IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI
NORTHERN DIVISION

MARY TROUPE, et al. **PLAINTIFFS**

VS. **CIVIL ACTION NO. 3:10-cv-153-HTW-MTP**

HALEY BARBOUR, et al. **DEFENDANTS**

MEMORANDUM OF AUTHORITIES SUPPORTING
DEFENDANTS' RESPONSE IN OPPOSITION
TO MOTION TO INTERVENE AND VACATE PROTECTIVE ORDER

The protective order governing the ongoing settlement negotiations and negotiation-related documents in this case should not be disturbed for essentially one reason: the *Clarion-Ledger* fails to appreciate the stark distinctions between ongoing settlement negotiations and documents generated to facilitate them, and a completed settlement agreement.

Our local rules expressly protect the confidentiality of litigants' settlement negotiations and negotiation-related documents. And weighty federal and state policies favoring the compromise of lawsuits justify routinely treating litigants' settlement negotiations and negotiation-related documents as confidential. However, litigants' completed settlement agreements, particularly those involving matters of public concern or filed with the Court, are normally not confidential absent compelling reasons.

The litigants here, including the plaintiffs, defendants David J. Dzielak and Diana S. Mikula, in their capacities as officers of the State of Mississippi's Division of Medicaid and Department of Mental Health ("defendants"), and the United

States Department of Justice ("DOJ"), are negotiating a settlement of this complex lawsuit and related claims. To facilitate the alternative dispute resolution process, a third-party neutral expert evaluated the State's children's mental health service array and parties' claims, and reported its critique to the parties. The parties are utilizing the report in their negotiations and agreed it would remain confidential. The Court has entered a protective order deeming the ongoing negotiations, and specifically the report, confidential. The parties have relied, and are relying, on the confidentiality of the report in their negotiations.

As the Court knew when it entered the protective order, the *Clarion-Ledger* has sued the Department of Mental Health in state court to obtain the report. Now, the newspaper seeks to intervene in this case and vacate the protective order, by mistakenly contending the report should be generally-accessible, like a finalized, court-approved settlement agreement. Granting the *Clarion-Ledger*'s requested relief would be inconsistent with the Court's rules, federal and state policies applicable to settlement negotiations and documents, and the federal case law directly on point. The Court should reaffirm its protective order, and deny the newspaper's motion.

FACTS

Plaintiffs, a group of represented children allegedly suffering from a variety of behavioral, emotional, and mental health disorders, filed this class action lawsuit on March 10, 2010. [Complaint, Docket No. 1]. They contend the State of Mississippi has failed to provide them intensive home- and community-based

services medically necessary to address their mental health needs, and are suing under the federal Medicaid Act, the Americans with Disabilities Act ("ADA"), and the Rehabilitation Act. [*Id.*].

On April 8, 2011, DOJ appeared as an interested party by filing a "Statement of Interest of the United States of America," pursuant to 28 U.S.C. § 517, supporting plaintiffs' claims. [Statement of Interest, Docket No. 41].[1] Effectively at various times since February 2012, to present, the parties have attempted to resolve the overlapping claims asserted by DOJ and the plaintiffs. The complex and ongoing alternative dispute resolution process has required considerable efforts by all sides. Defendants' attorneys and representatives alone have already devoted hundreds of hours and many resources to pursuing a settlement.

In 2012 and 2013, attorneys and agency officials exchanged various settlement proposals and correspondence, and met in-person and on conference calls on numerous occasions to negotiate a potential settlement. Negotiations continued into 2014, culminating in a structured agreement between DOJ and defendants

