MEMORANDUM IN SUPPORT OF PROPOSED INTERVENOR PUBLIC CITIZEN'S MOTION TO UNSEAL

In a case that has been the subject of national media attention, this court ordered on June 7, 2007, that "the balance of all proceedings . . . shall be filed under seal." Consent Order, June 7, 2007. The court's order states that the subject of the order was heard during a case management conference on June 1, 2007, that it was supported by "good cause," and that all counsel consented to its entry. *Id.* Other than these perfunctory statements, there is no indication in the public record of why the court ordered the case sealed. Nor is there any indication of whether the court found that the parties' interest in the secrecy of any particular filings outweighed the public's presumptive right of access.

The court's umbrella sealing order violates the well-established rule in New Jersey that courts "must examine *each* document individually and make factual findings with regard to why the presumption of public access has been overcome." *Hammock v. Hoffmann-LaRoche, Inc.*, 142 N.J. 356, 382, 662 A.2d 546, 559 (N.J. 1995). Accordingly, proposed intervenor Public Citizen respectfully requests that the court unseal all filings or portions of filings for which the court has not made findings that concrete interests in secrecy outweigh the public's right to know. In particular, the court should unseal any orders and opinions explaining the justification for its decision to seal the case so that Public Citizen can, if necessary, effectively challenge the adequacy of that justification.

BACKGROUND

This case involves a suit by Antonia Verni, who was injured by a drunk driver when she was two years old, against the driver, Daniel Lanzaro, and various businesses that served Lanzaro alcohol prior to the accident. The background of the case is set out in the accompanying memorandum in support of Public Citizen's motion to intervene.

ARGUMENT

The public has a presumptive right of access to judicial records that can be overcome only by a strong showing of an important countervailing interest. The heavy burden of this showing is on the party opposing disclosure and must be made with specificity on a document-by-document basis. In this case, there are no motions by the parties or decisions by the court in the public record supporting the decision to seal the case. Because important public interests mandate disclosure of the filings and no countervailing interests justify keeping them secret, the court should unseal all pleadings, transcripts, exhibits, and other documents filed in the case. Even if the parties can meet their burden as to specific materials, however, the court should unseal any documents—in redacted form if necessary—for which the parties' burden has not been met. At the least, the court should unseal its own decisions in the case, including any orders granting the parties' motion to seal.

I. The Common Law, Rules of Court, and the First Amendment Create a Presumptive Right of Public Access to Court Filings.

There is a strong "presumption of public access to documents and materials filed with a court in connection with civil litigation." *Hammock*, 142 N.J. at 375, 662 A.2d at 556; *see also In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). This presumption arises both from the common-law right of access and from New Jersey court rules requiring decisions to seal the record or to enter protective orders to be supported by "good cause." R. 1:2-1, 4:10-3; *Hammock*, 142 N.J. at 367-68, 662 A.2d at 551-52.

Court filings are part of the public record when they have "been filed with the court, or otherwise somehow incorporated or integrated into a . . . court's adjudicatory proceedings." *Cendant*, 260 F.3d at 192; *Hammock*, 142 N.J. at 381, 662 A.2d at 559. Thus, the public record includes all "documents, transcripts, and legal memoranda with attachments filed with the court." *Hammock*, 142 N.J. at 361, 662 A.2d at 548. It also includes settlement agreements, at least as long as the settlement has been filed. *See Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343-45 (3d Cir. 1986) (holding that a settlement filed with the court was a public record); *Jackson v. Del. River & Bay Auth.*, 224 F. Supp. 2d 834, 838-40 (D.N.J. 2002) (holding that a draft settlement agreement and transcript of proceedings where the draft was discussed were public documents).

