UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE SEPTEMBER 11 LITIGATION	21 MC 101 (AKH)

MEMORANDUM OF LAW IN SUPPORT OF THE NEW YORK TIMES COMPANY'S MOTION TO UNSEAL CERTAIN JUDICIAL RECORDS AND ENFORCE THE PUBLIC'S RIGHT OF ACCESS TO FILINGS AND ORAL ARGUMENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

PRELIMINARY STATEMENT

The New York Times Company[1] ("The Times") respectfully submits this memorandum of law in support of its motion to unseal certain judicial records and enforce the public's right of access to filings and oral argument on the pending motion to approve the settlement agreement between the Aviation Defendants and certain property damage plaintiffs (jointly, the "Settling Parties"). The Settling Parties cannot meet their burden of defeating the public's First Amendment and common law rights of access to these records and proceedings.

For the reasons set forth below, The Times respectfully requests that the Court unseal all briefs, declarations and exhibits submitted in conjunction with the Settling Parties' motion to approve the settlement, including the details of the settlement amount and its allocation among the various Aviation Defendants' insurers, and the portion of that amount allocated to each of the settling plaintiffs, as well as any opposition to the motion (collectively, the "Motion Papers"). In addition, The Times requests that the Court allow the public to attend the oral argument on the motion to approve the settlement.

BACKGROUND

On January 6, 2010, the Settling Parties announced an agreement in principle to settle their cases. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1071, Ex. E ("Hearing Tr. Jan. 6, 2010"), at 3. One month later but still in advance of an executed settlement,

[1] The Times is the publisher of *The New York Times*. The newspaper's daily and Sunday circulation are the largest in the nation of all seven-day newspapers. In 2009, its weekday circulation was nearly 1 million, and more than 1.4 million on Sundays. The average number of unique visitors in the United States to NYTimes.com reached 17.9 million per month in 2009. The Times has devoted significant time and resources to the coverage of the September 11 attacks and their aftermath. In addition, The Times has reported extensively on the civil and criminal litigation that has followed the terrorist attacks.

the Settling Parties moved to place a seal around the details of the settlement amount and its allocation. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1069 (S.D.N.Y. Feb. 5, 2010).

On February 19, 2010, the Court granted the Settling Parties' motion but, lacking the benefit of "a clash of viewpoints" to assist with the "delicate balancing" required, expressly "reserve[d] the right to review this ruling if, in the future, a motion for reconsideration is presented to me, either by parties to this litigation or other representatives of the public." *In re September 11 Litig.*, 21-MC-101, 2010 U.S. Dist. LEXIS 14805, at *27-28 (S.D.N.Y. Feb. 19, 2010) ("Sealing Order").

The Settling Parties then executed their agreement and moved for judicial approval of the settlement. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1080 (S.D.N.Y. Feb. 25, 2010). Under the Sealing Order, the Settling Parties' motion for approval and supporting declarations and exhibits redacted all references to the settlement amount and its allocation. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1081-1083 (S.D.N.Y. Feb. 25, 2010).

The Court then issued an order explaining that the "issue of confidentiality and sealing will be governed by my [Sealing Order], and not by the provisions of the agreement." *In re September 11 Litig.*, 21-MC-101, Dkt. # 1096 (S.D.N.Y. Mar. 10, 2010).

The World Trade Center Properties Plaintiffs and 7 World Trade Company, L.P., by order to show cause, then moved to vacate the Sealing Order and modify the Court's March 30, 2004 Confidentiality Order. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1112 (S.D.N.Y. Mar. 26, 2010). The Settling Parties opposed this motion. *In re*

September 11 Litig., 21-MC-101, Dkt. # 1116 (S.D.N.Y. Apr. 1, 2010). At oral argument on the motion, the Court addressed the movants' concerns that they could not file their opposition to the Settling Parties' motion to approve the settlement without delving into the settlement details covered by the limited Sealing Order. *In re September 11 Litig.*, 21-MC-101 (S.D.N.Y. Apr. 15, 2010) ("Hearing Tr. Apr. 15, 2010"), at 2-3, 11-14.

The Court deemed the motion timely and advised the movants to submit their opposition to the settlement "under seal and then we can determine later on what should be open and what should be sealed." *Id.* at 11. The Court further explained that it had "left [itself] an out in the order of sealing which leads to these direct proceedings" and would "reserve to a later date how to deal with this whole concept of sealing." *Id.* at 12-13. Accordingly, the Court ordered that "the motion is premature and is denied without prejudice." *In re September 11 Litig.*, 21-MC-101, Dkt. # 1132 (S.D.N.Y. Apr. 16, 2010). Pursuant to that direction, the parties have filed several submissions under seal.

On May 6, 2010, The Times wrote to the Court to request permission to be heard on the public's right of access to the filings and oral argument on the pending motion to approve the settlement. The Court granted The Times leave to intervene and directed the submission of this brief. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1155 (S.D.N.Y. May 7, 2010).

ARGUMENT

I. THE PUBLIC HAS A QUALIFIED RIGHT OF ACCESS TO THE MOTION PAPERS

The public has both a First Amendment right and a common law right of access to civil proceedings and judicial records. *Lugosch v. Pyramid Co.*, 435 F.3d 110, 119-20 (2d Cir. 2006). Under both approaches, the right is a qualified one giving rise to a

presumption of access that can be defeated only by an appropriate factual showing by the party seeking to impose or maintain secrecy. *Id.* at 120, 124. Because the Settling Parties cannot satisfy their burden, the Motion Papers should be unsealed.

