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IN THE CHANCERY COURT OF DAVIDSON COUNTY, TENNESSEE
FOR THE TWENTIETH JUDICIAL DISTRICT AT NASHVILLE

HENRY HODGES, Plaintiff, v. LISA HELTON, in her official capacity as Tennessee's Interim Commissioner of Correction and DR. KENNETH WILLIAMS, in his official capacity as Assistant Commissioner of Clinical Services, Chief Medical Officer Tennessee Department of Correction, Defendants.	No. 22-1440-III

MEMORANDUM OF LAW IN SUPPORT OF MOTION OF THE ASSOCIATED PRESS TO INTERVENE FOR THE LIMITED PURPOSE OF OPPOSING DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Proposed Intervenor the Associated Press ("AP"), a non-profit news cooperative with offices in Nashville and Memphis, submits this Memorandum of Law in support of its Motion to Intervene for the Limited Purpose of Opposing Defendants' Motion for Protective Order. For the reasons set forth herein, AP respectfully requests that Defendants' Motion be denied.

BACKGROUND

Plaintiff, a death-row inmate with a history of mental illness, alleges his civil rights have been violated by the Interim Tennessee Commissioner of Correction,

Lisa Helton, and the Department of Correction's Assistant Commissioner of Clinical Services and Chief Medical Officer, Dr. Kenneth Williams. Specifically, Plaintiff claims that Defendants have failed to provide him with adequate medical and mental health treatment, have subjected him to cruel and unusual punishment, have denied him due process (specifically, have denied him his liberty interest to be free from physical restraint), and have intentionally inflicted emotional distress upon him. Compl. Counts 1-4. The factual bases for these claims include allegations that from October 21, 2022, until at least the filing of the Complaint on October 28, 2022, Plaintiff "has been restrained in either a 4 or 6 point restraint," "has been deprived of clothing," and "has been strapped to a vinyl mattress on top of a concrete slab" with no sheets and with the lights on at all times. Compl. ¶¶ 46-48.

On October 28, 2022, the Court granted Plaintiff's Application for Temporary Restraining Order and issued an Order that restrained Defendants from, among other things, confining Mr. Hodges with a 6-point restraint device, denying Mr. Hodges clothing, and keeping the lights on in Mr. Hodges' cell room in a manner that interferes with his normal sleep routine. A hearing on Plaintiff's Motion for Preliminary Injunction is scheduled for December 19-20, 2022.

On December 5, 2022, Defendants filed a Motion for Protective Order (the "Motion") seeking two things. First, Defendants seek to prohibit public disclosure by Plaintiff of the following categories of records that, presumably, have already been provided to Plaintiff through discovery:

> 1. "[p]hotographs, videos, or other recordings produced in this action that depict the application of security restraints or other

security techniques used with violent or dangerous inmates at Riverbend Maximum Security Institute ("RMSI");"
2. "[t]he location of windows, doors, and other points of ingress and egress not externally visible at RMSI;"
3. "[t]he layout and interconnectedness of the units;"
4. "[t]he layout of the overall facility;"
5. Department of Corrections Internal Affairs investigative reports; and
6. "[u]nits logs containing sensitive information."

Defs.' Mot. at 1-2.

Second, "Defendants further request the Court issue an order requiring that any such materials," namely, the categories of records identified above, "filed with the Clerk be filed under seal." Defs.' Mot. at 4. Defendants' Motion is supported by the one-page Declaration of Ernest Lewis, the Associate Warden of Security at RMSI. Defs.' Mot. Ex. A. Defendants' Motion is set to be heard by the Court on December 12, 2022.

On December 7, 2022, Plaintiff filed his opposition to Defendants' Motion arguing, among other things, that much of what Defendants seek to keep confidential is in fact available to the public via the Tennessee Department of Correction's social media. Pl.'s Opp'n at 6-7. Plaintiff does not oppose AP's intervention. Defendants oppose AP's intervention.

ARGUMENT

I. AP's motion to intervene to oppose Defendants' Motion for Protective Order should be granted.

Under Tennessee law, media organizations like AP have standing to intervene to challenge a protective order and oppose the sealing of court records and proceedings. Tennessee courts "have 'firmly establishe[d] the right of the public,

including the media, to intervene in court proceedings for the purpose of attending the proceedings, or for the purpose of petitioning the Court to unseal documents and allow public inspection of them.'" *Kocher v. Bearden*, 546 S.W.3d 78, 84 (Tenn. Ct. App. 2017) (quoting *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Ct. Crim. App. 1998)). In *Ballard v. Herzke*, the Tennessee Supreme Court allowed media intervention to challenge a blanket protective order, holding that "we agree with those federal and state courts in other jurisdictions which have routinely found that third parties, including media entities, should be allowed to intervene to seek modification of protective orders to obtain access to judicial proceedings or records." 924 S.W.2d 652, 657 (Tenn. 1996) (string cite omitted). Likewise, in *State v. Drake*, the Tennessee Supreme Court allowed media intervention to challenge a closure motion that sealed all motions, orders, and transcripts from a proceeding. 701 S.W.2d 604, 608 (Tenn. 1985) ("Interested members of the public and the media may intervene and be heard in opposition to [a closure] motion."). Accordingly, under well-established Tennessee law, AP's motion to intervene for the limited purpose of opposing Defendants' Motion for Protective Order should be granted.