The presumption of public access "disallows the routine and perfunctory closing of judicial records." *Cendant*, 260 F.3d at 193-94. Before records can be sealed, the party advocating secrecy must meet its "burden of showing that the material is the kind of information that courts will protect" and that "disclosure will work a clearly defined and serious injury." *Id.* at 194 (internal quotations omitted). Only specific and identifiable privacy interests, such as genuine trade secrets, privilege, or interests created by statute or court rule justify sealing the record in civil cases. *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 546 (7th Cir. 2002); *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir. 1983). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, are insufficient." *Hammock*, 142 N.J. at 381-82, 662 A.2d at 559; *Cendant*, 260 F.3d at 194.

Even assuming that the parties satisfy their burden of identifying a compelling privacy interest, they must still show that the interests in secrecy substantially outweigh the strong public presumption of access. *Hammock*, 142 N.J. at 381, 662 A.2d at 559; *Cendant*, 260 F.3d at 194. This balancing process must be conducted separately for each document to be sealed. *Hammock*, 142 N.J. at 381-82, 662 A.2d at 559. Moreover, "to have the least intrusive effect on the public's right-of-access," an entire document should not be sealed when it is possible to redact just the private information. *Hammock*, 142 N.J. at 382, 662 A.2d at 559.

In addition to the common-law right of access, the First Amendment provides a right of access to judicial decisions and other sorts of filings in civil cases. *N.J. Div. of Youth & Family Servs. v. J.B.*, 120 N.J. 112, 119-123, 576 A.2d 261, 264-66 (N.J. 1990); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-71 (3d Cir. 1984). The presumption of openness under the First Amendment is even stronger than the common-law presumption and can be overcome only by showing "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Publicker*, 733 F.2d at 1073 (internal quotation omitted); *In re Providence Journal Co.*, 293 F.3d 1, 11 (1st Cir. 2002).[1]

II. The Interests of the Public in Access to Court Filings Mandate Disclosure in This Case.

Because of the strong public presumption of openness, Public Citizen need not offer any particular justification for the public's right of access to all the filings in this case. Regardless of the particularities of the case, public access to the

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[1] All the federal courts of appeals to have decided the question have held that the First Amendment protects access to civil filings. *See Grove Fresh Distribs. v. Everfresh Juice Co.*, 24 F.3d 893, 897 (7th Cir. 1994); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988); *Westmoreland v. CBS, Inc.*, 752 F.2d 16, 23 (2d Cir. 1984); *Publicker*, 733 F.2d at 1067-71; *Brown & Williamson Tobacco Corp.*, 710 F.2d at 1177; *Newman v. Graddick*, 696 F.2d 796, 801-02 (11th Cir. 1983).

court's files serves important societal values. Court openness "promotes public confidence in the judicial system by enhancing testimonial trustworthiness and the quality of justice dispensed by the court" and by "assur[ing] that judges perform their duties in an honest and informed manner." *Cendant Corp.*, 260 F.3d at 192 (internal quotations omitted). It also "provides the public with a more complete understanding of the judicial system and a better perception of its fairness." *Id.* Indeed, the public's ability to access civil trials is "inherent in the nature of our democratic form of government." *Publicker*, 733 F.2d at 1069.

Although establishing the right of public access does not require any showing as to the particular public-interest value of the case, the circumstances of this case make public access especially important. In its first round through the courts, the case led to the largest alcohol-liability award in the United States in at least twenty-five years. *Verdict Against Stadium Beer Vendor Overturned*, Chi. Trib., Aug. 4, 2006, at 16. This large verdict led to extensive national discussion and debate. Hundreds of articles and editorials were written about the case, including articles in the *Washington Post*, *Wall Street Journal, New York Times*, *Chicago Tribune*, *Houston Chronicle*, *San Francisco Chronicle*, *New York Post*, and *USA Today*. When, as here, the subject matter of the litigation is of interest to the public, the public's presumptive right of access is strengthened. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 788 (3d Cir. 1994) ("If a settlement agreement involves

issues or parties of a public nature, and involves matters of legitimate public concern, that should be a factor weighing against entering or maintaining an order of confidentiality.").

