IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

ADAM DOBSON,	:	
	:	1:16-CV-1958
Plaintiff,	:	
	:	Hon. John E. Jones III
	:	
v.	:	
	:	
THE MILTON HERSHEY SCHOOL, *et al.*,	:	
	:	
	:	
Defendants.	:	

MEMORANDUM AND ORDER

January 21, 2020

Presently pending before the Court is Intervenor the Philadelphia Inquirer's Objections to U.S. Magistrate Judge Martin C. Carlson's Memorandum and Order of October 22, 2019, (Doc. 176), granting the Philadelphia Inquirer intervenor status but denying its request to unseal docket entries 45, 46, 48, 54, 55, 59, 80, 82, 85, and 86. (Doc. 178). Intervenor's Objections have been fully briefed, (Docs. 179, 182, 186), and are ripe for disposition. For the reasons that follow, Intervenor's Objections shall be overruled in part and sustained in part to the extent that we shall remand this matter back to Judge Carlson to mediate a resolution between the parties in accordance with this Opinion.

I. BACKGROUND

This case is one of several filed against the Milton Hershey School and several individuals connected therewith. Unrelated to the merits of the underlying case, on June 20, 2019, the Philadelphia Inquirer ("the Inquirer") filed a motion to intervene for the limited purpose of unsealing documents 45, 46, 48, 54, 55, 59, 80, 82, 85, and 86 which had been previously sealed pursuant to Orders issued by our colleague Chief Judge Christopher C. Conner.[1] The Inquirer's motion to intervene and unseal was more than fully briefed, (Docs. 154, 163, 165, 166-1, 169), and was referred to U.S. Magistrate Judge Martin C. Carlson for resolution. (Doc. 164).

In Judge Carlson's Memorandum Opinion and Order authored pursuant to 28 U.S.C. § 636(b)(1)(A),[2] (*see* Doc. 176 at 1 n.1), Judge Carlson granted the Inquirer intervenor status but denied its request to unseal any documents. (*Id*. at 15–16). Judge Carlson reasoned that, "[t]he sealed records in this case relate

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[1] This matter was reassigned to the undersigned on January 22, 2019.

[2] Subsection 636(b)(1)(A) states:

> [A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A).

exclusively to a discovery dispute between the parties," and involve only an "intramural squabble" that "is, at most, only tangentially related to [the] matters of public interest" at issue in the merits of the claims underlying this action. (*Id*. at 14). Therefore, Judge Carlson concluded, the records "do not qualify as 'judicial records' subject to the public right of access or the First Amendment." (*Id*. at 12). Rather, after reviewing the contents of each of the documents, Judge Carlson resolved that the "records qualify as discovery documents . . . subject to Rule 26 of the Federal Rules of Civil Procedure and the *Pansy* factors." (*Id*. at 12–13 (citing *Leucadia, Inc. v. Applied Extrusion Techs., Inc*., 998 F.2d 157, 166 (3d Cir. 1993); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772 (3d Cir. 1994)). Looking to the *Pansy* factors and again reiterating the contents of each of the documents that the Inquirer hoped to unseal, Judge Carlson concluded that "there [wa]s good cause for the requested documents to remain sealed" because "it [wa]s apparent that Chief Judge Conner carefully considered the countervailing legal interests and determined [that] there was good cause for sealing these particular documents" at the time they were sealed based upon the parties' arguments and the relevant legal standard. (*Id*. at 14–15). Thus, Judge Carlson refused to disturb Chief Judge Conner's decision and noted that, "if either party wished to challenge the sealing of these documents, the more appropriate course of action would have been to have filed a motion to reconsider th[o]se specific rulings" at the time those rulings were

made. (*Id*. at 15). Accordingly, Judge Carlson denied the Inquirer's request to unseal, summarizing that "the documents requested by The Inquirer related to what is now a year-old discovery dispute between the parties, were sealed and subject to carefully conceived protective orders entered by the court, and the defendants have met their burden to show continued justification for the sealing of these particular documents." (*Id*.).