[1] DOJ filed its "Statement of Interest" in the midst of its then-ongoing investigation regarding the State's mental health and developmental disabilities programs. Between February and December 2011, DOJ targeted the State's compliance with various federal laws, including the ADA, Medicaid provisions of the Social Security Act, and the Individuals with Disabilities Education Act. [December 22, 2011 DOJ Findings Letter, Docket No. 48-1]. DOJ's investigation addressed a broad scope of state services, but expressly overlapped with the plaintiffs' children's mental health claims in this lawsuit. [*Id.* at pp. 26-31]. DOJ's 2011 findings letter suggested remedial recommendations, invited the State to enter into "structured negotiations," and politely explained that, in the event negotiations were unsuccessful, DOJ would "take appropriate action, including initiating a lawsuit, to obtain redress for outstanding concerns associated with the State's compliance with the ADA." [*Id.* at p. 33].

governing the settlement efforts. The agreement addressed certain remedial measures the State would implement immediately, and established a process for the parties to assess and negotiate the settlement of all DOJ's and plaintiffs' claims. [August 29, 2014 Agreement, Docket No. 71-2].

Significantly, the August 2014 agreement provided the State would engage the Technical Assistance Collaborative ("TAC") organization, a well-recognized expert in the provision of mental health services and compliance with federal law, to provide assessments of the State's existing services, guidance on program development, and recommendations related to program improvements. [*Id.*, at pp. 3-4]. Defendants and DOJ agreed "TAC will provide assistance to both parties during negotiations to find a global resolution." [*Id.*, at p. 4]. With respect to the claims in this lawsuit, they agreed to "engage in intensive negotiations for the purpose of reaching a comprehensive settlement agreement to resolve the United States' claims relating to service for children with mental health conditions," and to "include counsel for the *Troupe* plaintiffs in negotiations and attempt to resolve the *Troupe* claims within the agreement." [*Id.*]. To facilitate the voluntary alternative dispute resolution process, they agreed

> the State will contract with an independent consultant from TAC with system expertise in successfully serving children with significant mental health needs in community settings. The consultant will assist the parties during settlement discussions by assessing the State's existing service array, quality, and availability, and make recommendations for necessary improvements in order to address the issues raised in the *Troupe* litigation.

[*Id.*, at p. 5 (emphasis added)]. Further, the settlement discussions were deemed

confidential, including information and reports furnished by TAC designed to facilitate the negotiations:

> [d]ocuments created for use in the parties' negotiations, including reports provided by or to TAC, and statements made between the parties and/or TAC regarding this matter are not admissible as evidence because they are confidential and protected by Rule 408 of the Federal Rules of Evidence unless the State and the Department of Justice agree otherwise. In order to ensure the parties may work candidly with TAC, neither party will call TAC as a witness or seek discovery from TAC in the event litigation is necessary.

[*Id.*, at p. 6].

After executing the August 2014 agreement, defendants and DOJ proceeded with settlement negotiations facilitated through TAC's assistance and assessments, exchanged draft agreements, scheduled future settlement meetings involving the parties, and made plans to include plaintiffs' counsel in the negotiations. On February 12, 2015, TAC produced a "draft report" regarding Mississippi children's mental health issues. Later, in March 2015, TAC issued its final report on that subject to facilitate subsequent settlement negotiations.

On March 23, 2015, a former *Clarion-Ledger* reporter requested that the Mississippi Department of Mental Health produce a copy of TAC's March 2015 Report pursuant to the Mississippi Public Records Act. [March 23, 2015 Email, Docket No. 71-5]. On March 26, 2015, the Department denied the request. [March 26, 2015 Letter, Docket No. 71-6]. The Department's response explained that TAC's March 2015 Report, and other information exchanged in the ongoing settlement negotiations, are specifically exempted from the Public Records Act under

Mississippi Code Section 25-61-11,[2] integral to the parties' confidential settlement negotiations subject to this Court's local alternative dispute resolution rules, and did not have to be disclosed on those and numerous other grounds. [*Id.*].

