

Argument

A. The Public Has A First Amendment and Common Law Right of Access to the Exhibit and Witness Lists.

The public's common law and constitutional right of access to judicial records is well-established. *See e.g., Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 599 (1978) (common law); *Federal Trade Commission v. Standard Financial Management Corp.*, 830 F.2d 404, 410 (1st Cir. 1987) (common law); *In re Providence Journal Co., Inc.*, 293 F.3d 1, 13, 15 (1st Cir. 2002) (First Amendment); *Pokaski*, 868 F.2d at 502 (First Amendment).

Under the First Amendment, public access to a judicial record cannot be restricted absent findings that such an order is “essential to preserve higher values and is narrowly tailored to serve that interest.” *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 13-14 (1986) (“*Press-Enterprise II*”); *Pokaski*, 868 F.2d at 505. Indeed, although “[n]o right ranks higher than the right of the accused to a fair trial,” *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”), even where fair trial rights are at stake, a closure order is proper “only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.” *Press-Enterprise II*, 478 U.S. at 14. *See also Providence Journal*, 293 F.3d at 15 (“restrictions on access to presumptively public judicial documents should be imposed only if a substantial likelihood exists that the accused’s right to a fair trial will otherwise be prejudiced”). “[T]his inquiry requires specific findings; the First Amendment right of public access is too precious to be foreclosed by conclusory assertions or unsupported speculation.” *Id.*

The public's common law right of access also is “no paper tiger,” *Standard Financial Management*, 830 F.2d at 410. The party seeking to seal bears the burden of persuasion. *Id.* at 411; *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253 (4th Cir. 1988). “Only the most compelling reasons can justify non-disclosure of judicial records.” *In re Knoxville News-Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983). Conclusory assertions of the need for closure are not accepted as surrogates for hard facts, and doubts are to be resolved in favor of public

access. *Continental Illinois Securities Litigation*, 732 F.2d at 1313; *Standard Financial Management*, 830 F.2d at 412; *Siedle v. Putnam Investments, Inc.*, 147 F.3d 7, 10 (1st Cir. 1998).

Even when these formidable standards are met, the remedy is not an automatic blanket sealing of entire records. Rather, any sealing order must be “narrowly tailored” to serve its intended interest. *Press-Enterprise II*, 478 U.S. at 13-14; *Pokaski*, 868 F.2d at 505; *Siedle*, 147 F.3d at 12 & n.16. *See also Providence Journal*, 293 F.3d at 15 (First Amendment right of access requires “consideration of the feasibility of redaction on a document-by-document basis”).

In this case, public access to the exhibit and witness lists will facilitate news reporting of the trial and promote public understanding of the judicial process. The information contained in the lists, moreover, is not by its nature private since all of the exhibits are presumptively public and all of the witnesses will testify in open court. Nor is there any danger, now that the jury is seated, that disclosure will interfere with the jury selection process. Under these circumstances, movants respectfully submit that the parties cannot carry their burden of demonstrating that continued sealing of the exhibit and witness lists is either “essential to preserve higher values” or “narrowly tailored to serve that interest.” *Press-Enterprise II*, 478 U.S. at 13-14. *See also Pokaski*, 868 F.2d at 505; *Providence Journal*, 293 F.3d at 15.

WHEREFORE, movants request that the Court issue an order unsealing the witness and exhibit lists filed with the Court.

Respectfully submitted,

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TRUSTEES OF BOSTON UNIVERSITY D/B/A
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Dated: March 5, 2015

CERTIFICATE OF SERVICE

I, Jonathan M. Albano, 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 March 5, 2015.

/s/Jonathan M. Albano

Jonathan M. Albano