IN THE COURT OF COMMON PLEAS
LORAIN COUNTY, OHIO

GIBSON BROS., INC, et al.,	)	
	)	**CASE NO. 17CV193761**
Plaintiffs,	)	
	)	**JUDGE JOHN R. MIRALDI**
v.	)	
	)	
OBERLIN COLLEGE, et al.	)	
	)	
Defendants.	)	

REPLY OF WEWS-TV, ADVANCE OHIO, AND THE OHIO COALITION FOR OPEN GOVERNMENT TO PLAINTIFFS' OPPOSITION TO THEIR MOTION FOR ACCESS TO SEALED CASE DOCUMENT[1]

In their Opposition to the Motion of WEWS-TV, Advance Ohio, and the Ohio Coalition for Open Government (collectively, the "Media Movants") for access to Exhibit G to defendants' combined summary judgment reply brief, Gibson Bros., Inc., David R. Gibson, Allyn W. Gibson and Allyn D. Gibson (collectively, "Plaintiffs") make no attempt to satisfy the rigorous standards that must be met in order to overcome the public's presumptive right to access judicial records under the First Amendment, the Ohio Constitution, and the Ohio Rules of Superintendence. Plaintiffs completely ignore controlling Ohio Supreme Court case law holding that documents "submitted to a court or filed with a clerk of court in a judicial action or proceeding, including

[1] Rule 6(C)(1) of the Ohio Rules of Civil Procedure, as amended in July 2019, provides that "[a] movant's reply to a response to any written motion may be served within seven days after service of the response to the motion." The Staff Notes to Rule 6 state that these provisions "supersede and replace the differing deadlines for responding to motions imposed by the numerous local rules of Ohio trial courts, thereby eliminating confusion and creating consistency by providing uniform statewide deadlines." Though Rule 6(C)(1), as amended, contemplates the filing of a reply as a matter of right, to the extent the Court finds that Media Movants must be granted leave to file this Reply, Media Movants hereby request such leave.

[an] exhibit . . ." are judicial records to which a presumption of public access applies, regardless of the extent to which they are relied upon in resolving the action or proceeding. *See State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89. Plaintiffs further disregard the Court's obligation to make "specific, on the record findings" that a compelling interest outweighs the public's constitutional right of access to Exhibit G, and that any continued sealing of that judicial record be narrowly tailored to that interest. *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 13–14 (1986) ("*Press-Enterprise II*"); *see also* Sup. R. 45(E)(3). None of the hodgepodge of meritless arguments asserted by Plaintiffs—which rely on inapposite authority and are directed at inapplicable legal standards—provide any basis to deny the press and the public access to Exhibit G. For the reasons set forth in their Motion and herein, Media Movants respectfully request that the Court grant their Motion and unseal Exhibit G.

I. Media Movants Have Standing to Request that Exhibit G be Unsealed.

As an initial matter, Plaintiffs blatantly misrepresent Sup. R. 45(F) by claiming that it "does not grant standing to nonparties to assert state or federal constitutional challenges to a trial court decision restricting access to case documents." Opp. at 6. In reality, Sup. R. 45(F) does exactly that. Sup. R. 45(F)(1) provides that "[a]ny person, by written motion to the court" may request access to "case documents" sealed by a trial court. And, indeed, since the enactment of the Rules of Superintendence in 2009, Ohio courts have routinely heard motions by nonparties—including, as here, members of the press—seeking access to sealed case documents on statutory and constitutional grounds. *See, e.g.*, *State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St. 3d 7, 2014-Ohio-2354, 14 N.E.3d 989; *State ex rel. Cincinnati Enquirer v. Hunter*, 2013-Ohio-4459; *Wolff*, 132 Ohio St. 3d 481, 2012-Ohio-3328, 974 N.E.2d 89.

Further, Plaintiffs fundamentally misconstrue both Media Movants' Motion and the presumption of openness that governs here by arguing that "Movants lack standing to challenge the parties' stipulated protective order, including the designations made thereunder, under the Ohio and federal constitutions." Opp. at 6. Media Movants do not seek to vacate or modify the parties' stipulated protective order;[2] nor have Media Movants raised constitutional challenges to "confidential" designations made by the parties pursuant to that stipulated protective order (which restricts public access to documents merely exchanged during discovery that were never filed with the Court). Rather, Media Movants seek to unseal Exhibit G to defendants' combined summary judgment reply brief—a judicial document that, under clear Ohio and federal constitutional law, cannot be sealed on the basis of a stipulated protective order.