A. The Public's Common Law Right of Access to the Motion Papers

The common law right of access recognized in *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978), is based on a powerful public policy rationale. As articulated by the Second Circuit:

> The presumption of access is based on the need for federal courts, although independent – indeed, particularly because they are independent – to have a measure of accountability and for the public to have confidence in the administration of justice. Federal courts exercise powers under Article III that impact upon virtually all citizens, but judges, once nominated and confirmed, serve for life unless impeached through a process that is politically and practically inconvenient to invoke. Although courts have a number of internal checks, such as appellate review by multi-judge tribunals, professional and public monitoring is an essential feature of democratic control. Monitoring both provides judges with critical views of their work and deters arbitrary judicial behavior. Without monitoring, moreover, the public could have no confidence in the conscientiousness, reasonableness, or honesty of judicial proceedings. Such monitoring is not possible without access to testimony and documents that are used in the performance of Article III functions.

United States v. Amodeo ("*Amodeo II*"), 71 F.3d 1044, 1048 (2d Cir. 1995); *see also United States v. Aref*, 533 F.3d 72, 83 (2d Cir. 2008) ("Transparency is pivotal to public perception of the judiciary's legitimacy and independence. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat and requires rigorous justification. Because the Constitution grants the judiciary

neither force nor will, but merely judgment, courts must impede scrutiny of the exercise of that judgment only in the rarest of circumstances." (citations and internal quotation marks omitted)); *United States v. Gerena*, 869 F.2d 82, 85 (2d Cir. 1989) ("Public disclosure enhances the basic fairness of the judicial process and the appearance of fairness that is essential to public confidence in the system.").

The need for such public monitoring does not suddenly arise at the end of a proceeding when the ultimate decision on liability is before the court, but exists throughout the course of litigation whenever a judge's decision can change its course, create an advantage for one side over the other or significantly limit the public's ability to monitor the proceedings in the future. As the Seventh Circuit has succinctly put it, "The public at large pays for the courts and therefore has an interest in what goes on at all stages of a judicial proceeding." *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999).

The analytical path for determining whether the common law right of access applies is now well defined. First, the document at issue must be a "judicial document." *Lugosch*, 435 F.3d at 119. Not every document filed with a court is a judicial document, but the Second Circuit defines "judicial document" broadly: "In order to be designated a judicial document, 'the item filed must be relevant to the performance of the judicial function and useful in the judicial process.'" *Id.* (quoting *United States v. Amodeo* ("*Amodeo I*"), 44 F.3d 141, 145 (2d Cir. 1995)). After finding that "a common law presumption of access attaches" because a filing is a "judicial document," the court "must determine the weight of that presumption." *Id.* Finally, the court must consider whether

the party seeking to restrict access has demonstrated countervailing factors sufficient to overcome that presumption. *Id.* at 120; *Amodeo I*, 44 F.3d at 146-48.

1. The Motion Papers are Judicial Documents

There can be no doubt that a court's determination of a dispute over approval of a settlement is an "adjudication," and the briefs, declarations and exhibits of the parties filed to obtain that adjudication are "judicial documents" entitled to a very heavy presumption of access.

As the Court well knows, this litigation takes place within the framework established by Congress in Title IV of the Air Transportation Safety and System Stabilization Act of 2001 ("ATSSSA"), Pub. L. No. 107-42, 115 Stat. 230 (Sept. 22, 2001), *as amended*, 49 U.S.C. § 40101 (note). By that legislation, Congress sought "to protect the airline industry and other potentially liable entities from financially fatal liabilities while ensuring that those injured or killed in the terrorist attacks receive adequate compensation." *Can. Life Assur. Co. v. Converium Ruckversicherung (Deutschland) AG*, 335 F.3d 52, 55 (2d Cir. 2003) (citing legislative history). To this end, the ATSSSA "limits the liability of the airlines and other aviation defendants to their insurance coverages." *In re September 11 Litig.*, 567 F. Supp. 2d 611, 613 (S.D.N.Y. 2008). Because this limit "is considerably less than the aggregate of wrongful death, personal injury and property damage claims against these defendants," the Court established a "special protocol" to "resolve the dilemmas" presented by this litigation, requiring among other things judicial approval of the fairness and reasonableness of each settlement. *Id.* at 613-15; *see also id.* at 619-20 (explaining Court's obligation to "consider these settlements in the context of all other settlements and all remaining

outstanding claims" in line with Congress's intent "to have all of these cases handled in a uniform and consistent fashion," with "consistent," "logical and not arbitrary" recoveries); *Can Life Assur. Co.*, 335 F.3d at 58-59 (noting Congress's intent "to ensure consistency and efficiency in resolving the many expected actions arising from the events of September 11" and the goal of avoiding leaving "victims or their survivors without any possibility of recovery when the limits of liability have been exhausted in other lawsuits").

The Settling Parties have asked the Court to order that their agreement, including the amount and allocations, be approved as consistent with the ATSSSA and that the settlement payments be credited against the respective Aviation Defendants' statutory liability limits. Some of the non-settling plaintiffs oppose approval of the settlement.