On April 6, 2015, the *Clarion-Ledger* sued the Department of Mental Health in Hinds County Chancery Court over the Department's public records response. [*Clarion-Ledger* Complaint, Docket Nos. 68-1 & 71-1]. Among other things, the newspaper claimed an entitlement to TAC's March 2015 Report because "a protective or confidentiality order covering the TAC Report has not been entered in the *Troupe* case." [*Id.* at ¶ 14]. On April 24, 2015, defendants moved this Court for a protective order in light of the *Clarion-Ledger*'s admission. [Motion for Protective Order, Docket No. 68]. Defendants fully explained why the parties needed a protective order and attached a copy of the *Clarion-Ledger*'s state court complaint. [*See* Motion for Protective Order at Ex. "1," Docket No. 68-1]. Plaintiffs responded to the motion, consented to be bound by the confidentiality provisions of this Court's Local Rule 83.7, and expressly agreed that

> statements made, and documents generated or exchanged by one of the parties to negotiations or the Technical Assistance Collaborative

[2] Section 25-61-11 provides that the Act "shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter." The Legislature obviously, and expressly, enacted the provision to ensure privileged or confidential documents deemed as such under any courts' rules, decisions, and/or orders do not fall within the Act. *See* ***Estate of Cole v. Ferrell***, 163 So. 3d 921, 925 (Miss. 2012) (Section 25-61-11 makes clear "the Act does not conflict with the court's authority to declare a public record confidential or privileged").

> ("TAC") in the course of settlement negotiations, including, but not limited to, the March 2015 TAC Mississippi Children's Behavioral Needs Assessment, shall not be disclosed by any of the parties to anyone who is not a party, counsel, or an expert participating in the confidential settlement negotiations unless all parties agree otherwise in writing.

[Motion Response at ¶¶ 9-10, Docket No. 69]. On May 6, 2015, after carefully reviewing the parties' written submissions, and conducting a telephonic conference with counsel, the Court entered an agreed protective order, finding and mandating that

> This matter is before the Court on a Motion for Protective Order regarding documents exchanged between the Plaintiffs, Defendants, and the United States Department of Justice, appearing in this litigation pursuant to 28 U.S.C. § 517, in the course of confidential settlement negotiations through which the parties to the negotiations are attempting to settle this lawsuit and related claims asserted by the United States.
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> IT IS HEREBY ORDERED:
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> 1. There are ongoing confidential settlement negotiations governed by this Court's rules;
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> 2. Statements made, and documents generated or exchanged by one of the parties to the negotiations or the Technical Assistance Collaborative ("TAC") in the course of the settlement negotiations, including, but not limited to, the March 2015 TAC Mississippi Children's Behavioral Health Needs Assessment, shall not be disclosed by any of the parties to the negotiations to anyone who is not a party, counsel, or an expert participating in the confidential settlement negotiations, unless the parties to the negotiations expressly agree otherwise in writing; and
>
> 3. Counsel for the defendants shall provide counsel for plaintiffs with a copy of the March 2015 TAC Mississippi Children's Behavioral Health Needs Assessment, and said document shall be subject to the foregoing terms of the Court's order.

[Order, Docket No. 70].

Relying on the protective order, and consistent with the terms specified in its paragraph three, defendants provided plaintiffs' counsel with a copy of TAC's March 2015 Report. The parties, including representatives of plaintiffs, defendants and DOJ, have since participated in further settlement negotiations, and currently plan to conduct future settlement negotiations keyed on the issues identified in the report.

Meanwhile, the *Clarion-Ledger* has not taken any action in its state court lawsuit against the Department of Mental Health. Instead, on June 24, 2015, the newspaper filed its "Motion to Intervene and Vacate Protective Order" seeking to undo this Court's protective order. [Motion, Docket No. 71]. The *Clarion-Ledger*'s motion should be denied for the reasons explained below.

THE *Clarion-Ledger*'s MOTION SHOULD BE DENIED

I. The Court's ADR Rules and the policies behind them mandate denying the Clarion-Ledger's motion.

TAC is an expert third-party neutral engaged to facilitate the ongoing settlement negotiations encompassing the claims in this lawsuit. Everyone – except, of course, the *Clarion-Ledger* – acknowledges and agrees the confidentiality provisions of this Court's Local Rule 83.7(j) governing alternative dispute resolution actions apply to TAC's March 2015 Report.