On November 5, 2019, the Inquirer filed timely Objections to Judge Carlson's Memorandum and Order, (Doc. 178), followed by a brief in support thereof. (Doc. 179). Defendants the Hershey Trust Company and the Milton Hershey School filed a brief in opposition on November 19, 2019, (Doc. 182), and the Inquirer filed a Reply on November 26, 2019. (Doc. 186). The Inquirer's Objections have now been fully briefed and are ripe for disposition. For the reasons that follow, the Inquirer's Objections shall be overruled in part and sustained in part to the extent that we shall remand this matter back to Judge Carlson to mediate a resolution between the parties in accordance with this Opinion.

II. DISCUSSION

Before reaching the merits of the instant appeal, the parties dispute the appropriate standard of review applicable to Judge Carlson's Memorandum and Order. In his Opinion, Judge Carlson found that the district court should

reconsider his decision only "where it has been shown that [his] . . . order is clearly erroneous or contrary to law." (Doc. 176 at 1 n.1 (quoting 28 U.S.C. § 636(b)(1)(A))).

The Inquirer disagrees, arguing that Judge Carlson's Memorandum and Order is subject to *de novo* review. According to the Inquirer, the standard of review applicable to a U.S. Magistrate Judge's Order "turns on whether the motion being appealed is 'dispositive' or 'non-dispositive.'" (Doc. 186 at 3). If the matter being appealed to the district court is dispositive of a party's merits claims, then the matter is reviewed *de novo*. (*Id*. (citing 28 U.S.C. § 636(b)(1)(A)). If the matter is non-dispositive, then the matter is reviewed under the "clearly erroneous or contrary to law" standard. (*Id*. (citing 28 U.S.C. § 636(b)(1)(B)). Here, the Inquirer reasons, where the only relief it seeks is to unseal various records, Judge Carlson's decision denying that request is wholly dispositive of its merits claims and the matter must be subject to *de novo* review by the district court. Indeed, although the Inquirer concedes that the Third Circuit has not explicitly ruled on this issue, it argues that a federal district court in the Eastern District of California concluded as much, (*id*. at 3–4 (citing *Hall v. County of Fresno*, No. 11-CV-2047, 2016 WL 374550, *4 (E.D. Cal. Feb. 1, 2016)), and that such a finding "is consistent with Third Circuit law holding that an order granting or denying an intervenor's motion to unseal judicial records is immediately appealable as a final

order." (*Id*. at 4 (citing 28 U.S.C. § 1291; *United States v. Smith*, 123 F.3d 140, 145 (3d Cir. 1997) ("Orders either granting or . . . denying access to court proceedings or records are appealable as final orders under § 1291.")). Furthermore, the Inquirer urges, even if this Court deems the decision underlying the instant appeal non-dispositive, *de novo* review would still apply because the questions presented herein amount to legal questions over which reviewing courts exercise plenary review, (*id*. at 5 (quoting *Smith*, 123 F.3d at 146 ("[The Third Circuit] exercise[s] plenary review over whether the First Amendment or the common law creates a presumptive right of access to judicial documents or proceedings."), and the Court must conduct an independent factual review of the full record. (*Id*. at 5–6 (quoting *United States v. Antar*, 38 F.3d 1348, 1357 (3d Cir. 1994) ("In the First Amendment context . . . the Supreme Court has recognized the duty of reviewing courts to engage in an independent factual review of the full record. Thus[, the Third Circuit has] explained that when [it] address[s] a right of access claim, [the Court's] scope of review is substantially broader than that for abuse of discretion.").

Our review of this issue reveals a gap in the law into which we refuse to wade based upon the scant briefing we received and the procedural morass that such a decision would present. Nonetheless, we summarize our findings as follows. By statute:

> [A] judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

28 U.S.C. § 636(b)(1)(A). A district court judge may also:

> [D]esignate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

Id. § 636(b)(1)(B).