Most certainly, the Motion Papers seek action by the Court and were not merely filed for an insignificant reason. They are centrally relevant to the performance of the judicial function and useful in the judicial process, *i.e.*, deciding the weighty issues raised by the motion for approval and its opposition. *See Amodeo I*, 44 F.3d at 145; *Xue Lian Lin v. Comprehensive Health Mgmt., Inc.*, 08-cv-6519, 2009 U.S. Dist. LEXIS 64625, at *3 (S.D.N.Y. July 23, 2009) (If "judicial approval is required of the fairness of the settlement . . . , then the approval process is a judicial act.").[2] In contrast to documents "that play no role in the performance of Article III functions, such as those passed between the parties in discovery," the Motion Papers were filed by parties seeking action by the Court and "presented to the court to invoke its powers or affect its decisions."

[2] The Settling Parties have argued that the "Court will decide the motion, not the public, and it has all of the information necessary to render its decision." *In re September 11 Litig.*, 21-MC-101., Dkt. # 1116, at 6 (S.D.N.Y. Apr. 1, 2010). This argument overlooks the public's right to monitor the Court's performance of Article III duties and denigrates the democratic principles behind that right.

Amodeo II, 71 F.3d at 1050 (citing *Bank of America Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assocs.*, 800 F.2d 339, 343 (3d Cir. 1986)).

Not surprisingly, courts have repeatedly found that the presumption of access applies to settlement materials submitted to a court for approval, irrespective of the parties' desire for secrecy. "[T]he common law presumption of access applies to motions filed in court proceedings and to the settlement agreement between HRA and the Bank which they filed and submitted to the district court for approval." *Bank of America Nat'l Trust & Sav. Ass'n*, 800 F.2d at 343; *see also Jessup v. Luther*, 277 F.3d 926, 929 (7th Cir. 2002) (Posner, J.) ("Whatever the rationale for the judge's participation in the making of the settlement in this case, the fact and consequences of his participation are public acts. He was not just a kibitzer. But even if he had been, judicial kibitzing is official behavior. The public has an interest in knowing what terms of settlement a federal judge would approve and perhaps therefore nudge the parties to agree to."); *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("It 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. Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case."); *see also Amodeo I*, 44 F.3d at 146 (finding that a special master's report was a judicial document subject to the common law presumption of public access). The Motion Papers are unquestionably "judicial documents" to which the presumption of access attaches.

Furthermore, as the Motion Papers directly affect an adjudication determining litigants' substantive rights, that presumption "is of the highest" weight. *Lugosch*, 435

F.3d at 121, 123; *Amodeo II*, 71 F.3d at 1049 (citing *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 408-09 & n.5 (1st Cir. 1987)); *Bank of America Nat'l Trust & Sav. Ass'n*, 800 F.2d at 344 ("[T]he court's approval of a settlement or action on a motion are matters which the public has a right to know about and evaluate."). The approval or disapproval of the settlement will affect not only the rights of the settling parties but also the interests of the non-settling plaintiffs, whose litigation strategies and settlement posture will be shaped by the fate of those seeking to settle.

The Court's role in adjudicating the pending motion is not merely to review the Motion Papers "to insure their irrelevance." *Lugosch*, 435 F.3d at 121 (internal quotation marks omitted). Rather, the papers were required by a Court order and will result in substantial action by the Court. *Cf. Amodeo II*, 71 F.3d at 1051. The parties are asking the Court to engage in a careful, detailed review of the Motion Papers to assess the fairness and reasonableness of the proposed settlements, "in and of themselves, and in relation to non-settled cases and to previously-settled cases," *In re September 11 Litig.*, 2010 U.S. Dist. LEXIS 14805, at *27 (S.D.N.Y. Feb. 19, 2010), and to decide whether to dismiss these lawsuits. This is "conduct at the heart of Article III." *Amodeo II*, 71 F.3d at 1049.

"[T]he presumptive right to 'public observation' is at its apogee when asserted with respect to documents relating to 'matters that directly affect an adjudication.'" *Gambale v. Deutsche Bank AG*, 377 F.3d 133, 140 (2d Cir. 2004) (quoting *Amodeo II*, 71 F.3d at 1049). That applies with full force when the adjudication is approval of a settlement:

> The press and public could hardly make an independent assessment of the facts underlying a judicial disposition, or

> assess judicial impartiality or bias, without knowing the essence of what the court has approved. . . . [T]he amount of the settlement is the critical factor in the Court's ability to assess whether the settlement should be approved. It therefore follows that it is also the critical factor in the ability of the public to monitor the appropriateness of the Court's decision. The parties' stipulation of settlement is the central document 'presented to the court to invoke its power[] to approve the settlement, *Amodeo* [*II*], 71 F.3d at 1050, and the size of the settlement is the critical term in that document. The sealing request here thus goes to the very core of the constitutionally-embedded presumption of openness in judicial proceedings. Only the most 'compelling circumstances' could overcome the strong presumption in favor of public availability of such a document.

Geltzer v. Andersen Worldwide, S.C., 05-cv-3339, 2007 U.S. Dist. LEXIS 6794, at *7, *13-14 (S.D.N.Y. Jan. 30, 2007) (Lynch, J.) (citation and internal quotation marks omitted); *see also Standard Fin. Mgmt. Corp.*, 830 F.2d at 408-10 (common law presumption of access attaches to documents submitted for court's evaluation and approval of a consent decree, and restriction requires the most compelling reasons); *Bank of America Nat'l Trust & Sav. Ass'n*, 800 F.2d at 345 ("Disclosure of settlement documents serves as a check on the integrity of the judicial process.").

