Case No. 20CA011648

IN THE COURT OF APPEALS
NINTH APPELLATE DISTRICT
LORAIN COUNTY, OHIO

GIBSON BROS. INC., et al.,
Plaintiffs-Appellees,

v.

OBERLIN COLLEGE, et al.
Defendants,

and

WEWS-TV
Appellant.

APPEAL FROM THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO
CASE NO. 17CV193761

BRIEF OF APPELLANT
ORAL ARGUMENT REQUESTED

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ASSIGNMENT OF ERROR

The court erred in denying Appellant's Motion for Access to Sealed Case Document (the "Motion").

STATEMENT OF ISSUES FOR REVIEW

1. The First Amendment requires a presumption of access and prohibits filing court records under seal without specific, on the record findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. Exhibit G was filed under seal pursuant to a stipulated protective order, without any findings addressing the public's First Amendment rights. Did the court err by denying the Motion without any findings regarding the public's constitutional right to access?

2. Court records are presumed open to public access unless a court "finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." Sup.R. 45. Access to Exhibit G was restricted by agreement of the parties, and an original Rule 45(E) reason for restricting access was never established. Did the court apply an incorrect legal standard when it purported to decide "whether the original reason for restricting public access no longer exists"? R. 527 at 2.

3. Prior to restricting access, the First Amendment requires on-the-record findings specific enough for a reviewing court to determine

whether closure is appropriate. Conclusory assertions are reversible error. Did the court fail to make adequate findings on the record to support its conclusion that "continued restriction of public access is warranted" and "there is no less restrictive alternative to complete restriction" when it merely recited the language in Superintendence Rule 45?

STATEMENT OF THE CASE

Exhibit G to the affidavit of Cary M. Snyder ("Exhibit G") consists of Facebook records. Oberlin College and Dr. Meredith Raimondo (collectively "Oberlin") filed it with the court as an exhibit to their combined summary judgment reply brief in the matter of *Gibson Bros., et al. v. Oberlin College et al.*, Case No. 17CV193761 (the "Gibson-Oberlin Lawsuit"). Oberlin filed Exhibit G under seal pursuant to a stipulated protective order between the parties to the Gibson-Oberlin Lawsuit. At the time, the parties presented no arguments to the court to justify sealing it.

WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") moved to unseal Exhibit G. R. 509. Gibson Bros. Inc., David R. Gibson, and Allyn W. Gibson ("Gibson"), and nonparty Allyn D. Gibson, Jr. (collectively, the "Gibson Parties"), jointly opposed the Motion. R. 517. Oberlin did not.

On April 29, 2020, the court issued an Entry and Ruling denying the Motion (the "Order"). R. 527. The court concluded, in a perfunctory fashion, that "continued restriction of public access was warranted." *Id.* WEWS-TV appealed.

STATEMENT OF FACTS

A. The Gibson-Oberlin Lawsuit

In November 2016, a group of Oberlin College students participated in a protest of Gibson's Bakery (the "Bakery"), following an altercation between Bakery employee Allyn D. Gibson, Jr. and a Black Oberlin College student. R. 195 at 4–5. Flyers distributed by Oberlin College students in connection with the protest referred to the Bakery as "a racist establishment with a long account of racial profiling and discrimination." R.1 at ¶ 36; R. 195 at 6. The Oberlin College Student Senate subsequently published a resolution stating the same. R. 1 at ¶ 48; R. 195 at 6. On November 7, 2017, Gibson filed the Gibson-Oberlin Lawsuit, alleging that Oberlin, *inter alia*, aided and encouraged Oberlin College students in publishing allegedly libelous statements against the Bakery. R. 1.

For purposes of facilitating discovery, Gibson and Oberlin entered into a Stipulated Protective Order on June 6, 2018 (the "Protective Order"), permitting either party to designate documents as confidential "upon making a good faith determination" that the documents contained

information that should be protected from disclosure. R. 64 at ¶ 3. The Protective Order expressly stated that such party-level determinations, however, were not to "be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject to protection . . . until such time as the Court may rule upon a specific document or issue." R. 64 at ¶ 16.

Among the discovery documents designated as "confidential" by Gibson was a forensic image of Allyn D. Gibson, Jr.'s Facebook account. R. 491 at 4. A portion of that Facebook account was filed under seal as Exhibit G to Oberlin's combined summary judgment reply brief. *Id.* Oberlin's motions for summary judgment were granted in part and denied in part. R. 281 at 29. The case proceeded to trial on the remaining claims and a jury issued a verdict for Gibson in June 2019. R. 454. Oberlin appealed and Gibson filed a cross appeal and conditional cross appeal. R. 506.