The importance of openness in this case is further amplified by the issues of public health and safety involved. *See Hammock*, 142 N.J. at 379, 662 A.2d at 558 ("[T]here is a profound public interest when matters of health, safety, and consumer fraud are involved."); *Pansy*, 23 F.3d at 787. The case sparked a national debate about the "culture of intoxication" at ballparks, and much of the media coverage speculated that the case would be a "wake up call" to teams and stadiums that would lead to reforms. *See, e.g.*, Tom Fitzgerald, *A Sobering Reality for NFL Concessionaires*, S.F. Chron., Sept. 25, 2005, at D3; Robert Dvorchak, *'Culture' of Drinking, Sports Is Given a Sobering Revision*, Pittsburgh Post-Gazette, Apr. 3, 2005, at D1; Mark Maske, *Ruling May Affect Team Policies*, Wash. Post, Jan. 22, 2005, at D3. The Vernis' attorney, David Mazie, said the verdict "sends an appropriate message, and hopefully will make a difference at arenas across the country." David Porter, *Jury Awards $75M in Damages from Crash*, USA Today, Jan. 19, 2005. That message, however, and any deterrent value the settlement might have had, is lost as long as the settlement is kept secret.

Finally, the fact that the case involved approval of a settlement involving a minor increases the importance of public access. This is not a typical settlement

agreement, which is never filed in court and is essentially just a private contract between the parties. *See Pansy*, 23 F.3d at 776. Rather, because this case involves a minor, Rule 4:44-3 requires the court to "determine whether the settlement is fair and reasonable as to its amount and terms." R. 4:44-3. This requirement of judicial approval increases the importance of public oversight to ensure fairness of the process. *See Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) ("The public has an interest in knowing what terms of settlement a . . . judge would approve and perhaps therefore nudge the parties to agree to."); *Bank of Am.*, 800 F.2d at 345; *Stephens v. County of Albemarle*, 422 F. Supp. 2d 640, 644 (W.D. Va. 2006). Thus, whereas "a competent adult, whose settlement need not be judicially approved, is free to negotiate a 'private' settlement[,] in the case of a minor or incompetent, the requirement of judicial approval of the settlement forecloses, in the ordinary case, the plaintiff's privacy option." *Hammock*, 142 N.J. at 368, 662 A.2d at 552 (internal quotation omitted); *see, e.g.*, *Zukerman v. Piper Pools, Inc.*, 256 N.J. Super 622, 607 A.2d 1027 (N.J. Super. Ct. App. Div. 1992) (unsealing a minor's settlement where the presumption of access was not overcome). Courts should not make decisions about the fairness of settlements without public oversight, and the public cannot judge the fairness of a settlement—or of the court's decision approving the settlement—if they cannot see it.

III. No Countervailing Interests Support Keeping the Motions Under Seal.

Nothing in the public record explains the perceived need for secrecy in this case or how this need outweighs the public's strong interest in access to public documents. Public Citizen therefore only can speculate as to the reasons that led the court to seal the case file. Nevertheless, there are two reasons to believe that the parties cannot show a compelling interest in secrecy here.

First, the court's order requires prospective sealing of all future documents in the case. It thus covers documents that had not even been filed at the time of the order, for which the court could not possibly have made a determination that privacy interests outweighed the presumption of public access. Courts strongly disfavor umbrella sealing orders that fail to account for the circumstances of individual documents. *See Pansy*, 23 F.3d at 786-87 ("The burden of justifying the confidentiality of each and every document sought to be covered by a protective order remains on the party seeking the order."); *Hammock*, 142 N.J. at 381-82, 662 A.2d at 559 ("The need for secrecy must be demonstrated with specificity as to *each document*."); *see, e.g.*, *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 790 (1st Cir. 1988) (rejecting a blanket protective order that "extend[ed] broad protection to all documents . . . without a showing of good cause for confidentiality as to any individual documents"). The court's sealing order in this case disregards this requirement of an individualized determination.