Consistent with these statutes, Federal Rule of Civil Procedure 72 provides that "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge to hear and decide . . . . The district judge in the case must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." FED.R.CIV.P. 72(a). "Under [28 U.S.C. § 636(b)(1)(A) and Rule 72], the district court is bound by the clearly erroneous rule in reviewing questions of fact, and it is not permitted to receive further evidence." *In re Gabapentin Patent Litig*., 312 F.Supp.2d 653, 661 (D.N.J. 2004) (citing *Haines v. Liggett Group, Inc*., 975 F.2d 81, 91 (3d Cir. 1992)). "A finding is

clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Id*. (internal quotation marks omitted). "[T]he phrase 'contrary to law' indicates plenary review as to matters of law." *Id*.

Alternatively, when a magistrate judge is assigned a dispositive motion or a prisoner petition, "[t]he district judge must determine *de novo* any part of the magistrate judge's disposition that has been properly objected to. The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." FED.R.CIV.P. 72(b)(3); *see also* 28 U.S.C. § 636(b)(1). "Under [28 U.S.C. § 636(b)(1) and Rule 72], in contrast, the district court is permitted to make a *de novo* determination after proposed findings and recommendations and 'may also receive further evidence.'" *In re Gabapentin Patent Litig*, 312 F.Supp.2d at 661 (citing 28 U.S.C. § 636(b)(1)(B); FED.R.CIV.P. 72(b)). Thus, we agree with the Inquirer's characterization that the standard of review applicable to a magistrate's determination turns on whether that determination is dispositive or not of the merits of a party's claims. *See generally* 12 FED. PRAC. & PROC. CIV. § 3068.2 (3d ed.) ("Any pretrial matter properly referred to a magistrate judge must be categorized under Rule 72 as either 'dispositive' or 'nondispositive' for purposes of the standard of review to be exercised by the district judge.").

However, the dispositive-non-dispositive dichotomy is not helpful in this case where a party has filed a motion to intervene and a concurrent motion to unseal which that party alleges is its *only* merits claim. "A ruling on a motion to intervene is typically treated as non-dispositive, whereas a determination on the merits of the substantive claims of an intervenor is dispositive." *In re Gabapentin Patent Litig*., 312 F.Supp.2d at 661. As in *Gabapentin Patent Litigation*, this case is unique in that the Inquirer asserts that its sole reason for intervention is to unseal various records. As such, a ruling upon its request to unseal appears to moot its request to intervene and seems to be wholly dispositive of its merits claims. Yet, in most contexts, a request to unseal by itself is "not dispositive of a claim or defense of a party" in the underlying litigation as contemplated by Rule 72. FED.R.CIV.P. 72(a). In other words, whether a particular document is filed, or remains, under seal does not affect the underlying merits of the case in which that particular document has been filed.

Although the Third Circuit has hinted at this problem, it has not squarely addressed it. *See Dewey v. Volkswagen Aktiengesellschaft*, 558 F.App'x 191, 199 (3d Cir. 2014). Various district courts have dealt with this issue differently. Some have reasoned that, because a "Magistrate Judge's order denying [an intervenor's] request to unseal . . . expert reports has the practical effect of denying [the intervenor] the ultimate relief he seeks as an intervenor . . . the order [denying that