On August 28, 2019, pursuant to Paragraph 12 of the Protective Order—which provides a mechanism by which the parties may seek a court order relating to documents designated as "confidential"—Oberlin moved the court for an order unsealing Exhibit G. R. 490. In a two-page order on September 16, 2019, the court denied the request, noting that Oberlin "made no attempt to introduce" Exhibit G at trial. R. 505. The court went

on to hold that "at this juncture and with this procedural context" it was "not persuaded by [Oberlin's] arguments that [the court] should make a post-trial order regarding materials that [Oberlin] opted to file under seal nearly six months ago in accordance with an agreed protective order that they drafted and stipulated to." *Id.* at 2. The court made no factual findings as to: (1) whether the continued sealing of Exhibit G was necessary to serve a compelling interest, (2) whether a compelling interest outweighed the public's presumptive right of access, or (3) whether continued sealing of the entire Exhibit G was the least restrictive means of preserving any such interest.

B. The Motion

WEWS-TV believes Exhibit G contains information directly related to the allegations of racial profiling that spurred the student protest at the heart of the Gibson-Oberlin Lawsuit and about which there is significant public interest.

Appellant WEWS-TV ("WEWS") is an ABC-affiliated television station owned by The E.W. Scripps Company. WEWS serves the greater Cleveland metropolitan area and broadcasts nearly 40 hours of locally produced newscasts each week. It has reported extensively on the Gibson-Oberlin Lawsuit and its subsequent appeal. *See, e.g., Oberlin College*

Appeals Verdict that Awarded Bakery More Than $31 Million, NEWS 5 CLEVELAND (last updated Oct. 9, 2019), https://perma.cc/T24R-SGDY. *Jury Awards $11 Million in Lawsuit Over Ohio College Dispute,* NEWS 5 CLEVELAND (last updated June 8, 2019), https://perma.cc/K8FN-JDMH.

WEWS and the other Media Movants moved the court to unseal Exhibit G under Sup.R. 45(F)(1), which provides that "[a]ny person, by written motion to the court" may request access to "case documents" sealed by a trial court. R. 509.

Media Movants argued that, as a judicial document filed with the court in connection with a summary judgment motion, the press and the public have a presumptive right of access to Exhibit G under the First Amendment, the Ohio Constitution, and the Ohio Rules of Superintendence. *Id.* Media Movants further argued that, because Exhibit G was filed under seal based solely on the existence of a stipulated protective order, the court had made no specific, on the record findings of a compelling interest that outweighed the public's constitutional right of access to Exhibit G, or that sealing was narrowly tailored to serve that interest. R. 509 at 12.

On April 29, 2020, the court denied Media Movants' motion concluding that:

> At this juncture, the Court, under Ohio Sup. R. 45(F)(2) must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup. R. 45(E) have arisen which would require the continued restriction of public access. The Court, having considered all of the factors in Sup. R. 45(E), hereby finds that the continued restriction of public access is warranted. Of particular importance is Sup. R. 45[E](2)(c), which includes the risk of injury to persons, individual privacy rights and interests and fairness of the adjudicatory process. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

R. 527 at 2.

The court made no findings with respect to the public's presumptive right of access to Exhibit G under the First Amendment or the Ohio Constitution. Instead, in denying Media Movants' Motion, the court simply repeated its rationale for denying Oberlin's earlier motion, noting: (i) Exhibit G was filed under seal pursuant to a stipulated protective order; (ii) its admissibility as character evidence "was at issue during pretrial motions in limine;" and (iii) Oberlin "made no attempt to introduce the contents of Exhibit G . . . during trial." R. 527 at 2. The court made no specific, particularized findings with respect to how those reasons relate to the categories of interests contained in Sup.R. 45(E)(2)(c), how or why they were sufficiently compelling to outweigh the public's presumptive right of

access to Exhibit G, or how continued sealing was narrowly tailored to serve such interests.

ARGUMENT AND LAW

I. Summary of the Argument

The press and the public have a strong presumptive right of access to Exhibit G under the First Amendment, the Ohio constitution and the Ohio Rules of Superintendence. *See Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13-14, 106 S.Ct. 2735, 92 L.Ed.2d 1 (1986) ("*Press-Enterprise II*"); *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶¶ 8–9; Sup.R. 45(A). Accordingly, Exhibit G may remain under seal if—and only to the extent that—shielding it from public view is necessary to preserve "higher values" and is "narrowly tailored" to serve such an interest. *Press-Enterprise II*, 478 U.S. at 13-14.