Because the adjudication sought by the parties is a formal act of government, the basis for it "'should, absent exceptional circumstances, be subject to public scrutiny.'" *Amodeo II*, 71 F.3d at 1049 (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)); *see also In re Terrorist Attacks on Sept. 11, 2001*, 454 F. Supp. 2d. 220, 224 (S.D.N.Y. 2006) ("The public's right of access to the court and judicial process is at its 'apogee' with

respect to" documents "submitted to the Court in connection with trial, other hearings, and motions.").[3]

Furthermore, "access is particularly appropriate when the subject matter of the litigation is of especial public interest . . . ." *In re Agent Orange Product Liability Litig.*, 821 F.2d 139, 146 (2d Cir. 1987);[4] *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."); *Standard Fin. Mgmt. Corp.*, 830 F.2d at 412 ("The threshold showing required for impoundment of the materials is correspondingly elevated" where the litigation involves "matters of significant public concern.").

September 11, 2001 remains a day of unprecedented shock and suffering for the United States. The terrorist attacks on that day exacted a great toll on the United States and left behind many unanswered questions. Americans continue to struggle, individually and collectively, to comprehend fully how the terrorist attacks occurred and whether they could have been prevented. Questions concerning responsibility for the attacks and compensation for victims remain the subject of legitimate and substantial public debate. The public has a significant interest in monitoring the Court's application of the scheme

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[3] In *Schoeps v. Museum of Modern Art*, the court noted in dicta that "when settlement confidentiality is concerned" the "presumption of access is weak." 603 F. Supp. 2d 673, 676 n.2 (S.D.N.Y. 2009). But the *Schoeps* court's reliance on *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 858 (2d Cir. 1998), and *Gambale*, 377 F.3d at 143-44, for this proposition is misplaced because the settlement materials at issue in those cases were not even "judicial documents," as explained further below in Section I.A.2.

[4] While *Agent Orange*'s reliance on Federal Rule of Civil Procedure 5(d) has been abrogated by amendment of the Rules, *see SEC v. TheStreet.com*, 273 F.3d 222, 233 n.11 (2d Cir. 2001), its analysis of reliance on a sealing order and the principles of public access remains relevant. *See, e.g., Gambale*, 377 F.3d at 141 n.5.

imposed by Congress to ensure that compensation is "consistent," "logical and not arbitrary." Restricting access to the underlying information would render it impossible to evaluate the adjudication.

As the Court has recognized, "there is a particularly acute public interest in all that goes on in the 9/11 cases." *In re September 11 Litig.*, 2010 U.S. Dist. LEXIS 14805, at *24 (S.D.N.Y. Feb. 19, 2010); *see also* Hearing Tr. Jan. 6, 2010, at 28-29 ("Unlike most settlements in private litigation, this litigation and the particular facet of the litigation cap argued for publicity. Everything tied in to 9/11 is a matter of extreme public interest. ... [T]he public is interested in the litigation cap. How much remains of that cap is important. How much was spent in that cap in settling, the aggregate of all previous cases is important. I think it is something that the public would want to know and should know."). That interest encompasses the Court's decisions regarding proposed settlements, *see, e.g.*, Mireya Navarro, "Federal Judge Orders More Talks on 9/11 Deal," N.Y. TIMES, Mar. 20, 2010; Benjamin Weiser, "Judge Overturns Accords in 4 Suits by 9/11 Victims," N.Y. TIMES, July 25, 2008, as well as the instant sealing dispute, *see, e.g.*, Alison Gendar, "Judge in Ground Zero sickness cases may release other 9/11 settlement amounts," N.Y. DAILY NEWS, Apr. 16, 2010. Such an "enormous public interest" in this litigation presents a "compelling need for [the public] to evaluate fully the efficacy of settling this litigation." *Agent Orange*, 821 F.2d at 148.

2. The Presumption of Access is Not Overcome

The Settling Parties cannot meet their burden of establishing "countervailing factors" sufficient to overcome the strong presumption of access to the Motion Papers. *See Lugosch*, 435 F.3d at 121-23 (requiring the most compelling reasons to maintain a

seal around documents central to an adjudication); *Amodeo I*, 44 F.3d at 148 (party seeking sealing has burden under common law test).

Concededly, as the Court has recognized, "fostering settlement is an important Article III function of the federal district courts." *United States v. Glens Falls Newspapers, Inc.*, 160 F.3d 853, 856 (2d Cir. 1998); *Gambale*, 377 F.3d at 143 (courts must "encourage" settlement). And the Court should consider the countervailing factor of "whether public access to the materials at issue is *likely to impair in a material way* the performance of Article III functions." *Amodeo II*, 71 F.3d at 1050 (emphasis added); *Glens Falls*, 160 F.3d at 857 (noting public interest in settlement of "complex and expensive" litigation).

