UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

ISABEL ZELAYA, *et al.*,	)	
	)	
Plaintiffs,	)	
	)	No. 3:19-cv-00062-TRM-CHS
v.	)	
	)	
ROBERT HAMMER, *et al.*,	)	
	)	
Defendants.	)	

O R D E R

I. Introduction

This matter is before the Court upon three Motions to Seal relating to information designated as "confidential" by one or more parties in this action. [Docs. 676, 699, and 727]. The Court conducted a hearing on these motions on August 4, 2022. Attorneys Art Bookout and Michelle Lapointe presented argument for Plaintiffs. Attorney Laura Taylor presented argument for the United States, Attorney Mary Ann Stackhouse presented argument for Defendant John Witsell, and Attorney Ford Little presented argument for a group of the remaining individual defendants (collectively, "Defendants"). Having considered the parties' arguments and reviewed the materials submitted in relation to these motions to seal, the motions to seal [Docs. 676, 699, and 727] are **DENIED** for the reasons stated herein.[1]

[1] Plaintiffs filed each of the motions to seal because Plaintiffs were filing briefs and exhibits which contained information that Defendants had designated as confidential. Pursuant to the Stipulated Protective Order [Doc. 361] entered in this action, a party filing information designated as confidential by another party must move to seal that information—even if the moving party does not want the information placed under seal. The designating party then has fourteen days to respond and explain to the Court why the information should be sealed. In this case, Plaintiffs actually *oppose* sealing the information and documents which are the subject of the motions to seal [Docs. 676, 699, 727]. Defendants support sealing only *some* of the documents Plaintiffs moved to seal (or redact), and the Court will discuss that information only. The remaining documents which were filed as proposed sealed documents shall not be filed under seal since neither Plaintiffs nor Defendants have presented a basis to justify sealing.

II. Background

On April 5, 2018, federal, state, and local law enforcement agents (collectively, "law enforcement agents") raided a meat packing plant in Bean Station, Tennessee. During the raid, the Latino workers were rounded up and taken to a facility off-site where they were held while agents reviewed their immigration/citizenship status. Plaintiffs in this case—the detained Latino workers—allege that, during the raid, law enforcement agents violated Plaintiffs' federally protected civil rights. Individual Plaintiffs have brought claims for excessive force and other constitutional violations against individual law enforcement agents. Two Plaintiffs have brought excessive force claims against Defendant John Witsell, a Supervisory Special Agent ("SSA") with the Department of Homeland Security.

In addition to the individual claims, the named Plaintiffs also assert a class action on behalf of all Latino workers detained during the raid against the individual law enforcement agents and the United States under 42 U.S.C. § 1985 for a conspiracy to violate their constitutionally protected civil rights. On August 9, 2022, the District Court granted Plaintiffs' motion for class certification. [Doc. 735].

During the course of discovery, Plaintiffs have attempted to compel the deposition of SSA Witsell. The Court, however, in its Order dated June 27, 2022 [Doc. 670], denied Plaintiffs' motion to compel such deposition [Doc. 635] and granted SSA Witsell's motion for a protective order [Doc. 647]. In doing so, the Court found that SSA Witsell's current health status prevented him from participating in a deposition at the present time [Doc. 670]. As a consequence of his unavailability for deposition—and to prevent Plaintiffs from being prejudiced by his unavailability—the Court ordered that SSA Witsell be prohibited from testifying at trial, and further ordered that neither Defendants' lay witnesses nor expert witnesses would be permitted to

incorporate in their own testimony or statements of opinions information supplied by SSA Witsell concerning his version of events [*Id.*].

Following entry of that Order, Plaintiffs discovered that the Office of Professional Responsibility ("OPR") of the Department of Homeland Security conducted an investigation into SSA Witsell's arrest of a Latino worker, Jose Maurico Rodas-Guillen. This arrest was captured on video ("the Arrest Video") by a camera mounted at the meat packing plant. As part of its investigation, the OPR reviewed the video, interviewed SSA Witsell, and prepared a report ("the OPR Investigative Report"). Following receipt of the report, Plaintiffs filed a Motion to Reconsider (the "Motion to Reconsider") [Doc. 700] this Court's Order declining to compel SSA Witsell to participate in a deposition [Doc. 670]. Against that backdrop, the Court considers the information the parties seek to seal in the public record.

First, Defendants seek to seal or redact from the public record certain information filed in relation to Plaintiffs' reply brief in support of their motion for class certification (the "Class Certification Reply Brief") [Class Certification Reply Brief, Doc. 677]. Specifically, Defendants ask the Court to: (1) seal the Arrest Video [Doc. 677-2] which is attached to the Class Certification Reply Brief; and (2) redact from the public record one paragraph in the Class Certification Reply Brief which describes the events in the Arrest Video.