request] is dispositive and, accordingly, subject to *de novo* review." *Hall v. Cty. of Fresno*, No. 1:11-CV-2047, 2016 WL 374550, at *4 (E.D. Cal. Feb. 1, 2016). Others have held that, when the substance of an intervenor's request "is in the nature of a non-dispositive discovery dispute unrelated to claims in the underlying action" of a kind that fall "within the domain of magistrate judges [such as modification of a protective order] . . . . Absent any controlling authority to the contrary . . . the matter [is] non-dispositive under § 636(b)(1)(A) and . . . the clearly erroneous/contrary to law standard of review" applies. *In re Gabapentin Patent Litig.*, 312 F.Supp.2d at 661. Others have taken a more cautious approach, resolving that the matter would ordinarily be subject to the "clearly erroneous" standard but, nonetheless, opting to review the matter "with a scrutiny closer to that of '*de novo*' review, with careful attention to the facts of the case and the applicable case law." *United States v. W.R. Grace & Co.-Conn.*, 185 F.R.D. 184, 187 (D.N.J. 1999).

Presented with this unsettled question, we decline to rule on it at this juncture.[3] Rather, for the foregoing reasons, we find that, under either standard of

[3] Having said that, we note that this Court tasked Judge Carlson with resolving the Inquirer's motion by memorandum and order and expected his decision to be final and subject to review under the "clearly erroneous and contrary to law" standard. We did not task Judge Carlson with drafting findings and recommendations to be reviewed *de novo*. Moreover, we also find the Inquirer's presupposition that denying its request to unseal is wholly dispositive of its claims somewhat specious when it recently filed a second motion to unseal in a related case in which an identical motion to intervene was filed and granted. (*See* Doc. 303 in *Wartluft et al. v. The Milton Hershey School and School Trust et al.*, 1:16-cv-02145).

review, redacting the material, rather than disclosing or sealing it wholesale, will strike the appropriate balance between the competing interests at stake. Accordingly, and for the reasons that follow, we shall remand the matter to Judge Carlson to mediate a resolution between the parties consistent with this Opinion. For the benefit of the able Judge Carlson and the parties, we proceed to explain the principles that should be guiding their discussions and resolution.

Recently, our Court of Appeals delineated the various tests that govern when certain materials filed in connection with otherwise-public court proceedings may be shielded from public view. *In re Avandia Mktg., Sales Practices & Prod. Liab. Litig.*, 924 F.3d 662 (3d Cir. 2019). These same tests apply where, as in the case *sub judice,* a party asks the Court to unseal materials that had been previously labelled confidential.

The highest level of judicial scrutiny attaches to a request to seal an actual civil trial. Because trials are subject to the First Amendment right of public access to judicial proceedings, a request to bar access to a civil trial "is . . . evaluated under strict scrutiny." *Id*. at 673 (quoting *PG Pub. Co. v. Aichele*, 705 F.3d 91, 98 (3d Cir. 2013)) (internal quotation marks omitted). To determine whether the First Amendment right of access attaches, courts consider two prongs: "(1) the experience prong asks 'whether the place and process have historically been open to the press'; and (2) the logic prong evaluates 'whether public access plays a

significant positive role in the functioning of the particular process in question.'" *Id*. (quoting *N. Jersey Media Grp. Inc. v. United States*, 836 F.3d 421, 429 (3d Cir. 2016). "The party seeking closure or sealing in the face of the First Amendment right of access 'bears the burden of showing that the material is the kind of information that courts will protect and that there is good cause for the order to issue.'" *Id*. (quoting *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984)). "Good cause means 'that disclosure will work a clearly defined and serious injury to the party seeking closure'; '[t]he injury must be shown with specificity.'" *Id*.

The lowest level of scrutiny attaches to requests to preserve, or to continue to preserve, the confidentiality of discovery materials pursuant to a protective order under Federal Rule of Civil Procedure 26. *Id*. at 670. Under Rule 26, a litigant must demonstrate "good cause" before a protective order may be granted which either renders certain information or documents undiscoverable by an opposing party or which seals information or documents that have already been exchanged. FED.R.CIV.P. 26(c)(1) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense."). To demonstrate good cause, a movant must show "that disclosure will work a clearly defined and serious injury to the party seeking [to prevent] disclosure." *Publicker Indus.*, 733 F.2d at 1071. "The injury must be shown with

specificity." *Id*. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning" are insufficient. *Cipollone v. Liggett Group, Inc.*, 785 F.2d 1108, 1121 (3d Cir. 1986).