Not only do Media Movants have standing pursuant Sup. R. 45(F), but because Media Movants have a presumptive right of access to Exhibit G under the First Amendment and the Ohio Constitution as described further below, Media Movants also have constitutional standing to request that the Court unseal Exhibit G. "[U]nder traditional standing principles" a party has standing if it has suffered "(1) an injury that is (2) fairly traceable to the . . . allegedly unlawful conduct, and (3) likely to be redressed by the requested relief." *State ex rel. Walgate v. Kasich*, 2016-Ohio-1176, ¶ 18, 147 Ohio St. 3d 1, 7, 59 N.E.3d 1240, 1247. Here, the Media Movants have been, and continue to be, denied their constitutional right of access to Exhibit G due to the Court's continued sealing of Exhibit G and have requested, upon written motion to this Court, that the Court unseal Exhibit G to redress the injury suffered by Media Movants.

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[2] But to be clear, contrary to Plaintiffs' assertions, nonparties (including members of the media) do have standing to challenge protective orders that restrict the public right of access to court records. *See, e.g.*, *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919 (6th Cir. 2019).

Media Movants have a presumptive right of access to Exhibit G under the Rules of Superintendence, the First Amendment, and the Ohio Constitution and have standing to request that this Court unseal Exhibit G in accordance therewith.

II. A Summary Judgment Exhibit is Not Mere "Discovery Material"; the Presumptive Right of Access Afforded by the First Amendment, the Ohio Constitution, and Superintendence Rule 45 Applies to Exhibit G.

Both the Ohio Rules of Superintendence and the Ohio Supreme Court have recognized that a document "submitted to a court or filed with a clerk of court in a judicial action or proceeding, including [an] exhibit . . ." constitutes a judicial record to which a presumption of open public access applies under Sup. R. 45(A). *See* Sup. R. 44(C)(1); *Wolff*, 974 N.E.2d at 98. As set forth in detail in Media Movants' Motion, the press and the public are also afforded a presumptive right of access to judicial documents under the First Amendment and the Ohio Constitution. *See State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094, ¶ 8. The public's right of access applies in both civil and criminal cases. *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1179 (6th Cir. 1983) ("The policy considerations discussed in *Richmond Newspapers* apply to civil as well as criminal cases . . . The concern of Justice Brennan 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) ("We have long recognized a 'strong presumption in favor of openness' regarding court records.") (quoting *Brown*, 710 F.2d at 1179).

Where the constitutional right applies, the presumption of access can only be overcome 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 (quoting *Press-Enter. Co. v. Superior Court*, 464 U.S. 501, 510 (1984) ("*Press-Enterprise I*")). Such findings were not made in this case; Exhibit G was filed under seal pursuant to the stipulated protective order. The parties to an action cannot waive the press and the public's right of access to judicial records by stipulating to a protective order or otherwise. Contrary to Plaintiffs' assertions, Exhibit G is not mere discovery material subject to a stipulated protective order; it is distinguishable from documents merely exchanged between the parties during discovery and not filed with any court. Rather, Exhibit G was filed with this Court in connection with a potentially dispositive motion for summary judgment. As a result, it is a judicial document to which a presumptive right of public access applies.

A. Exhibit G is not unfiled discovery material; Plaintiff's claim that Exhibit G is not entitled to a presumptive right of access is unsupported.

Plaintiffs devote nearly half of their Opposition to an attempt to cast doubt upon the press and the public's constitutional right of access to Exhibit G. But these arguments are unavailing.

Plaintiffs' assertion that Exhibit G is "discovery material" that has "historically never been open to the public" finds no support, even in the cases relied on by Plaintiffs. Opp. at 6. Though the lead case Plaintiffs cite in support of this proposition, *Adams v. Metallica, Inc.*, 143 Ohio App. 3d 482, 490–91, 758 N.E.2d 286, 292 (2001), states that "there appears to be no clear, unqualified public right to inspect pretrial discovery materials" it goes on to clarify that this "does not mean that trial courts should feel free to seal them from inspection . . . ." As the appellate court in *Adams* explained, "[t]he Civil Rules clearly contemplate that discovery documents *on file with the court* shall not be sealed from the public absent "good cause shown," *thus creating a presumption in favor of public access to such materials*." *Id.* (italics added.)

Plaintiffs' reliance on *Seattle Times Co. v. Rhinehart*, 467 U.S. 20 (1984) is similarly misplaced. The *Seattle Times* Court was not asked to consider the press and the public's

presumptive First Amendment right of access to court documents. Rather, defendant newspaper—a party to the litigation—challenged the trial court's protective order prohibiting the newspaper from disseminating information it obtained through discovery as an impermissible prior restraint on expression under the First Amendment. *Id.* at 30–31. Media Movants are not a party to this case, are not subject to a protective order, and do not seek access to unfiled discovery material. Simply put, the public's presumptive right to access court documents was not at issue in *Seattle Times* and the case has no application here.