II. Defendants have not shown good cause sufficient to justify an order prohibiting Plaintiff from disclosing unfiled discovery material in this case of significant public interest.

When a protective order is sought, the burden is on the requesting party to "show that disclosure will result in a clearly defined injury to the party seeking closure." *Ballard*, 924 S.W.2d at 658; *see also In re Nat'l Prescription Opiate*

Litigation, 927 F.3d 919, 929 (6th Cir. 2019) ("To show good cause for a protective order, the moving party is required to make 'a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements.") (citation omitted).[1] Defendants have not carried that burden here because they have made only "[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning," and because the public interest in this case weighs heavily against a finding of good cause to prohibit Plaintiff from disclosing materials it has obtained through discovery. *Ballard*, 924 S.W.2d at 658 (citation omitted).

In support of their motion, Defendants proffered a declaration from Associate Warden Lewis that is conclusory in nature and devoid of specificity. For example, Associate Warden Lewis claims, without elaboration, that "[p]ublic disclosure regarding the application of security restraints to dangerous or violent inmates, the location of windows, doors, and other points of ingress or egress not externally visible, the layout and interconnectedness of the units, and the layout of the overall facility would all pose a severe security risk if publicly disclosed" and "[t]he disclosure of any such photographs, videos, or other recordings *could* pose a severe security risk to both inmates and staff at RMSI should they be publicly disclosed." Compl. Ex. A ¶¶ 6-7 (emphasis added). "Mere conclusory allegations," like these "are insufficient" to establish good cause for purposes of a protective order. *Ballard*, 924 S.W.2d at 658; *see also In re National Prescription Opiate Litigation*, 927 F.3d

[1] Cases cited in this Memorandum that are unpublished, from out of state, or from federal court are attached as Exhibit A.

919, 931 (6th Cir. 2019) (rejecting DEA's claim for protective order that release of data "would undermine DEA's mission of investigating and prosecuting misconduct involving controlled substances" as "vague"). And for the investigative reports and unit logs, Defendants do not even offer conclusory evidence to support their request.

The Tennessee Supreme Court also has identified two factors that "weigh[]against a finding of good cause" here, namely: "(1) the party benefitting from the protective order is a public entity or official [and] (2) the information sought to be sealed relates to a matter of public concern…" *Ballard*, 924 S.W.2d at 658. There is no question that the Defendants who seek the protective order are public officials with the Tennessee Department of Correction and the records at issue relate to the work of that public entity. Similarly, there is no doubt that the broad categories of documents Defendants seek to prohibit from being disclosed are of significant public concern.

Numerous courts have opined in a variety of contexts that civil rights cases and the treatment of people who are incarcerated is a matter of profound public interest. *U.S. v. Raines*, 362 U.S. 17, 27 (1960) ("[T]here is the highest public interest in the due observance of all the constitutional guarantees…"); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir. 1983) (holding closure to the media of certain records in prisoners' rights litigation was unconstitutional, reasoning that "litigation concerning penal administration [in the state] is of paramount importance to the citizens of that state"); *Flynn v. Doyle*, 630 F. Supp. 2d 987, 993 (E.D. Wis. 2009) ("The public has a strong interest in the provision of

constitutionally-adequate health care to prisoners …"); *Armstead v. Baldwin*, No. 2:19-CV-4857, 2020 WL 613934, at *11 (S.D. Ohio Feb. 10, 2020) ("It is in the public interest to ensure the just and humane treatment of the populace as a whole, inclusive of those detained in our jails and prisons.").

And widespread news coverage of Mr. Hodges' hunger strike, mental health crisis, and treatment by correctional staff underline the compelling public interest in his case, in particular. *See* Mariah Timms, *Nashville Judge: Tennessee prison must give adequate care to death row inmate*, The Tennessean (Oct. 28, 2022) https://perma.cc/U79Y-FXYP; Graig Graziosi, *Death row inmate cuts off his own penis after being denied suicide watch*, Yahoo! News (Oct. 27, 2022) https://perma.cc/UZ8J-URUG. In fact, AP's own reporting on Mr. Hodge's mental health crisis has been picked up by national and international publications, including *U.S. News*, *ABC News*, the *Independent*, the *Toronto Sun*, and the *San Diego Union Tribune*. Associated Press, *Attorney: Death Row Inmate on Suicide Watch Severed Penis*, U.S. News (Oct. 27, 2022) https://www.usnews.com/news/politics/articles/2022-10-27/attorney-death-row-inmate-on-suicide-watch-severed-penis; Travis Loller, Associated Press, *Attorney: Death row inmate on suicide watch severed penis*, ABC News (Oct. 27, 2022) https://perma.cc/96W7-H2F5; Travis Loller, *Attorney: Death row inmate on suicide watch severed penis*, The Independent (Oct. 27, 2022) https://perma.cc/6QM2-MXJG; Travis Loller, *Death row inmate on suicide watch severed penis: Attorney*, Toronto Sun (Oct. 27, 2022) https://perma.cc/3TGU-B4BS; Travis Loller, *Judge rules on case*

for Tennessee inmate who severed penis, San Diego Union Tribune (Oct. 28, 2022) https://perma.cc/6DDU-ULAB.