In *Pansy v. Borough of Stroudsburg*, the Third Circuit outlined several non-exhaustive factors to consider in determining whether good cause exists to grant, to continue to enforce, or to modify a Rule 26 protective order over confidential discovery material. These factors include whether: (1) disclosure will violate any privacy interests; (2) the information is being sought for a legitimate purpose or for an improper purpose; (3) disclosure will cause a party embarrassment; (4) confidentiality is being sought over information important to public health and safety; (5) the sharing of information among litigants will promote fairness and efficiency; (6) a party benefitting from the order of confidentiality is a public entity or official; and (7) the case involves issues important to the public. *Pansy*, 23 F.3d at 787–91.

The Third Circuit has also advised that the *Pansy* factors are to be considered "when a non-party moves to intervene in a pending or settled lawsuit for the limited purpose of modifying a protective order and inspecting documents filed under seal." *Leucadia*, 998 F.2d at 166; *see also Glenmede Tr. Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995). "The party seeking to modify the order of confidentiality must come forward with a reason to modify the order."

Pansy, 23 F.3d at 790. "Once that is done, the court should then balance the interests, including the reliance by the original parties to the order, to determine whether good cause still exists for the order." *Id*. Further:

> If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal. When that is not the case, the court should require the party seeking modification to show why the secrecy interests deserve less protection than they did when the order was granted. Even then, however, the movant should not be saddled with a burden more onerous than explaining why his need for the materials outweighs existing privacy concerns.

Id. (quoting Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV.L.REV. 1085, 1092 (1981)) (alteration in original). To that end, "continued sealing must be based on 'current evidence to show how public dissemination of the pertinent materials now would cause the [] harm [they] claim.'" *In re Cendant Corp.*, 260 F.3d at 196 (quoting *Leucadia*, 998 F.2d at 167). Consequently, the Court must conduct a document-by-document review of the sealed material, *Avandia*, 924 F.3d at 677, and balance the "private versus public interests" at stake. *Pansy*, 23 F.3d at 789.

When discovery materials "are filed as court documents" or have been "somehow incorporated or integrated into a district court's adjudicatory proceedings," however, such materials are deemed "judicial records" subject to a third level of intermediate scrutiny referred to as the common law right of access.

The common law right of access "begins with a presumption in favor of public access," and, although "not absolute," "[t]he party seeking to overcome the presumption of access bears the burden of showing 'that the interest in secrecy outweighs the presumption.'" *Avandia*, 924 F.3d at 672 (quoting *Bank of Am. Nat. Tr. & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 344 (3d Cir. 1986)). To carry her burden to overcome the common law right of access, "[t]he movant [seeking closure] must show 'that the material is the kind of information that courts will protect and that disclosure will work a clearly defined and serious injury to the party seeking closure.'" *Id*. (quoting *Miller v. Ind. Hosp.*, 16 F.3d 549, 551 (3d Cir. 1994)).

In light of the competing standards outlined *supra*, when discovery materials ordinarily subject to Rule 26's good-cause standard and the *Pansy* factors are "somehow incorporated or integrated into a district court's adjudicatory proceedings," the line between "discovery material," subject to the *Pansy* factors and Rule 26's good-cause standard, and "judicial records," subject to the common law right of access, is blurred. In such a case as that at bar, the scrutiny to be applied to an intervenor's request to unseal is not so much a function of the material that the intervenor hopes to unseal as much as the medium in which the material was presented to the Court. *See Leucadia*, 998 F.2d at 164. Materials—even raw discovery materials—that have been filed "in connection with"