Exhibit G was filed under seal pursuant to a stipulated protective order. Prior to sealing, the parties presented no arguments to the court to justify sealing, and the court made no requisite "specific, on the record findings" demonstrating that a compelling interest outweighs the public's constitutional rights of access to Exhibit G or that sealing the document in its entirety is narrowly tailored to serve that interest. *Id.* Nor did the court make the requisite finding "by clear and convincing evidence that the

presumption of allowing public access is outweighed by a higher interest" so as to justify sealing pursuant to Sup.R. 45(E)(2).

In its spare, two-page order denying Appellant's Motion, the court failed to consider—or indeed, even mention—the public's constitutional right of access to Exhibit G. Instead, it applied an incorrect legal standard, purporting to consider "whether the original reason for restricting public access no longer exists," while ignoring the fact that no reasons for restricting access were ever articulated in the first place. Moreover, the court failed to distinguish between the parties' interests in facilitating discovery by means of a stipulated protective order and the public's presumptive right of access to judicial records. And, finally, the court failed to articulate any "overriding interest" sufficient to overcome the strong presumption of access or offer "findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) ("*Press-Enterprise I*").

For the reasons set forth herein, this Court should reverse and remand this matter to the trial court with instructions to grant the Motion.

II. Legal Standard

De novo review applies to this appeal because the court applied an incorrect legal standard. Appellate courts generally review a trial court's decision to seal or unseal records—including denials of motions to seal or unseal—under an abuse-of-discretion standard. *See In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 473 (6th Cir.1983); *State v. Floyd*, 2018-Ohio-5107, 126 N.E.3d 361, 362 ¶¶ 3-4 (1st Dist.). However, when "a court's judgment is based on an erroneous interpretation of the law, an abuse-of-discretion standard is not appropriate." *Med. Mut. of Ohio v. Schlotterer*, 122 Ohio St.3d 181, 2009-Ohio-2496, 909 N.E.2d 1237, ¶ 13. Where an appeal from the denial of a motion to seal or unseal "involves a purely legal question," the standard of review is *de novo*. *Floyd*, 2018-Ohio-5107, at ¶ 4; *State v. Frazier*, 9th Dist. Summit No. 25654, 2012-Ohio-790, ¶ 16 ("[W]hether the trial court made an error as a matter of law in applying the incorrect legal standard is a question that we review *de novo*.").[1]

Here, the court failed to consider or make any findings with respect to the public's constitutional right of access to Exhibit G under the First

[1] *See also, Johnson v. Econ. Dev. Corp. of Cty. of Oakland*, 241 F.3d 501, 509 (6th Cir.2001) (Courts have consistently held that "constitutional questions are questions of law subject to *de novo* review."); *In re D.C.*,

Amendment and the Ohio Constitution, and it applied an incorrect legal standard in evaluating the right of access under Sup.R. 45. Thus, the court's decision should be reviewed *de novo*.[2]

III. The Court should reverse the Order because the trial court failed to consider and weigh the press and the public's presumptive right of access and applied an incorrect legal standard.

A. The press and the public have a constitutional, presumptive right to access Exhibit G.

Public access to judicial proceedings and documents is "one of the essential qualities of a court of justice." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 557, 100 S.Ct. 2814, 65 L.Ed.2d 973 (1980) ("*Richmond Newspapers*"); Ohio Const. Article I, Section 16.

The press plays a vital role in monitoring the judicial system and often "functions as surrogates for the public" by, for example, attending proceedings, reviewing court documents, and reporting on judicial matters

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2017-Ohio-114, , 75 N.E.3d 1040, ¶ 14 (10th Dist.) ("[A]ppellate courts review constitutional questions under a de novo standard.").

[2] If the Court finds an abuse of discretion review applies here, such review must be "circumscribed by [the] long-established legal tradition" regarding "the presumptive right of the public to inspect and copy judicial documents and files." *Knoxville News–Sentinel*, 723 F.2d at 473–74 (quotations and citations omitted). "In light of the important rights involved," a trial court's decision is not accorded the traditional scope of "narrow review reserved for discretionary decisions based on first-hand observations," but instead, "[o]nly the most compelling reasons can justify non-disclosure of judicial records." *Id.* at 476 (quotations and citations omitted).

to the public at large. *Richmond Newspapers*, 448 U.S. at 573. Particularly in cases of significant public interest, such as the Gibson-Oberlin Lawsuit, the ability of the press "to review the facts presented to the court" and report them to the public is necessary to assure public confidence in the administration of justice. *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178 (6th Cir.1983).