Likewise, Plaintiffs' citation to *In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1331 (D.C. Cir. 1985) is unavailing. The passage quoted in Plaintiffs' Opposition is merely *dicta* and, in any event, the D.C. Circuit's discussion of a U.S. Supreme Court decision which "did not involve a claim by the public to *access,* but rather a claim by one of the parties of the right to *disseminate* information acquired in the course of pretrial discovery" is not relevant to Media Movants' Motion to unseal a summary judgment exhibit filed with the Court. Plaintiffs' attempts to mischaracterize Exhibit G as equivalent to unfiled discovery materials not filed with a court is both incorrect and unsupported by case law.

B. Exhibit G is a judicial document to which a presumption of public access applies regardless of the extent to which it was relied upon by the Court.

Plaintiffs attempt to make much of the fact that Exhibit G was not proffered as evidence at trial and, purportedly, was not relied upon by defendants to support their truth defense. Opp. at 2–3. For this reason, Plaintiffs contend that the presumption of public access that applies to judicial documents does not apply to Exhibit G. But this reasoning was flatly rejected by the Ohio Supreme Court in *State ex rel. Vindicator Printing Co. v. Wolff.*

In *Wolff*, nonparty media organizations challenged a trial court decision that certain documents filed under seal with the court "were not entitled to presumptive public access,

because they were not used by [the court] to render a decision in the cases." 974 N.E.2d at 98. The Supreme Court rejected this argument and vacated the judge's sealing decision, holding 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)." *Id.; see also Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (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 or information contained in a 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 with a clerk of the court in a judicial action or proceeding"—specifically, as an exhibit to defendants' combined summary judgment reply. It 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 to Exhibit G. Moreover, because Exhibit G is a document filed in connection with a summary judgment motion, 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)).

III. Perhaps Because of This Clear Mandate Plaintiffs Make No Attempt to Demonstrate a Compelling or Higher Interest that Overcomes the Public's Presumptive Right of Access to Exhibit G.

Plaintiffs erroneously attempt to shirk their burden to justify continued sealing of Exhibit G by claiming that "when documents have already been sealed, the party seeking access bears

the burden to show that the restricted documents should be made available for public consumption." Opp. at 17. Yet, again, Plaintiffs' reliance on the stipulated protective order as a purported justification for the sealing of Exhibit G is misplaced. Plaintiffs simply misapprehend the presumption of access afforded by the First Amendment, the Ohio Constitution, and the Rules of Superintendence, as well as the inquiry now before the Court.

Because Exhibit G was filed under seal pursuant to the stipulated protective order, the parties did not present arguments to the Court to justify sealing. Accordingly, the Court did not make the requisite "specific, on the record findings" demonstrating that a compelling interest outweighs the public's constitutional rights of access to Exhibit G and that sealing it in its entirety is narrowly tailored to serve that interest. *Press-Enterprise II*, 478 U.S. at 13–14. For the same reason, the Court also did not make the requisite findings "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).

Plaintiffs' contention that the Court's order denying defendants' motion to unseal Exhibit G represents an order sealing the document for purposes of Sup. R. 45(E) is incorrect. In denying that motion, the Court made no findings with regard to the *public's* right of access to Exhibit G under the factors set forth in Rule 45(E)(2). Rather, the Court denied defendants motion, in part, due to the fact that defendants "opted to file" Exhibit G "in accordance with an agreed protective order that they drafted and stipulated to." *See* Entry and Ruling on Defendants' Motion to Unseal Exhibit G of Defendants' Combined Summary Judgment Reply Brief.

Contrary to Plaintiffs' assertions, to the extent any countervailing interest exists that could overcome the public's right of access here, the proper remedy is not automatic wholesale

sealing of the document. Because a constitutional presumption of access applies to Exhibit G, any sealing of that document must be "narrowly tailored"—*i.e.*, no broader than necessary to serve the compelling interest—and the Court must consider alternatives to blanket sealing. *See Press-Enterprise II*, 478 U.S. at 13–14. Likewise, Sup. R. 45(E)(3) requires that if a court finds it necessary to restrict public access, it must use "the least restrictive means available," for example, redacting information "rather than limiting public access to the entire document."

IV. Media Movants' Motion Should Not Be Held in Abeyance; Any Delay in Deciding Media Movants' Motion Constitutes Irreparable Harm.