adjudicatory motions like a motion for summary judgment, a preliminary injunction, a motion to dismiss, a motion for a more definite statement, a motion to preclude evidence, or as an exhibit to an amended complaint, are considered "judicial records" subject to the common law right of access. If this same material, however, "is submitted with respect to" a "discovery motion" like a motion to compel production of documents and answers to interrogatories or a motion to shorten time for production of documents, a request to unseal that same material is reviewed under the Rule 26 good-cause standard and the *Pansy* factors. *See Leucadia*, 998 F.2d at 163–64 ("In this case, the material submitted under seal falls within both categories of motions . . . . Some of the sealed discovery material was filed in connection with [Plaintiff's] motion for a preliminary injunction, [Defendant's] motion to dismiss and for a more definite statement, the exhibit to [Plaintiff's] first amended complaint, and [Defendant's] motion for preclusion of evidence, which were not merely motions relating to discovery. In contrast, the material submitted with respect to [Defendant's] motions to compel production of documents and answers to interrogatories and [Plaintiff's] motion to shorten time for production of documents can be characterized as discovery motions.").

In *Leucadia*, the Third Circuit expressly refused to extend the common law right of access to "discovery motions" for several reasons. First, the Third Circuit noted our Supreme Court's caution in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20,

33 (1984) that "pretrial deposition and interrogatories are not public components of a civil trial. Such proceedings were not open to the public at common law and, in general, they are conducted in private as a matter of modern practice." *Id*. Second, the Court reasoned, "a holding that discovery motions and supporting materials are subject to a presumptive right of access would make raw discovery, ordinarily inaccessible to the public, accessible merely because it had to be included in motions precipitated by inadequate discovery responses or overly aggressive discovery demands." *Leucadia*, 998 F.2d at 164. Third, the Third Circuit found such a broad presumption unnecessary "when there is in existence a source of law for the normative rules governing public access to discovery materials, that is Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure." *Leucadia*, 998 F.2d at 165.

In the instant case, the documents that the Inquirer hopes to unseal were all "submitted with respect to" what plainly amount to "discovery motions." The Inquirer petitioned this Court to unseal docket entries 45, 46, 48, 54, 55, 59, 80, 82, 85, and 86. (Doc. 178). Doc. 45 is a brief in support of Defendants' motion for leave to file documents under seal related to its motion for a protective order filed at Doc. 44. Doc. 46 is another motion for a protective order and a brief in support thereof. Doc. 48 is a motion for leave to file additional exhibits in support of Doc. 46. Doc. 54 is Plaintiff's brief in opposition to Defendant's motion for leave to file

documents under seal in Doc. 44 and a brief in support thereof. Doc. 55 is Plaintiff's brief in opposition to Defendant's motion for a protective order in Doc. 46. Doc. 59 is Defendants' Reply brief in support of Docs. 44 and 46. Doc. 71 is an Order granting Doc. 44 and Doc. 75 is a joint stipulated protective order. Doc. 80 is Defendants' motion for another protective order to prevent extrajudicial disclosure of certain information as well as a brief in support thereof. Doc. 82 is Plaintiff's brief in opposition to Defendants' motion for a protective order at Doc. 80. Doc. 85 is Defendants' Reply brief and Doc. 82 is an Order granting Defendants' motion for a protective order at Doc. 80. Plainly, all of the documents the Inquirer hopes to unseal were "submitted with respect to" various motions for protective orders which necessarily constitute "discovery motions" under *Leucadia*. Thus, the continued sealing of those documents is governed by Rule 26's good-cause standard and the *Pansy* factors. Indeed, in *Leucadia*, the Third Circuit expressly refused to extend the common law right of access "when there is in existence a source of law for the normative rules governing public access to discovery materials, that is Rules 5(d) and 26(c) of the Federal Rules of Civil Procedure." *Leucadia*, 998 F.2d at 165. Because all of the documents that the Inquirer hopes to unseal relate to various motions for protective orders governed by Rule 26, it is clear that such motions amount to "discovery motions" whose continued sealing requires this Court to consider the Rule 26 good-cause standard