The presumptive right of access applies to both criminal and civil matters. *See id.* at 1179 ("[Justice Brennan's concern] that secrecy eliminates one of the important checks on the integrity of the system applies no differently in a civil setting."); *see also Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir.2016) ("In civil cases . . . secrecy serves only to insulate the participants, mask impropriety, obscure incompetence, and conceal corruption.") (internal quotations and citations omitted).

1. The First Amendment and the Ohio Constitution afford the press and the public a qualified right of access to Exhibit G.

The Ohio Supreme Court has recognized a public right of access to judicial documents under Article I, Section 16 of the Ohio Constitution and the First Amendment. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶¶ 8–9 ("Article I of the

Ohio Constitution guarantees the public's right to open courts. This right of access found in both the federal and state Constitutions includes records and transcripts that document the proceedings.").

Ohio courts draw on their "experience" and "logic" to determine whether the constitutional right applies to a particular court record, as does the Supreme Court of the United States. *See, e.g., State ex rel. Beacon Journal Pub'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 38; *State ex rel. Scripps Howard Broad. Co. v. Cuyahoga Cty. Court of Common Pleas, Juv. Div.*, 73 Ohio St.3d 19, 652 N.E.2d 179 (1995); *State ex rel. Cincinnati Enquirer v. Bronson*, 191 Ohio App. 3d 160, 2010-Ohio-5315, 945 N.E.2d 551 (12th Dist.); *see also Press-Enterprise II*, 478 U.S. at 8.

Applying the considerations of "experience" and "logic," courts around the country have consistently held that summary judgment exhibits like Exhibit G, "are—as a matter of law—judicial documents to which a strong presumption of access attaches" under the First Amendment. *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir.2006); *see also San Jose Mercury News, Inc. v. U.S. District Court*, 187 F.3d 1096, 1102 (9th Cir.1999) ("the unbroken string of authorities . . . leaves little doubt" that the "right of public access extends to materials submitted in

connection with motions for summary judgment in civil cases prior to judgment"); *Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252–53 (4th Cir.1988) (Same).

Indeed, as the Sixth Circuit recently explained, "briefs . . . filed with the court, as well **as any reports or exhibits that accompan[y] those filings**, are the sort of records that would help the public assess for itself the merits of judicial decisions . . . [and] therefore subject to the strong presumption in favor of openness." *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 939 (6th Cir.2019) (emphasis added).

Where, as here, the constitutional right of access applies, it can be overcome 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.'" *Press-Enterprise II*, 478 U.S. at 13–14. In the context of civil litigation "only trade secrets, information covered by a recognized privilege (such as the attorney-client privilege), and information required by statute to be maintained in confidence (such as the name of a minor victim of a sexual assault) is typically enough to overcome the presumption of access." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 308 (6th Cir.2016) (internal quotations and citation omitted). The party seeking closure or sealing bears a "heavy" burden to

overcome the strong constitutional presumption of public access to court records, and must "analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.* at 305–06.

2. Exhibit G is a court record to which a presumption of openness also applies under Ohio Superintendence Rule 45.

In addition to the constitutional presumption of access, Ohio Superintendence Rule 45(A) also recognizes a fundamental presumption of public access to all judicial documents, including the summary judgment exhibit at issue here. Sup.R. 45(A) ("Court records are presumed open to public access."). Exhibit G is a "court record" under Sup.R. 45 because it was "submitted to a court or filed with a clerk of court in a judicial action or proceeding." Sup.R. 44(B) and (C)(1). According to the Ohio Supreme Court, "the Rules of Superintendence regarding public access to court records should enjoy a broad judicial construction in favor of access to records, which promotes openness, transparency of process, and accountability." *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 14.

Under Sup.R. 45, a court may restrict public access to all or part of a court record only "if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest."

Sup.R. 45(E)(2); *State ex rel. Cincinnati Enquirer v. Hunter*, 1st Dist. Hamilton No. C-130072, 2013 WL 558750, 2013-Ohio-4459, ¶ 11 (granting release of juvenile court records where presumption not overcome).

Prior to restricting access to all or any part of a court record, the court must consider:

> (a) Whether public policy is served by restricting public access;
>
> (b) Whether any state, federal, or common law exempts the document or information from public access;
>
> (c) Whether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process.

Sup.R. 45(E)(2)(a)-(c); *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, at ¶¶ 32-34.

In the event the court finds it necessary to restrict public access, it must do so using "the least restrictive means available," which typically requires "[r]edacting the information rather than limiting public access to the entire document." Sup.R. 45(E)(3).

B. The court erred as a matter of law by applying incorrect legal standards in evaluating the Motion and failing to make the specific, particularized findings necessary to justify continued sealing of Exhibit G.