Rule 83.7, enacted pursuant to Congress's Alternative Dispute Resolution Act of 1998, is consistent with the express federal policy favoring settlement of civil

actions and "designed to provide access to effective ADR techniques and to encourage mutually satisfactory resolutions of disputes in all stages of civil litigation." L.U.R.Civ. 83.7(a). The Rule applies to "any activity in which the parties mutually engage by consent" to resolve claims without the necessity of trial, including activities "in which impartial persons assist parties in reaching settlements . . . facilitate communications between the parties and assist them in their negotiations[, and] [w]hen appropriate . . . may also offer objective evaluations of cases and may make settlement recommendations." L.U.R.Civ. 83.7(d)(1)-(2). And, importantly, to further alternative dispute resolution activities' purposes under the Rule, settlement-related communications are confidential, not evidence in any proceeding, and "confidential information or data related to a mediation or settlement conference" is not subject to compelled disclosure absent extremely limited overriding circumstances. L.U.R.Civ. 83.7(j)(1), (2).

The parties are relying on Rule 83.7(j)'s confidentiality provisions, and the Court's protective order, as demonstrated by the August 29, 2014 agreement between DOJ and defendants [Docket No. 71-2], the parties' submissions on the motion for protective order [Docket Nos. 68 & 69], and the protective order itself [Docket No. 70]. Rule 83.7(j)'s confidentiality provisions expressly provide

> [t]he only circumstances which may make it appropriate for a party, a party's attorney, a party's representative, a mediator or a judicial officer to disclose a confidential communication arising from proceedings governed by this Local Rule is a finding by the court that such testimony or other disclosure is necessary to:
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> (A) prevent a manifest injustice;

(B) enforce a settlement;

(C) help establish a violation of criminal law; or

(D) prevent harm to the public health or safety.

L.U.R. Civ. 83.7(j)(4). The *Clarion-Ledger* cannot (and has not even attempted to) prove any of the circumstances prescribed in subsections (A) through (D) are present here. That justifies, in and of itself, denying the newspaper's requested relief.

Not only is maintaining the confidentiality of the parties' ongoing settlement negotiations, generally, and TAC's March 2015 Report, specifically, consistent with Rule 83.7, it is also consistent with the federal and state policies behind such rules. Federal local court rules preserving settlement communications, and limiting voluntary or compelled disclosures to third-parties, foster confidence and trust in the alternative dispute resolution process, which is an interest applicable to settlement negotiations during all stages of litigation, whether before or after a lawsuit is filed. ***Judicial Watch, Inc. v. United States Dept. of Justice***, 2014 WL 4178291, at *3-4 (D. D.C. Aug. 22, 2014); ***Sheldone v. Pennsylvania Turnpike Comm'n***, 104 F.Supp.2d 511, 513-14 (W.D. Pa. 2000). Similarly, Mississippi court rules protect the alternative dispute resolution process and the confidentiality of information exchanged during such negotiations. *See* Mississippi's Mediation Rules for Civil Litigation, Rules I and VII; Miss. R. Evid. 408 cmt. The Mississippi Supreme Court recognizes the State's strong public policy favoring settlements, *see* ***Chantey Music Publishing, Inc. v. Malaco, Inc.***, 915

So. 2d 1052, 1055 (Miss. 2005) ("compromise by way of mediation or otherwise, is favored in the state of Mississippi"), and that the confidentiality of settlement negotiations and agreements, when necessary, facilitate dispute resolution, *see* ***Estate of Cole***, 163 So. 3d at 926 ("confidentiality helps facilitate settlement and, in turn, conserves judicial and private resources . . . [t]hus, public policy provides a basis for preserving the confidentiality of settlement agreements when practical . . . [and,] [c]onversely, failure to preserve confidentiality could discourage settlement.") (citing ***Hasbrouck v. BankAmerica Housing Serv.***, 187 F.R.D. 453, 458-59 (N.Y. N.D. 1999)).

