

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BERNADETTE FEDORKA and PAUL  
FEDORKA, husband and wife,

Plaintiffs,

v.

UNIVERSITY OF PITTSBURGH  
MEDICAL CENTER, UNIVERSITY OF  
PITTSBURGH PHYSICIANS, PABLO  
SANCHEZ, M.D., PH.D., FACS, JAMES  
D. LUKETICH, M.D., FACS, TAKASHI  
HARANO, M.D., and PATRICK CHAN,  
M.D.,

Defendants.

---

JAMES D. LUKETICH, M.D., FACS

Third-Party Plaintiff,

v.

JONATHAN D’CUNHA, M.D., Ph.D, and  
LARA WALEED SCHAHEEN, M.D.,

Third-Party Defendants.

) CIVIL DIVISION

)  
) Case No. GD-18-017117

) **EMERGENCY MOTION TO ACCESS**  
) **FILINGS AND EXHIBITS**

) Filed on behalf of Intervenor,

) Torsten Ove and The Pittsburgh Post-Gazette

) Counsel of Record for this Party:

) Patrick K. Cavanaugh, Esquire

) PA ID No. 72960

) Zachary N. Gordon

) PA ID No. 318808

) Jonathan R. Bruno

) PA ID No. 327650

) DEL SOLE CAVANAUGH STROYD LLC

) 3 PPG Place, Suite 600

) Pittsburgh, PA 15222

) Tel: (412) 261-2393

) Fax: (412) 261-2110

## **NOTICE OF PRESENTATION**

PLEASE TAKE NOTICE that the within **Emergency Motion** will be presented to The Honorable Philip A. Ignelzi on August 24, 2022 2022, at 9:00 a.m., in Courtroom 820 of the City-County Building or as soon thereafter as meets the convenience of the Court.

## **CERTIFICATE OF SERVICE**

I hereby certify that on the 23<sup>rd</sup> day of August 2022, a copy of the within Emergency Motion was served upon the following via email:

Thomas J. Duffy, Esquire  
Duffy & Fulginiti  
One Liberty Place  
1650 Market Street, 55th Floor  
Philadelphia, PA 19103  
[tjd@duffyfirm.com](mailto:tjd@duffyfirm.com)  
(Counsel for Plaintiffs)

Patrick J. Loughren, Esquire  
Loughren, Loughren & Loughren, P.C.  
8050 Rowan Road, Suite 601  
Cranberry Township, PA 16066  
[ploughren@loughren.com](mailto:ploughren@loughren.com)  
(Counsel for Plaintiffs)

Robert J. Ridge, Esquire  
Allen M. Lopus, Esquire  
Bryon M. Chowka, Esquire  
CLARK HILL PLC  
301 Grant Street, 14th Floor  
One Oxford Center  
Pittsburgh, PA 15219  
[rridge@clarkhill.com](mailto:rridge@clarkhill.com)  
[alopus@clarkhill.com](mailto:alopus@clarkhill.com)  
[bchowka@clarkhill.com](mailto:bchowka@clarkhill.com)  
(Counsel for Defendants, UPMC, University of Pittsburgh Physicians, Pablo Sanchez, M.D., Ph.D., FACS, James D. Luketich, M.D., FACS, Takashi Harano, M.D. and Patrick Chan, M.D.)

Robert M. Barnes, Esquire  
Scott D. Livingston, Esquire  
Joshua A. Kobrin, Esquire  
Lauren A. Melfa Catanzarite, Esquire  
Leland P. Schermer, Esquire  
Marcus Shapira LLP  
One Oxford Centre, 35th Floor  
Pittsburgh, PA 15219  
[rbarnes@marcus-shapira.com](mailto:rbarnes@marcus-shapira.com)  
[livingston@marcus-shapira.com](mailto:livingston@marcus-shapira.com)  
[kobrin@marcus-shapira.com](mailto:kobrin@marcus-shapira.com)  
[catanzarite@marcus-shapira.com](mailto:catanzarite@marcus-shapira.com)  
[schermer@marcus-shapira.com](mailto:schermer@marcus-shapira.com)  
(Counsel for Additional Defendants, Lara Schaheen, M.D. and Jonathan D’Cunha, M.D.)

William F. McDevitt, Esquire  
Wilson, Elser, Moskowitz, Edelman & Dicker, LLP  
Two Commerce Square  
2001 Market Street, Suite 3100  
Philadelphia, PA 19103  
[William.McDevitt@wilsonelser.com](mailto:William.McDevitt@wilsonelser.com)  
(Counsel for Third-Party Defendant, Lara Waleed Schaheen, M.D.)