and the *Pansy* factors under *Leucadia*. *Leucadia*, 998 F.2d at 164–65 ("We believe that our earlier decisions and those in other courts lead ineluctably to the conclusion that there is a presumptive right of public access to *pretrial motions of a nondiscovery nature*, whether preliminary or dispositive, and the material filed in connection therewith.") (emphasis added); *N. Jersey Media Grp.*, 836 F.3d at 435 (recognizing "the longstanding limitation on the public's access to discovery materials and so limited the common law right of access, even when discovery motions and their supporting documents are filed with the court"); *see also Anderson v. Cryovac, Inc.*, 805 F.2d 1, 13 (1st Cir. 1986) ("History and logic lead us to conclude that there is no presumptive first amendment public right of access to documents submitted to a court in connection with discovery motions. Instead, the same good cause standard is to be applied that must be met for protective orders in general.").

Accordingly, we are unpersuaded by the Inquirer's insistence that the sealed records are subject to the common law right of access simply because the documents include motions which necessarily have some measure of "adjudicatory significance." (Doc. 179 at 8). Such a finding would mean that every motion—even those specifically labeled as "discovery motions" in *Leucadia*—are subject to the common law right of access. This would fly in the face of *Leucadia*'s

distinction in the first instance. We are not prepared to take such a leap, nor do we deem it necessary.

Having found that the continued sealing of the documents at issue is to be reviewed under Rule 26's good-cause standard and the *Pansy* factors, we next consider whether the materials should be subject to continued sealing thereunder. In its principal brief before this Court in relation to the Inquirer's initial motion to intervene and unseal, Defendants posit generally that:

> [T]he sealed documents contain a combination of highly sensitive student and personnel records, confidential discovery materials, and information regarding highly sensitive and confidential communications. Moreover, much of the sealed information was required to be sealed in order to redress the injury and prejudice to Defendants that Plaintiff's intentional disclosure of discovery and other confidential case information to the media was intended to accomplish.

(Doc. 163 at 17). A review of the sealed material offered by Defendants in support of Chief Judge Conner's initial sealing decision reflect these same worries. (Docs. 45, 59, 80). Defendants argue the same thing in the instant appeal of Judge Carlson's ruling. Moreover, Defendants also reason that, "due to the pervasiveness of confidential information through the sealed documents," redacting the material prior to unsealing "would not sufficiently protect the privacy interests at stake." (Doc. 163 at 21 n.5).

As previously noted, Docs. 44, 45, 46, 48, 54, 55, and 59 consist of briefing related to two motions for protective orders. Chief Judge Conner granted Doc. 44

allowing the parties to file the briefing related to the protective order under seal after holding a telephone conference wherein the parties agreed to file a joint stipulated protective order related to that same material the following day—which the parties did. (Docs. 71, 73). Thus, by agreement of the parties, Chief Judge Conner did what any district court would have done at the time and granted the parties' joint stipulated protective order after having considered the countervailing interests under the appropriate standard of review.[4] This same process played out as to Docs. 80, 82, and 85, which consist of briefing related to a motion for a protective order to prevent extrajudicial disclosure of material deemed confidential by the parties' joint stipulated protective order. In Doc. 86, Chief Judge Conner again considered the countervailing interests of the parties and the relevant legal standard applicable to a restraint on speech and found that good cause existed to grant the Defendants' protective order preventing extrajudicial disclosure of confidential materials. It was for this reason that Judge Carlson later concluded that "because these documents were sealed based upon separate and specific decisions by Chief Judge Conner, we will not disturb these findings," noting that "if either party wished to challenge the sealing of these documents, the more

[4] It is significant that our colleague did not have the benefit of the *Avandia* decision and we hasten to note that he thus proceeded exactly as we would have under the circumstances.

appropriate course of action would have been to have filed a motion to reconsider these specific rulings." (Doc. 176 at 15).