Additionally, Mississippi's well-established policy favoring settlement and confidentiality in settlement negotiations is not diminished in matters, like this one, involving settlement communications and/or information which third-parties – such as the *Clarion-Ledger* – contend are public records subject to the Mississippi Public Records Act. The Act provides for disclosure of public records, but, importantly, also specifically provides that public disclosure must yield to federal and state laws governing confidential or privileged documents and communications. Miss. Code Ann. § 25-61-11; *see also* ***Estate of Cole***, 163 So. 3d at 925.

Local Rule 83.7, and the sound policies supporting it, trump any purported "presumption" of public disclosure under the Public Records Act when it comes to preserving the confidentiality of voluntary settlement negotiations under this Court's rules. Otherwise, in this case, the State would not have voluntarily agreed to have TAC facilitate the parties' settlement negotiations by creating the March

2015 Report in the first place. Moreover, if Rule 83.7 and the policies undergirding it are not controlling here, no public entities would ever voluntarily or involuntarily attempt to negotiate a resolution of any disputes before this Court. The Public Records Act would render this Court's rules and the established state and federal policies of protecting settlement negotiations meaningless, and place the defendants here on an entirely different, un-level, playing field than all other litigants and potential litigants.[3]

In sum, the parties agree the confidentiality provisions of Rule 83.7 govern their ongoing negotiations, and the Court confirmed that its rules apply to the negotiations in issuing a protective order. That finding fully defeats the *Clarion-Ledger*'s motion and requested relief.

II. Even if Rule 83.7 does not apply, the *Clarion-Ledger*'s motion should still be denied.

A. The *Clarion-Ledger*'s reliance on a right to attend open court or obtain judicial records, and *Pansy v. Borough of Stroudsburg*, is misplaced.

Whether or not Rule 83.7 alone disposes of the *Clarion-Ledger*'s arguments, the Court's protective order still should not be disturbed. The *Clarion-Ledger*'s

[3] If the *Clarion-Ledger* is correct, the confidentiality of settlement communications, documents, and other information in federal lawsuits would turn on the public entity status of a party, rather than the character of the settlement-related information or proceeding. For example, the newspaper, and the general public, would be entitled to obtain confidential settlement memoranda submitted to the Court, or to attend settlement conferences and settlement negotiation sessions in person, merely because a public entity is one of the litigants. That would obliterate any incentive a public entity would ever have to attempt a negotiated settlement of a case, and be entirely inconsistent with this Court's rules, and federal and state law.

putative justification for intervening, and for vacating the protective order, is premised entirely on (1) its asserted general right to attend open court proceedings and obtain judicial records, and (2) a balancing test for determining when an executed final settlement agreement between federal litigants should remain confidential, if challenged. Those contentions are entirely off-base. The newspaper's dispute does not involve any proceedings in open court, access to any judicial records, or the confidentiality of a completed settlement agreement. Rather, the issue here is whether TAC's March 2015 Report – a document created for settlement purposes, and used by the parties in conjunction with ongoing confidential settlement negotiations – should properly remain confidential. Undoubtedly, the answer is yes.

The *Clarion-Ledger*'s argument for intervening and undoing the Court's protective order is a misleading syllogism. As for the newspaper's first flawed premise, there is no such thing as a right of unlimited public access to ongoing settlement negotiations in a federal lawsuit. The authorities cited by the newspaper do not establish any such unqualified right.

It is true, as the *Clarion-Ledger* asserts, that the press is entitled to notice and an opportunity to protest the closure of a criminal trial, as recognized in ***Globe Newspaper v. Superior Ct.***, 457 U.S. 596 (1982) and ***Gannett River States Publ'g Co. v. Hand***, 571 So. 2d 941 (Miss. 1990). But, an entitlement to view and report on a criminal trial (or any trial) is not implicated here. The ongoing settlement negotiations to which the *Clarion-Ledger* seeks access are not criminal

proceedings in open court, or even any proceedings in open court at all.