Efrem M. Grail, Esquire  
Brian C. Bevan, Esquire  
Julia Gitelman, Esquire  
The Grail Law Firm  
428 Boulevard of the Allies, Suite 500  
Pittsburgh, PA 15219  
[egrail@graillaw.com](mailto:egrail@graillaw.com)

[bbevan@grailaw.com](mailto:bbevan@grailaw.com)

[jgitelman@grailaw.com](mailto:jgitelman@grailaw.com)

(Counsel for Defendant, James D. Luketich,  
M.D.)

John C. Conti, Esquire

Howard A. Chajson, Esquire

Grant W. Cannon, Esquire

DICKIE, MCCAMEY & CHILCOTE, P.C.

Two PPG Place, Suite 400

Pittsburgh, PA 15222-5402

[JConti@dmclaw.com](mailto:JConti@dmclaw.com)

[HChajson@dmclaw.com](mailto:HChajson@dmclaw.com)

[gcannon@dmclaw.com](mailto:gcannon@dmclaw.com)

(Counsel for Defendants, UPMC, University of  
Pittsburgh Physicians, Pablo Sanchez, M.D.,  
Ph.D., FACS, James D. Luketich, M.D., FACS,  
Takashi Harano, M.D. and Patrick Chan, M.D.)

*/s/ Zachary N. Gordon* \_\_\_\_\_

Zachary N. Gordon, Esquire

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BERNADETTE FEDORKA and ) CIVIL DIVISION  
PAUL FEDORKA, husband and wife, )  
)  
Plaintiffs, )  
)  
v. ) Case No. GD-18-017117  
)  
UNIVERSITY OF PITTSBURGH )  
MEDICAL CENTER, UNIVERSITY OF )  
PITTSBURGH PHYSICIANS, PABLO )  
SANCHEZ, M.D., PH.D., FACS, JAMES )  
D. LUKETICH, M.D., FACS, TAKASHI )  
HARANO, M.D., and PATRICK CHAN, )  
M.D., )  
)  
Defendants. )  
)  

---

JAMES D. LUKETICH, M.D., FACS )  
)  
Third-Party Plaintiff, )  
)  
v. )  
)  
JONATHAN D’CUNHA, M.D., Ph.D, )  
and LARA WALEED SCHAHEEN, M.D., )  
)  
Third-Party Defendants. )

**EMERGENCY MOTION TO ACCESS FILINGS AND EXHIBITS**

Torsten Ove and The Pittsburgh Post-Gazette (collectively, “The Post-Gazette”), by and through their undersigned counsel, Del Sole Cavanaugh Stroyd LLC, file this Emergency Motion to Access Filings and Exhibits, and request that this Court ensure The Post-Gazette and the public can access the filings and exhibits in this case:

**INTRODUCTION**

1. On August 22, 2022, this Court granted The Post-Gazette the right to intervene to

object to past and future sealing of the record in this case and this Court completely unsealed the June 10, 2022 hearing transcript.

2. The Post-Gazette incorporates by reference its Petition to Intervene filed on August 19, 2022, which articulates The Post-Gazette's rights to access these proceedings under the common law and First Amendment rights of access.

**All Pleadings, Briefs, and Other Papers Submitted to the Court Should be Filed on the Public Docket.**

3. In reviewing the June 10, 2022 hearing transcript, The Post-Gazette noticed that the parties had referenced filings which appeared to have been submitted to the Court, but not publicly filed.

4. For example, on pages 65-66, Attorney McDevitt for Dr. Schaheen stated, "I submitted it just to the Court and parties waiting for some direction on how to handle some of the confidential information which I noted on the front page of it that I don't intend to put into the public record."

5. On page 66 of the June 10, 2022 hearing transcript, Attorney McDevitt further stated, "I only it put it on there, Your Honor, because I know there are motions pending in that vein. Communications from the clerk were we are not filing anything we're holding off so I'm holding off."

6. It is unclear what "motions pending" had not been filed as of June 10, 2022. From reviewing this transcript and the public docket it is not clear if all filings on behalf of Dr. Schaheen and the other parties to this case have been filed on the public docket.

7. In addition to this reference on June 10, 2022, The Post-Gazette has some additional concerns about filings not being submitted to the public docket.