1. The court failed to consider the public's constitutional right of access to Exhibit G and applied an incorrect legal standard.

As a preliminary matter, the court failed to make any findings whatsoever with respect to the public's presumptive right of access to Exhibit G under the First Amendment and the Ohio Constitution. Indeed, not once in the court's Order does it even mention Media Movants' constitutional arguments, much less meaningfully engage with them, or make specific findings as to their merits.

Moreover, although the court purported to evaluate Media Movants' request to unseal Exhibit G pursuant to the factors set forth in Sup.R. 45, it failed to apply the proper standard in doing so. Specifically, the court concluded that, in evaluating whether to unseal Exhibit G under Sup.R. 45(F)(2), it "must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup.R. 45(E) have arisen which would require the continued restriction of public access." R. 527 at 2. In so holding, the court

overlooked the glaring fact that no "original reason for restricting public access" to Exhibit G was ever articulated by either the parties or the court.

Exhibit G was not filed under seal pursuant to a written motion to the court or by the court upon its own order, as contemplated by Sup.R. 45(E). Rather, Exhibit G was filed under seal by Oberlin unilaterally, purportedly pursuant to the terms of the parties' stipulated Protective Order. As a result, the parties presented no arguments to the court to justify sealing, and the court made no findings as to whether "by clear and convincing evidence . . . the presumption of allowing public access" under Sup.R. 45(A) was "outweighed by a higher interest" or whether sealing would be "the least restrictive means available" to protect such an interest. Sup.R. 45(E)(2)-(3). Nor did the court make the requisite specific, on the record findings demonstrating that sealing was "essential to preserve higher values[,]" or that wholesale sealing of Exhibit G was narrowly tailored to serve that interest, as required by the First Amendment and the Ohio Constitution. *See Press-Enterprise II*, 478 U.S. at 13–14. The court could not therefore have "consider[ed] whether the original reason for restricting public access no longer exists"; it had never found any "original reason" in the first place, much less found it "by clear and convincing evidence." Sup.R. 45(E)(2).

Instead, the court appears to have improperly conflated the interests of the parties in facilitating discovery by means of a stipulated protective order with the interests of the press and the public in vindicating their presumptive right of access to judicial records under the First Amendment, the Ohio Constitution, and Sup.R. 45. In fact, much of the limited discussion in the court's Order is copied verbatim, or near verbatim, from its order denying Oberlin's motion to unseal Exhibit G pursuant to Paragraph 12 of the Protective Order: specifically that Exhibit G was filed under seal subject to a stipulated protective order; that its admissibility as character evidence "was at issue during pretrial motions in limine;" and that Oberlin "made no attempt to introduce the contents of Exhibit G during trial." R. 527 at 2. But the existence of a stipulated protective order entered into by litigants, and the decision by a litigant to file a judicial record under seal pursuant to that protective order, does not vitiate the public's presumptive right of access to that record.

The Protective Order was designed to facilitate discovery by allowing the parties to determine in the first instance the appropriate level of confidentiality applicable to documents exchanged between them during the course of discovery. However, "'[t]here is a stark difference between so-called 'protective orders' entered pursuant to . . . discovery . . . on the one

hand, and orders to seal court records, on the other." *Shane Grp., Inc. v. Blue Cross Blue Shield of Mich.*, 825 F.3d 299, 305 (6th Cir.2016). While "[s]ecrecy" may, in many cases, be "fine at the discovery stage," once a document is filed with the court, the presumptions of public access apply; the press and the public have "a strong interest in obtaining the information contained in the court record." *Id.* (internal quotations and citations omitted); *see also Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730-31, 761 N.E.2d 656 (1st Dist.2001) (holding that "discovery material becomes a public record when it becomes part of the court record."). Indeed, the Protective Order itself makes clear that party-level determinations as to the confidentiality of documents are not to "be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL by counsel or the parties is subject to protection . . . until such time as the Court may rule upon a specific document or issue." R. 64 at ¶ 16.

The parties to an action cannot waive the public's right of access to judicial records by filing a document under seal pursuant to a stipulated protective order, or otherwise. *Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 595 (6th Cir.2016). Nor may a party rely on a stipulated protective order to relieve it of its burden under the First

Amendment, Ohio Constitution, or Sup.R. 45 to articulate the compelling interests that it contends justify sealing. *See In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 940-41 (6th Cir.2019) (remanding for specific factual findings as to pleadings filed under seal pursuant to a protective order and directing the court "to bear in mind that the party seeking to file under seal must provide a compelling reason to do so and demonstrate that the seal is narrowly tailored to serve that reason"). The "court's obligation to keep its records open for public inspection is not conditioned on an objection from anybody." *Shane Grp.*, 825 F.3d at 307.