As the newspaper also argues, the press has a "general right to inspect and copy public records and documents, including judicial records and documents." ***Nixon v. Warner Comm'ns***, 435 U.S. 589, 597 (1978). However, the parties' documents and communications subject to this Court's protective order, including the TAC report at issue, have not been filed with the Court, or reviewed by the Court. TAC's March 2015 report is not part of the Court's public or judicial record. The parties requisitioned the report, and are utilizing it, to candidly evaluate the claims in this lawsuit for purposes of their confidential settlement negotiations. Any "right" to review publicly-filed documents described by ***Nixon***, and the *Clarion-Ledger*'s other cited inapposite authorities, is irrelevant here.

In short, the *Clarion-Ledger* has failed to articulate any valid basis for intervening to contest the Court's protective order. The newspaper has no right to access ongoing settlement negotiations or documents, such as TAC's March 2015 report, developed for, and used in conjunction with, the negotiations. Absent a right to intervene and assert, obviously, the newspaper's request to intervene lacks merit.

With respect to the newspaper's second faulty premise, even assuming the *Clarion-Ledger* has a right to intervene in this case, it has failed to justify vacating the Court's protective order. The newspaper's argument relies exclusively on ***Pansy v. Borough of Stroudsburg***, 23 F.3d 772 (3rd Cir. 1994). ***Pansy*** is entirely distinguishable. This Court should not adopt or apply its rationale as the *Clarion-*

Ledger desires.

In ***Pansy***, members of the press sought access to a settlement agreement executed in conjunction with a Pennsylvania borough's settlement of a Section 1983 suit. ***Id.***, at 775. The parties presented the completed agreement to the district court, but never filed it, and the court ordered the agreement's terms must be kept confidential. ***Id.***, at 776. The press sought to intervene and set aside the confidentiality order, and the district court denied the motion. ***Id.***, at 776-77.

On appeal, the Third Circuit rejected the press organizations' claimed right of access to the unfiled settlement agreement as a "judicial record." ***Id.***, at 780-83. However, ***Pansy*** opined the district court should have balanced the various public and privacy interests at stake, and considered numerous factors – such as, whether the party seeking confidentiality of the completed agreement demonstrated "good cause," whether a public entity or official was involved, whether a particularized need for confidentiality of the settlement agreement existed, whether modification of an existing confidentiality order was at issue, whether the parties relied on the confidentiality order, and whether the order impacted other laws affecting access to the settlement agreement – to determine whether the completed settlement agreement should have been deemed confidential. ***Id.***, at 784-92. In light of the balancing test established, ***Pansy*** remanded the case for the district court to apply it. ***Id.***, at 792.

The ***Pansy*** analysis is useless for determining whether to vacate this Court's

protective order governing this case's settlement negotiations. TAC's March 2015 Report, and the parties' other settlement negotiation-related documents and communications in this case, are not a consummated settlement agreement like the document at issue in ***Pansy***. No federal presumption of public access to settlement *negotiations* or *negotiation-related documents* exists. Maintaining a settlement agreement's post-settlement confidentiality is not the issue before the Court. Applying ***Pansy***'s rationale in this case to vacate the Court's protective order would be blatantly inappropriate.

B. Federal authorities evaluating orders protecting the confidentiality of settlement negotiations, and negotiation-related documents, justify this Court's protective order.

Instead of relying on ***Pansy***'s guideposts for judging whether to allow public access to an executed settlement agreement, the Court can and should look to federal authorities where the confidentiality of *settlement negotiations* and *settlement negotiation-related documents* was actually at issue. *See* ***United States v. Glen Falls Newspapers***, 160 F.3d 853, 855-58 (2nd Cir. 1998); ***Landco Equity Partners, LLC v. City of Colorado Springs, Colo.***, 259 F.R.D. 510, 513-15 (D. Colo. 2009); ***B.H. v. Ryder***, 856 F.Supp. 1285, 1288-92 (N.D. Ill. 1994).