8. For example, there was a letter brief circulated by Plaintiffs' counsel in response to The Post-Gazette Petition to Intervene, but that letter brief does not appear to be filed on the

public docket.

9. The Post-Gazette also believes that this Court referenced a second filing responding to The Post-Gazette's Petition to Intervene. The Post-Gazette's counsel did not receive a copy of that second response and that second response is not on the public docket.

10. Further during the proceedings on August 23, 2022, the Post-Gazette's reporter heard this Court mention that the Court had recently issued an email ruling to the parties. The Post-Gazette does not believe that ruling is on the public docket.

11. If there are submissions provided to this Court, which have not and are not being publicly filed, then that greatly restricts the public's right to observe and understand what is transpiring in these proceedings.

12. It appears that the practice of submitting items for the Court's consideration, but not publicly filing them is ongoing, and clarification of this process is needed immediately to ensure the public is able to view these proceedings and to stop this practice from continuing any further.

13. The submissions referenced as being provided to this Court, but not publicly filed all appear to be submissions intended to obtain or influence decisions from this Court.

14. If the submission is the "type of material upon which a judicial decision is based," then a public right of access attaches. Com. v. Upshur, 924 A.2d 642, 651 (Pa. 2007).

15. The Supreme Court further clarified this point explaining:

We also credit WPXI's argument that the status of materials as "part of the record" or "filed with the court," though relevant, is not necessarily dispositive when deciding whether an item is a public judicial record or document.

**The common law right of access is based upon the public's interest in knowing about events as they actually transpire and not simply on what is filed with a court or formally admitted into evidence.**

Id. at 650 (emphasis added).

16. To the extent that the parties are submitting papers to the Court and the Court is issuing rulings on those papers, those papers and decisions are judicial documents subject to the right of access.

17. The Post-Gazette respectfully asks that this Court Order all papers previously submitted to the Court for consideration and not already filed be filed with the Department of Court Records, and that all future papers submitted for the Court's consideration be publicly filed.

**Request for Access to Filings without Redactions.**

18. On August 22, 2022, Third Party Defendant, Dr. Jonathan D'Cunha filed a Bench Memorandum with unexplained redactions on pages 4, 7, and 8.

19. The Post-Gazette is not aware of any Order that authorized the filing of materials under seal, and the filing does not purport to be redacted to comply with the Case Records Public Access Policy of the Unified Judicial System of Pennsylvania.

20. The Post-Gazette, therefore, requests the unsealing of the redacted portions of the Bench Memorandum filed on August 22, 2022 by Dr. Jonathan D'Cunha.

21. The Post-Gazette further requests that this Court unseal any other redactions not made pursuant to a prior Order of this Court.

**Request to Access Exhibits.**

22. On August 22, 2022, the parties in public proceedings displayed exhibits in open court<sup>1</sup>

23. The Post-Gazette's reporter, Jonathan Silver, asked the Court for copies of the exhibits used on August 22, 2022 but The Post-Gazette was denied access to those materials.

---

<sup>1</sup> This Court has noted on the record that The Post-Gazette has a continuing objection to the sealing of the audio tape and transcript of the audio tape at the heart of this injunction hearing. The Post-Gazette rests on its continuing objection to the sealed portions of these proceedings and is not intending to re-litigate this Court's ruling on that issue through this Motion. The Post-Gazette reserves the right to raise the unsealing of those materials at a later time. This Motion seeks access to exhibits displayed during the unsealed portions of these proceedings.

24. The Post-Gazette’s reporter was told by a clerk that the reason for denial was that the materials had not been admitted into evidence.

25. The United States Courts of Appeals for the Third Circuit has found that when audio recordings were played for a jury in a public courtroom and the jury was given a transcript of the audio recordings played, the media had a right to access those materials displayed in a public courtroom and published to the jury even though those materials were not formally admitted into evidence. The Court of Appeals explained:

The common law right of access is not limited to evidence, but rather encompasses all “judicial records and documents,” *Warner Communications*, 435 U.S. at 597, 98 S.Ct. at 1311–1312. It includes “transcripts, evidence, pleadings, and other materials submitted by litigants ....” Comment, *All Courts Shall Be Open: The Public's Right to View Judicial Proceedings*, 52 Temple L.Q. 311, 337–38 (1979). The public interest in monitoring judicial proceedings also supports a presumption in favor of access. Although representatives of the media were present at the trial and were able to take notes on the recorded conversations as they were played to the jury, this procedure has obvious limitations. The public interest can best be vindicated by the release of complete and accurate transcriptions, at the expense of the media applicants. We therefore hold that the strong presumption in favor of public access applies to these transcripts. *Cf. Criden I*, 648 F.2d at 828 (“It would unduly narrow the right of access were it to be confined to evidence properly admitted, since the right is based on the public's interest in seeing and knowing the events which actually transpired.”).