Finally—without citing any supporting authority—Plaintiffs ask "in the alternative" that the Court hold its decision on the Media Movants' Motion in abeyance until the conclusion of appellate proceedings. Opp. at 24. This "alternative" relief should be rejected. The delay sought by Plaintiffs flies in the face of well-established case law holding that when the public has a right of access to a court document access must be contemporaneous, and delaying access constitutes irreparable harm. *See Doe v. Pub. Citizen*, 749 F.3d 246, 272–73 (4th Cir. 2014) ("the public and press generally have a contemporaneous right of access to court documents and proceedings when the right applies" and the "court therefore must make on-the-record findings . . . as expeditiously as possible"); *Grove Fresh Distributors, Inc. v. Everfresh Juice Co.,* 24 F.3d 893, 897 (7th Cir. 1994) ("In light of the values which the presumption of access endeavors to promote, a necessary corollary to the presumption is that once found to be appropriate, access should be immediate and contemporaneous . . . To delay or postpone disclosure undermines the benefit of public scrutiny and may have the same result as complete suppression."); *Paulsen v. County of Nassau,* 925 F.2d 65, 68 (2d Cir.1991) ("[T]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.") (quoting *Elrod v. Burns,* 427 U.S. 347, 373 (1976)); *Nebraska Press Ass'n v. Stuart,* 423 U.S. 1327, 1329 (1975)

("[E]ach passing day [that access is delayed] may constitute a separate and cognizable infringement of the First Amendment.")

In support of their attempt to delay resolution of Media Movants' Motion, Plaintiffs point to nothing more than a purported desire to "avoid" some unidentified "potential prejudice[.]" Opp. at 24-25. But it is Media Movants and the public who will be prejudiced by continued sealing of Exhibit G while appellate proceedings are pending. Not only are Media Movants prejudiced by the continued sealing of Exhibit G as a legal matter, but the public is prejudiced as a practical matter, having already been denied access to the document for nearly seven months. Such ongoing prejudice clearly cuts against Plaintiffs' argument that the release of Exhibit G is not "time sensitive." Opp. at 24.

As reflected by the significant national and local media attention cited in Media Movants' Motion surrounding the jury verdict and the defendants' appeal, public interest in this case has continued to grow since the time of the verdict. Interest in the case should remain high as the case proceeds on appeal. Yet the logical conclusion to Plaintiffs argument would seem to be that the best way to deal with the fact that the public has been denied access to a newsworthy court record for nearly seven months is to continue to deny the public access to that record until such an as-yet-undetermined time when appellate proceedings conclude and the public's ability to contemporaneously monitor developments in the case has passed.

Moreover, even if proceedings in the case were not still ongoing, the length of time that a document has been under seal does not dictate the newsworthiness of the document or serve as a means of assessing the present public interest in the document. *See In re Pineapple Antitrust Litigation*, 2015 WL 5439090, *2 (S.D.N.Y. Aug. 10, 2015) ("The decision whether a potential investigatory story is newsworthy is ultimately for the journalist to make; it is not for the subject

of the investigation or the court to decide."). Indeed, the public only recently became aware that Exhibit G was filed under seal when the Court denied defendants' motion to unseal the document. *See, e.g.*, William A. Jacobson, *Judge Denies Oberlin College's Request to Unseal Gibson Bakery Clerk's Facebook Records*, Legal Insurrection (Sept. 24, 2019), https://legalinsurrection.com/2019/09/judge-denies-oberlin-colleges-request-to-unseal-gibson-bakery-store-clerks-facebook-records/.

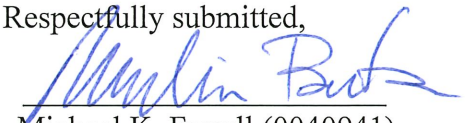
The continued sealing of Exhibit G—absent any specific on the record findings that a compelling or higher interest outweighs the public's presumptive right of access—cannot be justified. To hold the Court's decision in abeyance for months, or potentially years, would be an impermissible violation of the press and the public's constitutional right of access and would result in irreparable injury to the Media Movants and the public. Accordingly, Media Movants respectfully request that the Court grant their pending Motion expeditiously.

CONCLUSION

For the foregoing reasons, and those in the Media Movants' Memorandum in Support of their Motion for Access, the Court should grant Media Movants' motion and unseal Exhibit G to defendants' combined summary judgment reply brief.

Dated: December 9, 2019

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served this 9th day of December, 2019, via e-mail, pursuant to Civ.R. 5(B)(2)(f) of the Ohio Rules of Civil Procedure, upon the following:

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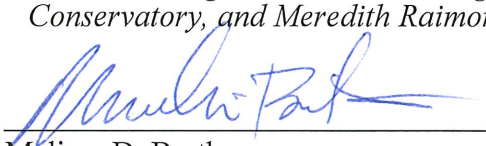

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