In ***Glen Falls***, a newspaper and a reporter sought to intervene in a long-pending federal CERCLA lawsuit against governmental entities to vacate a consent protective order deeming as confidential

> "all past, present and future drafts of the proposed Stipulation of Settlement and Order on Consent, or draft settlement agreements

> referred to by whatever name, and engineering reports, financial reports, attorney work product, and correspondence between counsel for the parties and participants prepared for the purpose of settlement discussions and negotiations in this case . . .."

Id., at 854 (quoting district court's protective order). Precisely as in this case, the newspaper sued the governmental entities in New York state court, under New York's Freedom of Information Law, to obtain documents utilized by the parties in the settlement negotiations. ***Id.***, at 855. The federal district court subsequently entered the above-quoted consent protective order to protect the documents and the ongoing settlement negotiations, and the state court denied the newspaper's relief. ***Id.*** Then, the newspaper moved the federal district court to intervene and vacate the consent protective order, and the district court denied the newspaper's motion, finding that

> the presumption of public access to settlement conferences, settlement proposals, and settlement conference statements is very low or nonexistent under either constitutional or common law principles. Weighted against this presumption is the strong public policy which encourages the settlement of cases through a negotiated compromise.
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> After a careful consideration of the history of these proceedings, it is the Court's opinion that granting the relief sought by the intervenors, which would open all of the settlement negotiation processes to the public, would delay if not altogether prevent a negotiated settlement of this action. This finding alone warrants the denial of the motion.

Id., at 855-56; *see also* ***United States v. Town of Moreau, N.Y.***, 979 F.Supp. 129, 136 (N.D. N.Y. 1997).

On the newspaper's appeal, the Second Circuit agreed with the district court

"that opening settlement negotiations in this case prior to the crafting of a tentative agreement would not be in the public interest, nor required by the Constitution or laws," ***Glen Falls***, 160 F.3d at 856, and affirmed the denial of the newspaper's relief, ***id.***, at 858. The appellate court's conclusion rested on an analysis of four interrelated considerations.

First, ***Glen Falls*** recognized "that fostering settlement is an important Article III function of the federal district courts." ***Id.***, at 856. District courts have "'the power to prevent access to settlement negotiations when necessary to encourage the amicable resolution of disputes,'" ***id.*** (quoting ***City of Hartford v. Chase***, 942 F.2d 130, 135 (2nd Cir. 1991)), and "may aid in crafting a settlement by enjoining the interference of others," ***id.*** (citing ***In re Baldwin-United Corp.***, 770 F.2d 328, 337-38 (2nd Cir. 1985)).

Second, "[i]n addition to recognizing that federal trial judges have an important role in settling cases," the court has "specifically endorsed the 'larger role' of the court in the resolution through settlement of suits 'affecting the public interest.'" ***Id.*** (quoting ***City of Hartford***, 942 F.2d at 136). "Where a case is complex and expensive, and resolution of the case will benefit the public, the public has a strong interest in settlement." ***Id.***, at 856-57. Accordingly, district courts "must protect the public interest, as well as the interests of the parties, by encouraging the most fair and efficient resolution," which "includes giving the parties ample opportunity to settle the case." ***Id.***, at 857.

Third, in light of its first two considerations, ***Glen Falls*** explained the

"settlement discussions and documents in this case do not carry a presumption of public access," because "access to settlement discussions and documents has no value to those monitoring the exercise of Article III judicial power by the federal courts," and since the district court "cannot act upon those discussions or documents until they are final, and the judge may not be privy to all of them." ***Id.*** Further, "discussions and documents exchanged before an agreement has been reached in this case therefore play a 'negligible role,' in the trial judge's exercise of Article III judicial power until they are merged into a tentative final agreement for court action, thereby becoming public." ***Id.*** And, no presumption of public access to settlement negotiation-related documents was apparent given that New York law required a final settlement be made public at an open meeting, while also providing access could be exempted by state or federal law. ***Id.***

Fourth, given the lack of any presumption of public access to the settlement negotiation-related materials, the court weighed "competing considerations" against it. ***Id.*** Such considerations included "whether release of the materials is likely to impair in a material way the performance of Article III functions," such as "fostering settlement of any case or controversy," and courts' "even larger role in settling cases such as this affecting the public interest." ***Id.***