But courts must give "careful scrutiny and particularized scrutiny" to parties' claims that confidentiality is necessary to effect settlements. *Hartford v. Chase*, 942 F.2d 130, 136 (2d Cir. 1991); *Bank of America Nat'l Trust & Sav. Ass'n*, 800 F.2d at 346 ("Even if we were to assume that some settlements would not be effectuated if their confidentiality was not assured, the generalized interest in encouraging settlements does not rise to the level of interests that we have recognized may outweigh the public's common law right of access."). While the Settling Parties assert that confidentiality has been a "central factor" to the settlement, this assertion must be reviewed with skepticism, for "if the case goes to trial, even more is likely to be disclosed than if the public has access to pretrial matters." *Pansy*, 23 F.3d at 788 (internal quotation marks and citation omitted). For this reason, the parties' expressed preference for confidentiality "does not mean that they would not settle otherwise." *Id.*

The Settling Parties have contended that if the Court declined to place the details under seal, "settlement of any of the remaining September 11 litigation will become extraordinarily challenging, if not impossible." *In re September 11 Litig.*, 21-MC-101, Dkt. # 1070, at 10-11 (S.D.N.Y. Feb. 5, 2010); *see also In re September 11 Litig.*, 21-MC-101, Dkt. # 1117, Ex. D ("Kathryn Koorenny Declaration"), at ¶ 11 ("[I]f settlement amounts are not going to be maintained in confidence, American will be very reluctant to participate in any discussions that might lead to settlement of any of the remaining 9/11 Litigation."); *In re September 11 Litig.*, 21-MC-101, Dkt. # 1117, Ex. E ("Ricks Frazier Declaration"), at ¶ 11 (attesting that the non-settling property damage cases will have trouble settling if this information is disclosed). They say only that without the Sealing Order, "it is highly unlikely that this settlement would have been consummated." *In re September 11 Litig.*, 21-MC-101, Dkt. # 1116, at 4 (S.D.N.Y. Apr. 1, 2010).

But the record of this litigation raises doubts about that position. Even though the Court plainly reserved decision on whether confidentiality would be maintained, the Settling Parties nonetheless proceeded to execute their settlement.

In addition, the Settling Parties' professed reason for needing confidentiality does not withstand scrutiny. The Aviation Defendants claim to be "deeply concerned about the false light in which the disclosure of the [settlement amount and allocations] *could* place them." *In re September 11 Litig.*, 21-MC-101, Dkt. # 1070, at 3 (S.D.N.Y. Feb. 5, 2010) (emphasis added). This speculative fear is a far cry from establishing that the Motion Papers will "serve as reservoirs of libelous statements for press consumption." *Nixon*, 435 U.S. at 598.

It is hard to fathom how the details of the settlement – which the Settling Parties ask the Court to deem fair, reasonable and consistent with the ATSSSA – will somehow cast them in a false light. The assertion is premised on a rather dim and simplistic view of both the public and the Settling Parties themselves. The Aviation Defendants are sophisticated companies capable of explaining with little difficulty their reasons for settling. Indeed, their affidavits make their case in a few, short paragraphs. *See* Kathryn Koorenny Declaration; Ricks Frazier Declaration. They fail to explain why they would be unable to offer these same ideas up for consumption in the public sphere. Nor do they offer any plausible basis for thinking the public would draw a worse implication from news accounts providing the details of the settlement than from headlines blaring that they had settled for an undisclosed (but presumably quite large) sum. *Cf.* Natasha Singer, "Johnson & Johnson Accused of Drug Kickbacks," N.Y. TIMES, Jan. 16, 2010 (describing Omnicare's $98 million settlement as lacking "any finding of wrongdoing or any admission of liability"); Benjamin Weiser, "9/11 Wrongful-Accusation Suit Settled," N.Y. TIMES, Sept. 25, 2009 (explaining settlement for $250,000 with "no admission of fault or liability").

Even assuming the Settling Parties could make a well-founded, particularized showing that confidentiality was a critical consideration in their decision to settle, that showing is not dispositive in deciding whether confidentiality should be maintained. *Pansy*, 23 F.3d at 788 ("[T]he interest in furthering settlement should only be one factor in the district court's determination."). Indisputably, resolving complex litigation short of trial is desirable, but that goal often yields to other important values, including the traditional transparency of our judicial processes. *See, e.g.*, *In re September 11 Litig.*,

567 F. Supp. 2d 611 (S.D.N.Y. 2008) (rejecting settlements because amounts were unreasonably disproportionate to settled values). The "expediency of the moment" must not be allowed "to overturn centuries of tradition of open access." *Bank of America Nat'l Trust & Sav. Ass'n*, 800 F.2d at 345; *Pansy*, 23 F.3d at 792 (despite strong interest in settlements, "an informed public is desirable, ... access to information prevents governmental abuse and helps secure freedom, and ... , ultimately, government must answer to its citizens").

In this case, the interest of some parties in a secret settlement does not outweigh the public's right of access to information underlying an adjudication. Because of the sealing, The Times is not in a position to articulate fully the public interest in the details of the settlement. But all parties seem to agree that the particular information sought to be kept under seal is fundamental to the settlement and the Court's consideration of the pending motion for approval. *See In re September 11 Litig.*, 21-MC-101, Dkt. # 1081, at 7-8 (S.D.N.Y. Feb. 25, 2010) (describing settlement amount and allocations as "fundamental"); *In re September 11 Litig.*, 21-MC-101, Dkt. # 1113, at 3 (S.D.N.Y. Mar. 29, 2010) (explaining that opposition to settlement requires discussion of the redacted information); *In re September 11 Litig.*, 21-MC-101, Dkt. # 1119, at 2-3 (S.D.N.Y. Apr. 7, 2010) (same); *see also* Hearing Tr. Apr. 15, 2010, at 12 (noting the difficulty in evaluating and comparing cases "where a lot of important information is sealed") .