Moreover, the fact that Exhibit G was not proffered by Oberlin as evidence at trial is irrelevant to whether the public's presumptive right of access applies to that judicial record. The Ohio Supreme Court has specifically held that "[t]here is no requirement under the Superintendence Rules that a record or document must be used by the court in a decision to be entitled to the presumption of public access specified in Sup.R. 45(A)." *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, 974 N.E.2d 89, at ¶¶ 32-34 (vacating the trial court's sealing decision); *see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir.2006) (concluding that judicial documents should not be afforded "different weights of presumption based on the extent to which they were

relied upon in resolving the motion."). Rather, "to qualify as a case document that is afforded the presumption of openness for court records, the document must merely be 'submitted to a court or filed with a clerk of court in a judicial action or proceeding' and not be subject to the specified exclusions [in Sup.R. 44(C)(2)]." *Wolff*, 974 N.E.2d at 98.

Here, as in *Wolff*, Exhibit G was filed in a judicial action and is not subject to any of the exceptions set forth in Sup.R. 44(C)(2). Therefore, under Sup.R. 45(A), the presumption of openness applies. And, because Exhibit G is a summary judgment exhibit, the presumption of openness "is of the highest" order. *See Lugosch*, 435 F.3d at 123 ("documents used by parties moving for, or opposing, summary judgment should not remain under seal absent the most compelling reasons.") (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir.1982)). Even if Oberlin's decision not to introduce Exhibit G as evidence at trial had any bearing on Oberlin's motion to unseal Exhibit G pursuant to Paragraph 12 of the Protective Order, it has absolutely no bearing on the public's presumptive right of access. *Wolff*, 974 N.E.2d at 98; *Lugosch*, 435 F.3d at 123.

The court failed to make any findings with respect to the public's presumptive right of access to Exhibit G, nor did it identify what weight—if any—it ascribed to such rights. Here, the court erred as a matter of law; the

press and the public's constitutional rights do not cease to exist merely because the court refused to engage with them. For this reason alone, the court's Order should be reversed.

2. The court made no specific findings demonstrating that restricting access to Exhibit G is necessitated by a higher interest or narrowly tailored to serve that interest.

Even if the court had made the requisite findings with respect to the public's presumptive right of access to Exhibit G, the presumption of openness can only be overcome by "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest," *Press-Enterprise I*, 464 U.S. at 510, or a finding "by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest." Sup.R. 45(E)(2). When such an overriding or higher interest is found to apply, it "is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enterprise I*, 464 U.S. at 510 (emphasis added). Here, no such overriding or higher interest was properly identified or articulated by the court.

Indeed, the court proffered only one reason for finding that "continued restriction of public access is warranted[.]" Specifically, the court stated that "[o]f particular importance is Sup.R. 45(E)(2)(c), which

includes the risk of injury to persons, individual privacy rights and interests and fairness of the adjudicatory process." R. 527 at 2.

This perfunctory conclusion falls far short of a finding "specific enough that a reviewing court can determine whether the closure order was properly entered." *Press-Enter. I*, 464 U.S. at 510. Rather, the court merely pointed to the three broad, generalized interests referenced in the text of Sup.R. 45(E)(2)(C): (1) risk of injury to persons; (2) individual privacy rights and interests; and (3) fairness of the adjudicatory process. The court did not identify what risks of injury, privacy interests, or harms to the fairness of the adjudicatory process might possibly be affected by unsealing Exhibit G, nor did it identify or make specific findings as to why or how continued sealing of Exhibit G is "essential to preserve" these "higher values." Indeed, it is difficult to fathom how restricting the public's access to a summary judgment exhibit could be essential to preserving the "fairness of the adjudicatory process." Here again, the court failed to distinguish between the parties' interests in facilitating discovery by means of a stipulated protective order and the interest, articulated by the Supreme Court of the United States, in ensuring public confidence in the judicial process through the public's right of access. *See Press-Enterprise I*, 464 U.S. at 508 ("Openness thus enhances . . . the appearance of fairness so

essential to public confidence in the system.") (citing *Richmond Newspapers*, 448 U.S. at 569–571).