Second, Defendants seek to seal certain information filed in relation to the Motion to Reconsider. Specifically, Defendants seek to seal or redact from the public record: (1) Plaintiffs' descriptions of the Arrest Video in Plaintiffs' Motion to Reconsider and in Plaintiffs' Reply Brief in Support of the Motion to Reconsider [Doc. 728]; (2) the OPR investigative report, attached as an exhibit to the Motion to Reconsider [Doc. 700-2]; (3) handwritten notes by the agent who interviewed SSA Witsell during the OPR investigation, which notes are attached as an exhibit to

Plaintiffs' Reply Brief in support of Plaintiffs' Motion to Reconsider [Doc.728-4]; and (4) two email strings between federal agents—one of which includes SSA Witsell—arranging for an interview of SSA Witsell for purposes of the OPR investigation [Docs. 700-2 and 700-3].

III. Analysis

A. Standard of Review

"As a general rule, the public has a first amendment right of access to court documents and proceedings." *In re Morning Song Bird Food Litig.*, 831 F.3d 765, 782 (6th Cir. 2016)(dissenting opinion). However, the first amendment right of public access does not apply to information exchanged during the discovery phase of litigation because that information is not considered by a court to render a ruling on an issue in the case. *See Shane Grp. Inc. v. Blue Cross Blue Shield of Michigan, Inc.*, 825 F.3d 299, 305 (6th Cir. 2016). "'At the adjudication stage, … very different considerations apply,'" *id.* (quoting *Joy v. North*, 692 F.2d 880, 893 (2d Cir. 1982)), because, of course, a court does consider the information filed in the court record to make its rulings. Therefore,"[u]nlike information merely exchanged between the parties, '[t]he public has a strong interest in obtaining information contained in the public record.'" *Shane Grp.,* 825 F.3d 299, 305 (6th Cir. 2016) (quoting *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1180 (6th Cir. 1983)). Accordingly, "[c]ourts have long recognized . . . a 'strong presumption in favor of openness' as to court records." *Shane Grp.*, 825 F.3d at 305 (quoting *Brown & Williamson*, 710 F.2d at 1179).

In *Shane Group.*, the Sixth Circuit discussed the very high barrier a party must surmount to overcome the presumption of openness as to a court's record:

> The burden of overcoming that presumption is borne by the party that seeks to seal them. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001). The burden is a heavy one: "Only the most compelling reasons can justify non-disclosure of judicial records." *In re Knoxville News–Sentinel Co.*, 723 F.2d 470, 476 (6th Cir. 1983).

> Moreover, the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access. *See Brown & Williamson*, 710 F.2d at 1179.

825 F.3d at 305 (emphasis added); *see also Rudd Equip. Co. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 594 (6th Cir. 2016) (requiring "compelling reasons" to justify sealing court records). Damage to a party's reputation by filing information in the public record is insufficient to justify sealing that information. *Rudd Equip.* 834 F.3d at 594; *Brown & Williamson*, 720 F.2d at 1179. Moreover, "even where a party can show a compelling reason why certain documents or portions thereof should be sealed, the seal itself must be narrowly tailored to serve that reason." *Shane Grp*., 825 F.3d at 305; *see also Rudd Equip.*, 834 F.3d at 594 (same); *Beauchamp v. Fed. Home Loan Mortg. Corp.*, 658 F. App'x. 202, 207 (6th Cir. 2016) (same).

In *Brown & Williamson*, the court articulated three reasons for the right of public access. First, "public trials play an important role as outlets for community concern, hostility and emotions. When judicial decisions are known to be just and when the legal system is moving to vindicate societal wrongs, members of the community are less likely to act as self-appointed law enforcers or vigilantes." 710 F.2d at 1178 (internal citations omitted). Second, "public access provides a check on the courts. Judges know that they will continue to be held responsible by the public for their rulings. Without access to the proceedings, the public cannot analyze and critique the reasoning of the court . . . . One of the ways we minimize judicial error and misconduct is through public scrutiny and discussion." *Id.* Third, "open trials promote true and accurate fact finding." *Id.* (internal citation omitted). The court in *Shane Group* articulated the reasons for the public's interest in open access to court records similarly:

> "[S]ecrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." [*Brown & Williamson*, 710 F.2d at 1179]. And in any of these cases, the public is entitled to assess for itself the merits of judicial decisions. Thus, "[t]he public has an interest in ascertaining what evidence and records the District Court and this Court have relied upon in reaching our decisions." *Id*. at 1181.