Where the court must "assess the economic underpinnings of the settlement in determining whether it was fair, sufficient, and reasonable," the public has "a right to know the contents of the materials upon which the [parties], and ultimately the court,

relied in this endeavor." *Standard Fin. Mgmt. Corp.*, 830 F.2d at 413. In this context, "as in so many other instances, justice is better served by sunshine than by darkness." *Id.*

Decisions that have provided confidentiality to settlement materials are readily distinguishable. In *Glens Falls*, the Second Circuit weighed the countervailing interest in fostering settlement against the "negligible to nonexistent presumption of access" applicable to "settlement negotiations, draft agreements, and conference statements." 160 F.3d at 857-58. Not surprisingly, the scales tipped decidedly in favor of sealing when the materials on the other side were not even judicial documents. *Id.* at 857.

Moreover, the *Glens Falls* court expressly contemplated that the final settlement would in fact "become a public record." *Id.* ("[B]efore any of the draft settlement documents can result in judicial ratification or rejection, there must be a proceeding in open court, and the document sought to be acted upon by the judicial power will be placed on file and must become a public record."). The court thus contrasted "a tentative final agreement for court action" that would become public with pre-agreement negotiations that play a "negligible role in the trial judge's exercise of Article III judicial power." *Id.* (citation and internal quotation marks omitted); *see also id.* at 856 (explaining that limiting access to negotiations would "leave the public with a settlement to review that is a fait accompli").

Likewise, in *Gambale*, the "district court was not asked to, and did not, 'approve' or otherwise act with respect to the Settlement Agreement." *Gambale*, 377 F.3d at 142 n.6. The settlement documents were "not themselves part of the court record," "were not filed with the court and were not the basis for the court's adjudication"; and "the amount [of the settlement] made its way into the transcript only in response to the court's

apparently casual questioning of counsel in the course of proceedings addressing the settlement, not the adjudication, of litigation." *Id.* at 143.

Far from the "more searching judicial scrutiny of a proposed settlement" required in this case, *Geltzer*, 2007 U.S. Dist. LEXIS 6794, at *3, the court in *Gambale* was only asked "to retain jurisdiction over the action in order to permit it to appoint a special master to hear future disputes, if any about settlement payments." 377 F.3d at 136; *see Pansy*, 23 F.3d at 780-83 (settlement agreement not a "judicial record" when not filed with the court); *Schoeps*, 603 F. Supp. 2d at 676 n.2 (settlement agreement at issue was not a judicial document because it was only "submitted at the Court's request and was not the basis of any decision or action by the Court").

Finally, to the extent that the Settling Parties choose to frame the argument as one sounding in reliance, that argument fails as well. The cases are clear: Reliance on a confidentiality order that may be lifted or modified is unreasonable and does not provide the basis for maintaining confidentiality. *Gambale*, 377 F.3d at 142 n.7 (finding any reliance on an "explicitly temporary" sealing order to be unreasonable); *SEC v. TheStreet.com*, 273 F.3d 222, 230-31 (2d Cir. 2001) ("[S]ome protective orders may not merit a strong presumption against modification [such as] protective orders that are on their face temporary or limited."); *cf. Palmieri v. New York*, 779 F.2d 861, 865 (2d Cir. 1985) (finding reliance on sealing order).

Here, the Court's Sealing Order expressly reserved the right to rule in favor of access "if, in the future, a motion for reconsideration is presented to me, either by parties to this litigation or other representatives of the public." *In re September 11 Litig.*, 2010 U.S. Dist. LEXIS 14805, at *27-28 (S.D.N.Y. Feb. 19, 2010); *see also* Hearing Tr. Apr.

15, 2010, at 12 ("I left myself an out in the order of sealing which leads to these direct proceedings. . . . I will distinguish later on and make a determination what should be sealed and what shouldn't and maybe nothing should be sealed."); *id.* at 13 ("[W]e will reserve to a later date how to deal with this whole concept of sealing."). Thus, the Settling Parties "were on notice virtually from the time it was issued that the district court's order might be lifted or modified." *Agent Orange*, 821 F.2d at 144 (rejecting assertions that confidentiality of discovery materials was essential to settlement).

Even in January 2010, when the Settling Parties announced that they had reached an agreement in principle, they acknowledged that the details may properly become public in the course of the litigation. *See* Hearing Tr. Jan. 6, 2010, at 28 (Desmond Barry: "I think there is going to come a point, perhaps, at some time during the approval process where you might have to take a second look at [confidentiality]."). And the Court made that abundantly clear. *Id.* at 29-30 ("[H]ave in mind that this order for sealing is not going to be a precedent. It's a convenience in terms of deciding the issue. . . . Prepare [your clients] now" for the possibility of disclosure.). The Settling Parties concede that as a result of the Court's expressed views on confidentiality they limited their redactions to the settlement amount and its allocation. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1070, at 2 n.4 (S.D.N.Y. Feb. 5, 2010). This apparent accession to the Court's preference for transparency undermines their claim that confidentiality was essential to the negotiated result. *Cf. In re September 11 Litig.*, 21-MC-101, Dkt. # 1071 ("Desmond T. Barry, Jr. Declaration"), at ¶ 14 (S.D.N.Y. Feb. 5, 2010) (attesting that the Settling Parties expected that "*all information* concerning settlement was confidential and

that such information would remain confidential if a settlement were reached" (emphasis added)).[5]