United States v. Martin, 746 F.2d 964, 968–69 (3d Cir. 1984).

26. In Upshur, the Pennsylvania Supreme Court also rejected the rationale that the media lacked a right of access to a recording played during a preliminary hearing, which was not formally admitted into evidence. The Supreme Court explained, “the common law right of access is based upon the public's interest in knowing about events as they actually transpire and not simply on what is filed with a court or formally admitted into evidence.” Com. v. Upshur, 924 A.2d 642, 650 (Pa. 2007).<sup>2</sup>

---

<sup>2</sup> The Post-Gazette submits the First Amendment right of access also applies, but in Upshur, the Pennsylvania Supreme Court declined to analyze the constitutional issue since it found access was guaranteed by the common law right of access. Id. at 653, n. 11.



27. Thus, The Post-Gazette submits it should be provided copies of all Exhibits used during the public portions of these proceedings.

WHEREFORE, The Post-Gazette respectfully requests that this Court: (1) require the parties to file all pleadings on the public docket without redaction; and (2) provide The Post-Gazette copies of the exhibits used during the public portion of these proceedings, including those not formally moved into evidence.

By: /s/ Zachary N. Gordon  
Patrick K. Cavanaugh  
Zachary N. Gordon  
Jonathan R. Bruno

Del Sole Cavanaugh Stroyd LLC  
Three PPG Place, Suite 600  
Pittsburgh, PA 15222  
412-261-2393  
412-261-2110 (fax)

***Counsel for Intervenors,  
Torsten Ove and  
The Pittsburgh Post-Gazette***

**CERTIFICATE OF COMPLIANCE**

I certify that this filing complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts* that require filing confidential information and documents differently than non-confidential information and documents.

Submitted by: Intervenors

Signature: /s/ Zachary N. Gordon

Name: Zachary N. Gordon

Attorney No. (if applicable): 318808

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

BERNADETTE FEDORKA and ) CIVIL DIVISION  
PAUL FEDORKA, husband and wife, )  
)  
Plaintiffs, )  
)  
v. ) Case No. GD-18-017117  
)  
UNIVERSITY OF PITTSBURGH )  
MEDICAL CENTER, UNIVERSITY OF )  
PITTSBURGH PHYSICIANS, PABLO )  
SANCHEZ, M.D., PH.D., FACS, JAMES )  
D. LUKETICH, M.D., FACS, TAKASHI )  
HARANO, M.D., and PATRICK CHAN, )  
M.D., )  
)  
Defendants. )  
)  

---

 )  
JAMES D. LUKETICH, M.D., FACS )  
)  
Third-Party Plaintiff, )  
)  
v. )  
)  
JONATHAN D’CUNHA, M.D., Ph.D, )  
and LARA WALEED SCHAHEEN, M.D., )  
)  
Third-Party Defendants. )

**ORDER OF COURT**

And Now this \_\_ day of \_\_\_\_\_, 2022, upon consideration of the Emergency Motion to Access Filings and Exhibits submitted on behalf of The Pittsburgh Post-Gazette, it is hereby ORDERED as follows:

1. All materials, submissions, and other papers previously submitted to the Court via e-mail for the Court’s consideration and not already publicly filed, shall be publicly filed within 3 days of the date of this Order.

2. All future materials, submissions, and other papers provided to the Court for the Court's consideration shall also be contemporaneously filed with the Department of Court Records.

3. No filing shall be made with redactions unless those redactions are authorized by a prior Order of Court or pursuant to the *Public Access Policy of the Unified Judicial System of Pennsylvania Case Records of the Appellate and Trial Courts*.

4. Dr. Jonathan D'Cunha's August 22, 2022 Bench Memorandum shall be re-filed without the redactions on pages 4, 7, and 8 within 2 days of the date of this Order.

5. The Exhibits displayed in the Courtroom during unsealed portions of the preliminary injunction hearing are judicial records and subject to public access under the common law and First Amendment right of access and shall be provided to The Post-Gazette.

BY THE COURT:

\_\_\_\_\_, J.