825 F.3d at 305.

The right of access is not absolute, however. *Brown & Williamson*, 710 F.2d at 1179. There are two categories of exceptions to the right of public access. The first category is the need to keep dignity and order in the courtroom. In such an instance, the legitimate societal interest in protecting the adjudicatory process from disruption outweighs the interest of unfettered public access to the proceedings. *Id.* The second category consists of restrictions based on the content of the information to be disclosed to the public. *Id.* Certain content-based exceptions outweigh the right to public access. Some of these exceptions include:

- a defendant's right to a fair trial;
- trade secrets;
- national security; and
- certain privacy rights of participants and third parties.

Id.; *see also Rudd Equip.*, 834 F.3d at 593 (noting defendant's right to a fair trial, national security, protection of trade secrets, privacy rights of a third party, and information protected by statute or a recognized privilege may be a valid basis for sealing a court record).

When faced with a request to seal, the reviewing court must "balance the litigants' privacy interests against the public's right of access, recognizing our judicial system's strong presumption in favor of openness." *Rudd Equip.*, 834 F.3d at 594; *see also Shane Grp.*, 825 F.3d at 305. "'A naked conclusory statement that disclosure will injure a producing party falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal.'" *In re Se. Milk Antitrust Litig.*, 666 F. Supp. 2d at 915 (citing *Joy v. North*, 692 F.2d 880, 884 (2d Cir.

1982)).

B. The Arrest Video and the Description of it in the Plaintiffs' Class Certification Reply Brief

Defendants offer several arguments as to why the Arrest Video and the description of it in the Plaintiffs' Class Certification Reply Brief should be sealed from public view:

1. The Arrest Video, as well as the description of it—which description Defendants characterize as inflammatory and provocative—could incite civil unrest, taint the jury pool, and invite condemnation of the agents and potential retaliation against them.

2. A written description of the Arrest Video has already been filed in this case and so the public's right to know what is in the Arrest Video has already been satisfied.

3. The Arrest Video has no bearing on the Motion for Class Certification.

4. The Arrest Video and the description of it are offered in support of motions that are "interlocutory disputes." Therefore, the need to allow public access to the Arrest Video and any descriptions of it are not as great as if they were offered in support of "merits disputes."

The Court will discuss these reasons *seriatim.*

First, Defendants' assertion that allowing the public to see the Arrest Video and the written descriptions of it will incite civil unrest, taint the jury pool, and subject the agents/officers to condemnation and potential physical harm is speculative and conclusory. This action was filed in February 2019 and the complaint contains detailed, graphic descriptions of alleged wrongdoing by law enforcement agents. Those assertions are purely conclusory. Despite these descriptions having been placed in the public record over three years ago, Defendants have provided no evidence to support their concerns of civil unrest or a presumption that a jury will be biased against Defendants if the Arrest Video is placed in the public record. There *has* been public interest in this particular case—a number of media/journalism outlets have published stories about the raid, and it appears that there has been a peaceful demonstration [*See* Doc. 701]. But a few news stories and one

peaceful demonstration do not constitute civil unrest. Further, while the Arrest Video and descriptions of it may portray some members of law enforcement unfavorably, potential damage to reputation is not a sufficient basis to place information under seal. While the Court is mindful that allegations of wrongdoing on the part of law enforcement can place such agents in jeopardy of retaliation, the Court is unaware of any specific threats against Defendants. To mitigate this possibility, the Court has and will continue to allow the parties to redact from the public record the Personal Identifiable Information of any law enforcement agents.

Second, Defendants assert that, because a written description of the Arrest Video has already been filed in a previous brief, there is no need to release the actual video itself or subsequent descriptions of it. The Court disagrees. As discussed above, there is a presumption of openness with respect to court filings—particularly where there is public interest in the litigation's subject matter. Members of the public should be allowed to view the video and reach their own conclusions as to what it depicts.

Third, Defendants contend that the Arrest Video has no bearing on the Plaintiffs' Motion for Class Certification; therefore, it is not necessary for the public to view it to understand the Court's decision on class certification. Plaintiffs respond that the Arrest Video *is* relevant to demonstrate commonality (that is, the potential class members have suffered an action that arises from a common set of facts)—one of the elements necessary to pursue a class action. Here, Plaintiffs are attempting to demonstrate that Defendants conspired to violate their civil rights giving rise to a claim under 42 U.S.C. § 1985, and they maintain that the event depicted in the video illustrates one such civil rights violation. And, in fact, the District Court did consider the Arrest Video in making its decision to grant the motion for class certification. [*See* Doc. 738, Order at 4 and 18, Page ID ## 12218 and 12232]. So, Defendant's contention that the Arrest Video had

no bearing on the Motion for Class Certification is inaccurate.