Under these circumstances, the parties cannot claim to have reasonably relied upon court-ordered confidentiality. *See Agent Orange*, 821 F.2d at 147 (2d Cir. 1987) ("Any reliance . . . simply was misplaced" where court had indicated that confidentiality issue would be reconsidered); *cf. TheStreet.com*, 273 F.3d at 230-31 (discussing whether reliance on protective orders is reasonable).

Accordingly, this case stands in marked contrast to those in which reasonable reliance was shown and led the court to decline to modify a protective order. For instance, the decision in *In re Franklin Nat'l Bank Securities Litig.*, 92 F.R.D. 468 (E.D.N.Y. 1981), was premised on the court's protection of the parties' reasonable reliance on court-ordered confidentiality that had been maintained for two years. *Id.* at 472, *aff'd sub nom. FDIC v. Ernst & Ernst*, 677 F.2d 230, 232 (2d Cir. 1982) (per curiam) (explaining limited grounds for modifying a confidentiality order that "has been entered and relied upon"). As the court noted, it was not a case where there were "early intervention motions by public interest groups before a settlement is consummated." 92 F.R.D. at 472. Moreover, the court's balancing of the public and private interests there does not reveal any consideration of the presumption of access to a disputed motion to approve the settlement. *See id.* at 470, 472 (contrasting the confidential settlement

[5] The Settling Parties have referred to earlier orders to justify the reasonableness of their expectation of confidentiality. *In re September 11 Litig.*, 21-MC-101, Dkt. # 1070, at 6-8, 17-18 (S.D.N.Y. Feb. 5, 2010). The April 2006 Settlements Order expressly limits confidentiality subject to "Order of the Court," *In re September 11 Litig.*, 21-MC-101, Dkt. # 1071, Ex. H, at ¶ 7, and, as the Court previously explained, that order primarily concerned the wrongful death actions and should not "extend to the property damage field." Hearing Tr. Jan. 6, 2010, at 28. Even assuming such older orders could support a reasonable expectation of confidentiality, the Sealing Order, with its facial limitation, must have ended any prior notions.

between FDIC and Ernst & Ernst with the "class action aspect of the case" that "was concluded only after a public hearing on that settlement").[6]

B. The Public's First Amendment Right of Access to the Motion Papers

In addition to the common law right of access, a First Amendment right of access also applies to the Motion Papers. A qualified First Amendment right of access applies to certain court records and proceedings. *See, e.g.*, *Lugosch*, 435 F.3d at 124 (finding a qualified First Amendment right of access to summary judgment motions). The Supreme Court has developed a two-part test – experience and logic – for determining when that First Amendment right attaches. *See Press-Enterprise Co. v. Superior Court of California* ("*Press-Enterprise II*"), 478 U.S. 1, 8 (1986).[7] Under the experience prong, the court considers whether the document has historically been available to the press and the public. *Id.* The logic prong concerns "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.*

The constitutional right plainly attaches to the Motion Papers, which are central to a court's adjudicatory powers. First, there is a long history of openness to civil proceedings. *See, e.g.*, *Hartford Courant v. Pellegrino*, 380 F.3d 83, 92-93 (2d Cir.

[6] Because the Motion Papers are "judicial documents" entitled to the presumption of access, cases dealing with the standard for modifying a protective order governing discovery or other litigation documents, such as *Martindell v. Int'l Tel. & Tel. Corp.*, 594 F.2d 291 (2d Cir. 1979), and its progeny, do not govern. *See TheStreet.com*, 273 F.3d at 231-33, 234. Even if the *Martindell* line of cases were applicable, their presumption against access would not carry the day here because, as discussed above, any reliance on the limited Sealing Order would be unjustified and the high level of public interest in adjudicatory judicial documents would overcome the presumption.

[7] Alternatively, the Second Circuit has decided whether the First Amendment right of access attaches by considering "the extent to which the judicial documents are derived from or [are] a necessary corollary of the capacity to attend the relevant proceedings." *Lugosch*, 435 F.3d at 120 (internal quotation marks omitted); *Hartford Courant v. Pellegrino*, 380 F.3d 83, 93 (2d Cir. 2004) (explaining "that the right to inspect documents derives from the public nature of particular tribunals"). Thus, if the Court decides against closing the courtroom for oral argument, discussed below, information needed "to ascertain the substance of particular proceedings" should also be disclosed. *Id.* at 93.

2004) ("The courts . . . have generally invoked the common law right of access to judicial documents in support of finding a history of openness."). This is so because the common law right "is firmly rooted in our nation's history," *Lugosch*, 435 F.3d at 119, and "predate[s] the Constitution," *Amodeo I*, 44 F.3d at 145.[8]

Likewise, the logic prong is met because openness serves the important goal of placing a check on the judicial system. *See Amodeo II*, 71 F.3d at 1048. That is especially so in a suit where the public's interest in ensuring fair and reasonable compensation within the bounds set by Congress is paramount, and where openness serves the important goals of assuring both the existence and appearance of fairness and accountability.