Second, the case has already been through a four-week public trial that was the subject of national press coverage. Any previously private or confidential facts are thus probably already in the public record. The only facts that are likely not to have already been made public are the terms of the settlement agreement itself, but courts have repeatedly stressed that an agreement to secrecy as a term of a settlement cannot trump the public's right to know. *See Lederman v. Prudential Life Ins. Co., Inc.*, 385 N.J. Super. 307, 311, 897 A.2d 362, 365 (N.J. Super. App. Div. 2006) ("[P]arties' contractual agreements do not outweigh the presumption of openness that applies to court proceedings and filed documents."); *see also, e.g.*, *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("Calling a settlement confidential does not make it a trade secret . . . ."); *Bank of Am.*, 800 F.2d at 345-46 (holding that the parties' private confidentiality agreement could not bar access to a settlement in the public record). The parties may argue that secrecy was an essential element of their agreement, but the public's right of access to documents that have been filed with the court cannot be bargained away by the parties. *See Bank of Am.*, 800 F.2d at 345; *see also Nault's Auto Sales, Inc. v. Am. Honda Motor Co.*, 148 F.R.D. 25, 44 (D.N.H. 1993) ("The decision to seal pleadings and documents filed with the Court is not one properly left to the litigants themselves."). Thus, "[i]t is immaterial whether the sealing of the record is an integral part of a negotiated settlement between the parties, even if the settlement comes

with the court's active encouragement." *Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

IV. At the Very Least, the Court Should Unseal Its Orders and Opinions in the Case, Including Any Order Authorizing Sealing the Record.

Even if the court does not unseal all documents in the file, it should, at a minimum, unseal all of its orders and opinions in the case. In particular, the court should publicly release any documents that explain its rationale for sealing the case file.

The public's right of access to judicial decisions is especially strong. *Hicklin Eng'g, L.C. v. Bartell*, 439 F.3d 346, 348 (7th Cir. 2006) ("[R]edacting portions of opinions is one thing, secret disposition is quite another."); *BBA Nonwovens Simpsonville, Inc. v. Superior Nonwovens*, LLC, 303 F.3d 1332, 1335 n.1 (Fed. Cir. 2002) (citing the importance of public scrutiny on the administration of justice in denying a motion to issue an opinion under seal); *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982) ("An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny."). Because of the importance of public access to judicial decisions, courts have upheld the right of access even when national security interests were at stake. *See, e.g.*, *United States v. Ressam*, 221 F. Supp. 2d 1252, 1263-64 (W.D. Wash. 2002). As the court wrote in *Ressam*:

> [T]here is a venerable tradition of public access to court orders, not only because of the inherent value in publicly announcing a particular result, but because dissemination of the court's reasoning behind that result is a necessary limitation imposed on those entrusted with judicial power. A court's order therefore serves a function that extends far beyond a specific case. More than merely informing the parties of the outcome of a motion, an order also enlightens the public about the functioning of the judicial system.

Id. at 1262. The court should therefore, at a minimum, allow access to its decisions in the case, including its order approving the settlement.

Most importantly, the court should release any orders or opinions that justify its decision to seal the balance of proceedings in this case. The New Jersey Supreme Court has explained that, when a court seals a document that is part of the public record, it "must . . . state with particularity the facts, without disclosing the secrets sought to be protected, that currently persuade the court to seal the document or continue it under seal." *Hammock*, 142 N.J. at 382, 662 A.2d at 559; *see also Ressam*, 221 F. Supp. 2d at 1263-64 (holding that protective orders sealing the record must be released with redactions). Moreover, Rule 1:2-1 requires that the "good cause" supporting the decision to seal a filing "shall be set forth on the record." R. 1:2-1. Other than the perfunctory statement that the sealing order was supported by good cause, however, there is no indication in the public record of this case of why the court entered its sealing order. Only by examining the court's rationale for sealing the file can Public Citizen effectively challenge that rationale, both in this court and on appeal.

CONCLUSION

All filings currently under seal in this case should be unsealed and the order sealing all future proceedings should be vacated or otherwise modified.

Respectfully Submitted,

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