cir. 2006) (stating that district court "must make its findings quickly" in proceedings to unseal court records). Where, as here, the First Amendment right of access applies, "even a one to two day delay impermissibly burdens the First Amendment." *Globe Newspaper Co. v. Pokaski*, 868 F.2d 497, 507 (1st Cir. 1989). To protect the public's access right and to ensure that the instant motion is resolved expeditiously, the *Times* respectfully requests that if the Court is inclined to entertain proposed redactions of portions of the Fifth Amended Complaint or the documents it references, the Court require defendants to propose any such redactions by no later than **Tuesday, September 11, 2012,** and approve or reject the redactions thereafter. Otherwise, the *Times* respectfully requests that the Court unseal the Fifth Amended Complaint in its entirety, along with any documents filed in court that are referenced therein.

CONCLUSION

For the foregoing reasons, and those set forth in its memorandum, the *Times* respectfully requests that its motion be granted.

Respectfully Submitted,

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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 September 10, 2012.

/s/ Jeffrey J. Pyle
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