Moreover, recitations of generalized, non-specific interests in the "risk of injury to persons" and "individual privacy rights and interests," cannot, by themselves, justify wholesale sealing of a judicial document to which there is a strong presumption of access. Where the presumption applies, it cannot be overcome by a "conclusory assertion" of harm to the party seeking closure. *See Press-Enterprise II*, 478 U.S. at 15 ("The First Amendment right of access cannot be overcome by the conclusory assertion that publicity might deprive the defendant of [the] right [to a fair trial]."); *Application of Nat'l Broad. Co., Inc.*, 828 F.2d 340, 346 (6th Cir.1987) (vacating and remanding a district court's order denying news media's request for access to judicial records, "[w]hile the district court used the language of [*Press-Enterprise II*], it did so in a conclusory manner. It did not make '*specific findings . . . demonstrating that*' there was substantial probability that the defendants' right to a fair trial would be prejudiced by [granting public access].") (emphasis in original) (quoting *Press-Enterprise II*, 478 U.S. at 13).

The court must make specific findings of fact sufficient to support its conclusion that sealing is necessary to preserve a higher interest. *See In re*

Memphis Pub. Co., 887 F.2d 646, 648–49 (6th Cir.1989) (reversing order closing voir dire hearings where the "naked assertion by the district court . . . that defendant's Sixth Amendment right to a fair trial 'might well be undermined', without any specific finding of fact to support that conclusion, was insufficient to justify closure under *Press-Enterprise I* and *Press-Enterprise II*."); *State ex rel. Plain Dealer Publ'g Co. v. Geauga Cty. Court of Common Pleas, Juv. Div.*, 90 Ohio St.3d 79, 88, 2000-Ohio-35, 734 N.E.2d 1214 (court abused its discretion by closing criminal proceedings to the press and the public "based on findings that were not supported by sufficient evidence and constituted little more than [the judge's] personal predilections . . . ").

The court's failure to make specific findings of fact demonstrating that continued sealing of Exhibit G is essential to preserve a countervailing interest is in itself reversible error. *See In re Memphis Pub. Co.*, 887 F.2d at 648–49. But the court further erred by failing to make specific findings as to how restricting public access to Exhibit G in its entirety is narrowly tailored to serve any overriding interest. Instead, the court offered yet another conclusory, generalized statement that "[b]ecause of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction." R. 527 at 2. The court

did not identify "the nature of the information at issue" or explain why alternatives to wholesale sealing, such as redaction, would be inadequate. But the law is clear: any restriction on the public's presumptive right of access must be "narrowly tailored to serve" a compelling or higher interest, and must be "the least restrictive means available"; for example, by "[r]edacting the information rather than limiting public access to the entire document." *See* Sup.R. 45(E)(3); *see also Press-Enterprise I*, 464 U.S. at 511, 513 (noting that where jurors have a privacy interest in their answers during voir dire sufficient to justify closure, "[t]he trial judge should seal only such parts of the transcript as necessary to preserve the anonymity of the individuals sought to be protected"); *Frisby v. Schultz*, 487 U.S. 474, 485, 108 S.Ct. 2495, 101 L.Ed.2d 420 (1988) (narrow tailoring "targets and eliminates no more than the exact source of the 'evil' it seeks to remedy").

The court's conclusory finding that that "there is no less restrictive alternative to complete restriction," absent specific findings to support its conclusion, is insufficient to justify continued wholesale sealing of Exhibit G and is reversible error. *See Application of Nat'l Broad. Co., Inc.*, 828 F.2d at 347 (vacating order denying request for access to sealed judicial records and remanding with instructions to make "specific findings" as to

why "no alternatives" to complete sealing "can adequately protect" the countervailing interest.)

C. The presumptions in favor of public access to Exhibit G have not been overcome; Exhibit G should be unsealed.

Continued sealing of Exhibit G cannot be justified. Under the correct legal standards governing requests to unseal judicial documents under the First Amendment, the Ohio Constitution, and Sup.R. 45, the Media Movants' Motion should have been granted. There is nothing in the record demonstrating that either the initial sealing of Exhibit G or its continued sealing is warranted. The Gibson Parties have not met their "heavy burden" to articulate a compelling interest necessary to justify sealing. *See Shane Grp.*, 825 F.3d at 305–06. Nor did the court identify "by clear and convincing evidence . . . a higher interest" that would overcome the strong presumption of access under Sup.R. 45(A), let alone the type of compelling interest necessary to overcome the constitutional presumption of access. This is particularly true here, where public interest in the Gibson-Oberlin Lawsuit—with its allegations of discrimination and racial profiling by a century-old neighborhood bakery, on the one hand, and alleged impropriety on the part of a large educational institution on the other—is substantial. *See, e.g.*, Evan Gerstmann, *Oberlin College Files Appeal of $32*

Million Libel Verdict in Racism Dispute, FORBES (June 5, 2020), https://perma.cc/YLP8-MCUT; EJ Dickson, *How a Small-Town Bakery in Ohio Became a Lightning Rod in the Culture Wars*, ROLLING STONE (July 18, 2019), https://perma.cc/YP4J-PYQT; Conor Friedersdorf, *From Public Shame to the Courtroom*, THE ATLANTIC (June 15, 2019), https://perma.cc/5BQM-9BAK; *Oberlin Helped Students Defame a Bakery, a Jury Says*, NEW YORK TIMES (June 14, 2019), https://perma.cc/HCW4-K5BQ.