Considering these four factors – (1) the importance of settlement and the court's authority to encourage it, (2) the public's interest in settlement of complex and expensive disputes, as opposed to merely the subject matter of the litigation, (3) the lack of a presumption of public access to settlement discussions and documents,

and (4) competing considerations, such as potential impairment of settlement efforts if negotiation-related documents were released – the district court's conclusions were undoubtedly correct. For, as ***Glen Falls*** agreed with the district court, "settlement negotiations in this case would be chilled to the point of ineffectiveness if draft materials were to be made public." ***Id.***, at 857-58. Indeed, "[f]ew cases would ever be settled if the press or public were in attendance at a settlement conference or privy to settlement proposals." ***Id.***

Finally, and perhaps most important, ***Glen Falls*** explicitly based its affirmation of the district court on recognizing that settlement negotiation-related materials "are not part of the public record of a federal case," district courts "may seal documents in order to foster settlement," and "that the district court's power to seal documents 'takes precedence over FOIA rules that would otherwise allow those documents to be disclosed.'" ***Id.*** (quoting ***City of Hartford***, 942 F.2d at 135-36).

In this case, the ***Glen Falls*** analysis fully supports the Court's protective order governing the parties' confidential settlement negotiations, and specifically TAC's March 2015 Report. Settling this lawsuit is important to the parties and this Court undoubtedly has the authority, if not a duty, to encourage the parties to settle by protecting their negotiations. The public has an interest in the parties settling this complex and expensive class action lawsuit, now pending for nearly five years, not merely an interest in the lawsuit's subject matter.[4] TAC's March

[4] Moreover, the *Clarion-Ledger*'s own submissions prove the Court's protective order is not preventing its reporters from gathering and reporting facts regarding

2015 Report has not been presented to the Court in the context of judicial proceedings. The report was expressly developed to facilitate the parties' settlement negotiations, and pursuant to an agreement that it should remain confidential. Further, requiring the defendants, or anyone else, to release the report by lifting the Court's protective order would adversely affect the parties' ongoing negotiations.

The defendants have relied, and are relying upon the confidentiality of the report, and other documents and communications exchanged in the course of the parties' negotiations, and the Court's protective order. Eliminating that confidentiality, at the *Clarion-Ledger*'s behest or otherwise, would prematurely destroy the parties' negotiations. That is all the Court must recognize to deny the newspaper's motion and requested relief.

CONCLUSION

Whether on account of the Court's rules governing confidentiality of settlement negotiations and related documents, the federal case law directly on point, or both, this Court should deny the *Clarion-Ledger*'s requested relief. If a settlement is reached in this matter, the written agreement may be disclosed to the

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children's mental health issues in Mississippi. If the newspaper's lawyers can obtain an affidavit from a children's mental health advocate who provided information to TAC used in formulating the March 2015 Report [Affidavit of Joy Hogge, Docket No. 71-3], then surely the newspaper's reporters can interview that same source (and any others) and write stories about any information supplied to TAC, without any need to compromise the parties' confidential settlement negotiations or their reliance on TAC's March 2015 Report remaining confidential.

newspaper and the public. In the meantime, for the reasons explained above, the newspaper's motion to intervene and vacate this Court's protective order should be denied.

THIS the 8th day of July, 2015.

Respectfully submitted,

DAVID J. DZIELAK in his official capacity as Director of the Mississippi Division of Medicaid, and DIANA S. MIKULA, in her official capacity as Executive Director of the Mississippi Department of Mental Health

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CERTIFICATE OF SERVICE

I, Harold E. Pizzetta, III, Assistant Attorney General for the State of Mississippi, do hereby certify that on this date, I electronically filed the foregoing document with the Clerk of Court using the ECF system which sent notification of such filing to all counsel of record.

THIS the 8th day of July, 2015.

S/Harold E. Pizzetta, III
Harold E. Pizzetta, III