Now, however, unlike Chief Judge Conner, we have the benefit of *Avandia*. Although at first blush *Avandia* appears to restate and aggregate long-standing jurisprudence concerning the confidentiality of discovery materials, in practice it does much more. In practical fact, *Avandia* signals that the Court's formerly routine practice of sealing materials by agreement is no longer acceptable. *Avandia* doubled down on the public's right to access materials filed in relation to judicial proceedings and has, in effect, placed a thumb on the scale when a district court balances the "private versus public interests" at stake in any sealing decision. *Pansy*, 23 F.3d at 789.

With that in mind, we reserve judgment upon whether the documents at issue should be subject to continued sealing under both Rule 26 and the *Pansy* factors, as our review of the subject material suggests that redactions may strike the appropriate balance between the competing interests at stake in the instant case. As mentioned *supra*, much of the material at issue is briefing related to various motions for protective orders, and, therefore, much of the sealed documents contain restatement of the relevant law associated with sealing and confidentiality. These pages plainly need not be sealed. The briefs also contain as attachments various newspaper articles which are already in the public domain. Such material

also plainly need not be sealed. On the other hand, it is also apparent to us that appended to the briefs are unredacted copies of deposition transcripts which may contain confidential information related to employees or students—material which would clearly be subject to sealing or redaction. This list is not designed to be exhaustive but only to provide obvious guideposts moving forward.

As noted in *Pansy*:

> If access to protected [material] can be granted without harm to legitimate secrecy interests, or if no such interests exist, continued judicial protection cannot be justified. In that case, access should be granted even if the need for the protected materials is minimal.

Pansy, 23 F.3d at 790 (quoting Note, *Nonparty Access to Discovery Materials in the Federal Courts*, 94 HARV.L.REV. 1085, 1092 (1981)) (alteration in original). With these words and *Avandia* in mind, we see wholesale disclosure or sealing of the material at issue inappropriate and unnecessary. Rather, although we reserve judgment as to both the standard of review applicable to Judge Carlson's Memorandum and Order and as to whether Defendants have demonstrated good cause to preserve Chief Judge Conner's sealing decisions, we shall remand the matter to Judge Carlson to mediate a resolution between the parties as to appropriate redactions. Should the parties be unable to come to a resolution, Judge

Carlson shall *sua sponte* decide the appropriate redactions in accordance with Third Circuit precedent and this Opinion.[5]

In closing, we hasten to note that the instant dispute is wholly unrelated to the merits underlying the instant action. As outlined in other related cases pending before this Court involving many of the same parties, we caution that the amount of time, paper, and electronic ink that has been dedicated in this case to resolving extraneous disputes has reached an unfortunate crescendo. Counsel for both sides are advised to change course. We expect a far greater degree of cooperation than evinced in this case, and the lack of civility is disheartening and unprofessional. This is a federal court, not a World Wrestling Entertainment exhibition. The parties are to double down on their efforts to work with Judge Carlson to reach an agreement as to appropriate redactions and cease the wearying gamesmanship that has marked this litigation.

III. CONCLUSION

For the foregoing reasons, Intervenor the Philadelphia Inquirer's Objections, (Doc. 178), shall be overruled in part and sustained in part.

[5] We caution the parties to not blithely pay lip service to the task of forging an amicable resolution only to slough this off to Judge Carlson. We will monitor this process, we will be vigilant for that, and counsel are at risk if they fail to use their best efforts to resolve this matter.

NOW, THEREFORE, IT IS HEREBY ORDERED THAT:

1. Intervenor the Philadelphia Inquirer's Objections, (Doc. 178), are **OVERRULED IN PART AND SUSTAINED IN PART** to the extent that this matter is **REMANDED** to Judge Carlson to mediate a resolution between the parties as to appropriate redactions consistent with this Opinion.

/s/ John E. Jones III
John E. Jones III
United States District Judge