CONCLUSION

For the foregoing reasons, the Court should vacate the Order and remand with instructions to grant Appellant's Motion.

Dated: September 15, 2020

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this Brief complies with the word-count provision set forth in Ninth District Local Rule 7(E)(2). This Brief is printed using Georgia 14-point typeface using Microsoft word processing software and contains 6273 words.

Melissa D. Bertke
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was served on September 15, 2020, via email, pursuant to App.R. 13(C)(6) of the Appellate Rules of Civil Procedure, upon the following:

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Appendix

In compliance with Local Rule 7(B)(10),
appellant appends a copy of the judgment entry appealed from.

ORIGINAL

LORAIN COUNTY COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

TOM ORLANDO, Clerk
JOURNAL ENTRY
John R. Miraldi, Judge

Date 4/29/20 Case No. 17CV193761

GIBSON BROS INC
Plaintiff

JACQUELINE BOLLAS CALDWELL
Plaintiff's Attorney ()-

VS

OBERLIN COLLEGE
Defendant

JOSH M MANDEL
Defendant's Attorney ()-

ENTRY AND RULING ON NON-PARTIES' MOTION FOR ACESS TO SEALED CASE DOCUMENT

This matter comes before the Court upon non-parties WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government's Motion for Access to Sealed Case Document, seeking an order unsealing Exhibit G to the Affidavit of Attorney Cary M. Snyder, counsel for Oberlin College and Meredith Raimondo in the above-case. The above case has concluded, and an appeal of the judgment is pending before the Ninth District Court of Appeals.

Following the conclusion of the trial in this matter, the Defendants filed a similar motion which the Court denied on September 8, 2019. Now, the above-mentioned non-parties have filed a motion arguing that under Sup. R. 45, the Court should unseal the exhibit. The exhibit at issue contains unauthenticated Facebook postings purportedly belonging to non-party Allyn D. Gibson. After the movants initial motion, the Court asked the parties to brief the issue of jurisdiction in light of the pending appeal. Each party then submitted a short brief regarding jurisdiction over the unsealing in addition to their briefing on the movants initial motion to unseal.

Ohio Sup. R. 45 addresses public access to Court records in a variety of different contexts. Ohio Sup. R. 45(F) states:

1. Any person, by written motion to the court, may request access to a case document or information in a case document that has been granted restricted public access pursuant to division (E) of this rule. The court shall give notice of the motion to all parties in the case and, where possible, to

the non-party person who requested that public access be restricted. The court may schedule a hearing on the motion

2. A court may permit public access to a case document or information in a case document if it finds by clear and convincing evidence that the presumption of allowing public access is no longer outweighed by a higher interest. When making this determination, the court shall consider whether the original reason for the restriction of public access to the case document or information in the case document pursuant to division (E) of this rule no longer exists or is no longer applicable and whether any new circumstances, as set forth in that division, have arisen which would require the restriction of public access.

Here, access was originally restricted to Exhibit G under the parties' Mutual Protective Order. That order was agreed-to by the parties and approved and entered by the Court on June 8, 2018. The contents of Exhibit G and their admissibility was at issue during pretrial motions in limine, at which time, a preliminary ruling was issued that these materials could not be utilized as character evidence, but the Court withheld ruling on their admissibility for other purposes. The Defendants made no attempt to introduce the contents of Exhibit G for any reason, nor did they call or attempt to call non-party Allyn D. Gibson as a witness during trial.

At this juncture, the Court, under Ohio Sup. R. 45(F)(2) must consider whether the original reason for restricting public access no longer exists, and whether any new circumstances identified in Sup. R. 45(E) have arisen which would require the continued restriction of public access. The Court, having considered all of the factors in Sup. R. 45(E), hereby finds that the continued restriction of public access is warranted. Of particular importance is Sup. R. 45(2)(c), which includes the risk of injury to persons, individual privacy rights and interests, and fairness of the adjudicatory process. Because of the nature of the information at issue in Exhibit G, the Court also finds that there is no less restrictive alternative to complete restriction.

IT IS SO ORDERED.

John R. Miraldi, Judge

cc: All Parties