Fourth, Defendants argue "courts in the Sixth Circuit recognize that there is a distinct difference, with regard to right of public access, between interlocutory disputes on the one hand, and merits disputes, on the other, when reviewing confidential discovery information so designated." [Defendant's Brief in Support of Motion to Seal, Doc. 693]. Defendants imply that the Arrest Video and descriptions of it are offered as part of an "interlocutory dispute," *to wit*, whether this action should be certified as a class action, and, therefore, the public's interest in accessing this information is not as great as if it were offered in support of a "merits dispute." As previously discussed, *supra* pp. 3-4, the Sixth Circuit in *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, *Inc.*, does distinguish between information exchanged by the parties during the discovery phase of litigation and information relied upon by the Court "at the adjudication stage." 825 F.3d at 305-06. But, *Shane Group* makes no distinction between what Defendants refer to as "interlocutory disputes" and "merits disputes." Regardless, in *Shane Group* the Sixth Circuit held that the "adjudication stage" does include motions for class certification, *id.* at 307, and clarifies that the public has a strong interest in access to information considered by the court at the *adjudication* stage of litigation, *id.* at 305. So, the Arrest Video—which was considered by the District Court in deciding the class certification motion—is information in which the public has a strong interest and which should be available to the public.

Finally, the Court notes that the information sought to be sealed relates to police conduct during a raid at a slaughterhouse in Tennessee. The public has a strong interest in understanding how law enforcement performs its critically important duties. Police, often at great personal risk, provide order in our communities and allow us to live our lives safely—free from unwarranted interruption or fear. To carry out this mission, federal and state governments have empowered law

enforcement to investigate, detain, and arrest people and to seize their property. This power is not limitless—transparency is necessary to prevent abuses. Such transparency can reassure the public that police are conducting themselves within constitutional boundaries, thereby increasing trust and confidence. Alternatively, it can provide accountability and an impetus for correction should police overstep constitutional boundaries.

The Court concludes that Defendants have not satisfied their high burden to provide a compelling reason to seal the Arrest Video and the description of it in Plaintiffs' Class Certification Reply Brief.

C. Descriptions of Arrest Video in, and Supporting Exhibits to, Plaintiffs' Motion for Reconsideration and Plaintiffs' Reply Brief in Support

Defendants originally sought to have sealed from the public record: (1) Plaintiffs' descriptions of the Arrest Video in Plaintiffs' Motion for Reconsideration and in Plaintiffs' Reply Brief in Support of Plaintiffs' Motion for Reconsideration; (2) an OPR investigative report of SSA Witsell's arrest of Mr. Rodas-Guillen; (3) handwritten notes made during the course of the OPR investigation; and (4) an email thread between federal agents arranging for the interview of SSA Witsell during the OPR investigation. However, during the hearing on August 4, 2022, the Court advised the parties it would not seal the Arrest Video and explained its reasons for this decision. In response, the Defendants withdrew their request to seal the remaining information at issue. So, the referenced information will not be sealed.

D. Redactions of Information Protected by the Work Product Doctrine and the Attorney-Client Privilege.

The Court notes that, in some of the exhibits submitted by the parties which are the subject of the motions to seal, certain information has already been redacted on the ground that it is protected by the work product doctrine and/or the attorney-client privilege. The parties do not wish

to submit this redacted information for the Court's consideration in ruling on any motion. Therefore, the sealing analysis as to these redactions is unnecessary. The parties will be allowed to keep these redactions in the exhibits filed in the public record which are the subject of these motions to seal.

IV. Conclusion

For the reason stated herein, the Motions to Seal Documents 676, 699, and 727 are **DENIED**. Accordingly, it is **ORDERED** that

1. Plaintiffs **shall** file in the public record all briefs, exhibits, and documents which are the subject of these motions to seal [Docs. 676, 699, and 727] **within seven days of entry of this Order**.

2. When filing said briefs, exhibits and documents, Plaintiffs shall redact Personal Identifiable Information including home or private addresses; phone numbers; email addresses; social security numbers; personal financial, medical or other private information; and personal family information of the law enforcement agents in any of the briefs, exhibits or documents to be filed. Such Personal Identifiable Information is not relevant to the claims or defenses in this action and will not be considered by the Court in reaching any decision during the adjudication stage of this litigation.

3. Plaintiffs and Defendants shall cooperate to ensure all such Personal Identifiable Information is redacted. In the event there is any disagreement as to information to be redacted pursuant to this Order, the parties shall immediately contact this Court for guidance.

SO ORDERED.

/s/ Christopher H. Steger
UNITED STATES MAGISTRATE JUDGE