The constitutional right having attached, a presumption of access arises, and the Motion Papers "may be sealed only if 'specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *Aref*, 533 F.3d at 82 (quoting *Press-Enterprise II*, 478 U.S. at 13-14). Any sealing must be no broader than necessary to protect the threatened interest. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 14; *Richmond Newspapers Inc. v. Virginia*, 448 U.S. 555, 581 (1980).

Because the countervailing interests of the Settling Parties are insufficient to overcome the common law presumption of access, as discussed above, they plainly are insufficient to meet the higher test imposed for sealing by the First Amendment under the

[8] While it is appropriate to consider the related prongs of experience and logic, "logic alone, even without experience, may be enough to establish the right." *In re Copley Press, Inc.*, 518 F.3d 1022, 1026 & n.2 (9th Cir. 2008); *see Press-Enterprise II*, 478 U.S. at 10 n.3 (noting that courts have held a right of access should still apply "given the importance of the pretrial proceeding" even though it has "no historical counterpart"); *United States v. Chagra*, 701 F.2d 354, 363 (5th Cir. 1983) ("[T]he lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings.").

Press-Enterprise line of cases. *See Lugosch*, 435 F.3d at 126 (the burden on those advocating sealing is heavier under the First Amendment than under the common law).

Accordingly, access to the Motion Papers is required as a matter of constitutional law as well.

II. THE PUBLIC HAS A QUALIFIED RIGHT OF ACCESS TO ORAL ARGUMENT

The public has a qualified right of access to civil court proceedings under both the First Amendment and the common law. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984) ("[T]he public and the press possess a First Amendment and a common law right of access to civil proceedings; indeed, there is a presumption that these proceedings will be open.").

The public's common law right to attend civil proceedings is firmly established. *See Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979) ("For many centuries, both civil and criminal trials have traditionally been open to the public."). "This has been so in this country from the time of its founding, and both here and in England during Colonial times. This is no quirk of history; rather, it has long been recognized as an indispensable attribute of an Anglo-American trial." *Huminski v. Corsones*, 396 F.3d 53, 81 (2d Cir. 2004) (citations and internal quotation marks omitted); *Publicker Indus.*, 733 F.2d at 1066-67 (representatives of the public "possess a common law right of access to civil trials"); *Cowley v. Pulsifer*, 137 Mass. 392, 394 (Mass. 1884) (Holmes, J.) (explaining the "vast importance" of open civil proceedings "because it is of the highest moment that those who administer justice should always act under the sense of public

responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed").

In addition, the First Amendment "secure[s] to the public and to the press a right of access to civil proceedings." *Westmoreland v. CBS*, 752 F.2d 16, 23 (2d Cir. 1984); *see Huminski*, 396 F.3d at 81-82 (discussing experience and logic of open court proceedings in both the criminal and civil contexts); *Hartford Courant*, 380 F.3d at 91 ("The circuits, including ours, have concurred in holding that this [constitutional] right applies to civil as well as criminal proceedings."); *Publicker Indus.*, 733 F.2d at 1067-70; *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1177 (6th Cir. 1983); *New York Civ. Liberties Union v. New York City Transit Auth.*, 675 F. Supp. 2d 411, 430 (S.D.N.Y. 2009).

The Second Circuit has explained that "oral arguments relating to a motion for summary judgment fall into the category of civil proceedings to which there is a First Amendment presumption of access, as articulated in *Westmoreland*." *Lugosch*, 435 F.3d at 124. This is because a summary judgment is an "adjudication, and 'an adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny.'" *Id.* (quoting *Joy v. North*, 692 F.2d at 893); *see Publicker Indus.*, 733 F.2d 1059 (access to preliminary injunction hearing).

As explained above in Section I.A.1, the motion to approve the settlement asks for an adjudication and so the public has a constitutional right of access to oral arguments on the motion just as it does to the Motion Papers. Accordingly, oral arguments on the motion are presumptively open.

"Before closing a proceeding to which the First Amendment right of access attaches, a district court must make specific, on the record findings demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *United States v. Alcantara*, 396 F.3d 189, 199 (2d Cir. 2005) (internal quotation marks and alterations omitted). The proponent of closure must demonstrate that no alternative can adequately protect the threatened interest and any closure required is no broader than necessary. *See, e.g.*, *Press-Enterprise II*, 478 U.S. at 13-14; *In re The Herald Co.*, 734 F.2d 93, 100 (2d Cir. 1984). Finally, any order limiting access must be effective; the public's rights must not be restricted for a futile reason. *See Press-Enterprise II*, 478 U.S. at 14 (must demonstrate that substantial probability exists that defendant's rights would be prejudiced by publicity "that closure would prevent"); *In re the Herald Co.*, 734 F.2d at 101 (public exposure of "information sought to be kept confidential" may "preclude a closure order on this account").

For the reasons discussed in Section I above, closure of oral arguments is not justified under either the First Amendment analysis or the common law balancing test.

CONCLUSION

For all of the foregoing reasons, The Times respectfully requests that the Court unseal the Motion Papers, including all references to the settlement amount and its allocation; allow the public to attend the oral argument on the motion to approve the settlement; and grant such other relief as the Court deems just and proper.

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