Given the lack of specificity in Defendants' proffered declaration, the fact that the records at issue involve the work of public officials, and the significant public interest in this case, Defendants have not carried their burden to justify the protective order they seek.

III. Defendants' sealing request is premature and contrary to law.

"The Tennessee Supreme Court has recognized a qualified right of the public, founded in the common law and the First Amendment to the United States Constitution to attend judicial proceedings and to examine the documents generated in those proceedings."[2] *Knoxville News-Sentinel v. Huskey*, 982 S.W.2d 359, 362 (Tenn. Crim. App. 1998) (citing *Ballard*, 924 S.W.2d at 661). The Sixth Circuit has explained that the public "has an interest in ascertaining what evidence and records" underlie judicial decisions, *Brown & Williamson Tobacco Corp. v. F.T.C.*, 710 F.2d 1165, 1181 (6th Cir. 1983), and permitting the public "to review the facts presented to the court" is essential to public confidence in, and oversight of, the administration of justice, *id.* at 1178. *See also Rudd Equip. Co., Inc. v. John Deere Constr. & Forestry Co.*, 834 F.3d 589, 593 (6th Cir. 2016) ("[T]he resolution of

[2] Article I, Sections 17 and 19 of the Tennessee Constitution similarly protect the public's right to access court records. *Autin v. Goetz*, 524 S.W.3d 617, 629 (Tenn. Ct. App. 2017) (citing Article 1, Section 17 in the sealing context for the fact that "the right to open courts is enshrined in Tennessee's Constitution); *Huskey*, 982 S.W.2d at 363 n.3 ("Article I, Sec. 19 of the Constitution of Tennessee presumably extends a similar qualified right to the public.")

private disputes frequently involves issues and remedies affecting third parties or the general public, and secrecy serves only to insulate the participants, mask impropriety, obscure incompetence, and conceal corruption.") (quotation marks and citations omitted); *Brown & Williamson*, 710 F.2d at 1177 ("[C]ourt records often provide important, sometime the only, bases or explanation for a court's decision."). Accordingly, the Tennessee Supreme Court has held that when a party seeks a closure order, "[t]he presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest." *Drake*, 701 S.W.2d at 607 (quoting *Waller v. Georgia*, 467 U.S. 39, 45 (1984); *see also Autin*, 524 S.W.3d at 629 ("The Tennessee Supreme Court has cautioned that restrictions on public access to judicial records must be 'based on findings that closure is essential to preserve higher values,'" and "'narrowly tailored to serve that interest.") (quoting *Drake*, 701 S.W.2d at 607). Here, Defendants' request that the Court enter an order requiring that broad categories of discovery materials be filed under seal is not only patently insufficient to overcome the presumption of openness, but also is premature and procedurally improper.

Defendants seek to have records the Court has never reviewed sealed without knowledge of the context in which they might be filed with the Court. Such a process is inconsistent with the procedural requirements for closure orders, like sealing. Without seeing the records sought to be sealed the Court cannot decide whether "an overriding interest … is likely be prejudiced" if sealing is not granted,

cannot "consider reasonable alternatives," cannot "tailor any closure order so that it is no broader than necessary to protect that interest," and cannot "make findings adequate to support the closure." *Drake*, 701 S.W.2d at 608. Moreover, the context in which the records are to be filed matters in the analysis. *See In re NHC-Nashville Fire Litigation*, 293 S.W. 3d 547, 571 (Tenn. Ct. App. 2008) ("[A media organization] has a presumptive right of access to documents filed in court, particularly documents filed in connection with a dispositive motion."). Indeed, Defendants' Motion asks this Court to ignore its responsibility to "articulate the specific facts upon which [the Court] has based a finding that closure is essential to preserve the moving party's interest and [its] finding that no alternatives to closure will adequately protect that interest." *Drake*, 701 SW 2d at 608. As such, Defendants' sealing request is wholly improper and premature.

Moreover, Defendants have made no arguments in favor of satisfying the stringent standard for sealing court records. One line in a motion focused on preventing public disclosure under the good cause standard is patently insufficient to overcome the presumption in favor of public access to court records. As such, even if the Court finds good cause to prevent the public disclosure of the identified discovery materials, Defendants' request to seal the broad categories of materials it seeks to keep from being publicly disclosed should be rejected.

CONCLUSION

For the reasons herein, AP respectfully requests that the Court grant its motion to intervene and deny Defendants' Motion for Protective Order.

Dated: December 8, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that on December 8, 2022, a true and correct copy of the foregoing was served by email, as agreed by the parties:

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