IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION-CINCINNATI

NORCAL TEA PARTY PATRIOTS, ON BEHALF OF ITSELF, ITS MEMBERS, AND THE CLASS IT SEEKS TO REPRESENT, Plaintiff, v. THE INTERNAL REVENUE SERVICE, et al., Defendants.	Civil Action No. 1:13-cv-00341 Judge Michael R. Barrett **THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT GP MEDIA, INC.'S REPLY IN SUPPORT OF ITS MOTION TO UNSEAL**

The Government Defendants relied on the depositions of Former Individual Management Defendants, Lois Lerner and Holly Paz, to support their Motion for Summary Judgment, filed July 21, 2017. Plaintiffs also relied on the Lerner and Paz depositions to oppose the Government's motion. Both parties filed the complete depositions, and summary judgment materials, under seal.

Both parties submitted the Lerner and Paz depositions to this Court for the purpose of adjudicating the Government's Motion for Summary Judgment. At that moment, the depositions transformed from discovery materials to adjudicative materials, and thus court records subject to public access. The Court could only have sealed those records if the party requesting the seal presented the "most compelling reasons" to do so. None were given here. The seal is improper.

Now, Lerner and Paz are attempting to remedy the error by submitting a tardy motion to seal. They base their argument on the faulty premise that the pending settlement and stayed deadlines have extinguished the adjudicative nature of their depositions and summary judgment materials, so they are no longer court records subject to public access.

Lerner and Paz also fail to meet the standard set forth by the Sixth Circuit in *Shane Group, Inc. v. Blue Cross Blue Shield,* requiring the moving party to demonstrate the "most compelling reasons" for sealing a court record. Lerner and Paz argue the court should seal the records to protect them against media attention arising from the release of the deposition transcripts that could spur harassment. But they do not contend that the depositions contain any sensitive information.

Lerner and Paz have been in the media in connection with this matter since 2013 and they present no evidence demonstrating any immediate threat to their safety if the deposition transcripts and summary judgment materials are unsealed. Accepting Lerner and Paz's argument would create a dangerous precedent, allowing government officials to hide their bad conduct by simply stating they want to avoid media attention.

Both the Government and the Plaintiffs, the only other parties who have viewed the sealed records, do not believe the records contain any information that could be subject to a seal. Both parties support The Enquirer's Motion to Unseal.

Moreover, Lerner and Paz's argument that the release of the court records will serve no legitimate function is not only baseless, but also cuts against the First Amendment. Lerner and Paz were key government actors alleged to have targeted certain political groups seeking tax-exempt status. The depositions will provide the public with important details regarding their

activities. The public plays an important role in holding its government officials accountable, and it can only do that when there is transparency surrounding actions taken by government officials, acting in their official capacity, on the taxpayers' dime. Allowing government officials to hide facts pertaining to their conduct will only perpetuate malfeasance.

I. Summary Judgment Materials, and Attached Deposition Transcripts, Did Not Lose Their Status as Court Records Subject to Public Access.

Lerner and Paz make the bold argument that since the Court will not use the deposition transcripts or summary judgment materials to adjudicate substantive rights, they are not subject to public access. Lerner and Paz's argument is legally deficient.

The controlling case law in the Sixth Circuit is *Shane Group, Inc. v. Blue Cross Blue Shield,* 825 F.3d 299 (6th Cir. 2016). The Sixth Circuit in *Shane Group* drew a clear line for when materials become court records subject to public access. It occurs when the parties place the material in the court record. *Shane Group,* 825 F.3d at 305. The public's interest in the court records are not merely focused on the result, "but also on the conduct giving rise to the case." *Id.* Without transparency regarding the parties' conduct, "secrecy insulates the participants, masking impropriety, obscuring incompetence, and concealing corruption." *Id.*

Lerner and Paz fail to cite to a single case holding that materials filed for adjudicatory purposes can lose their status as court records when a court has merely stayed all matters to consider whether a class action settlement agreement is proper. The settlement in this case is not final and the Court can still reject it. Moreover, the Court may look to the summary judgment materials and deposition transcripts to determine whether the settlement agreement sufficiently remedies the Plaintiffs. "The public has an interest in ascertaining what evidence

and records the [Court has] relied upon in reaching [its] decisions." *Shane Group*, 825 F.3d at 305.

Lerner and Paz rely heavily on *United States v. El-Sayegh*, 131 F.3d 158 (D.C. Cir. 1997), to support their argument because it was cited by the Sixth Circuit in *United States v. Miami Univ.*, 294 F.3d 797 (6th Cir. 2002). But the *Miami University* decision provides no guidance to this Court. *Miami University* concerned public access to student disciplinary proceedings and the release of student disciplinary records pursuant to the Family Education Rights and Privacy Act ("FERPA"). The court held student discipline records were protected "education records" under FERPA and not subject to release under the Ohio Public Records Act. *Miami Univ.*, 294 F.3d at 815. The court also refused to place student discipline hearings on equal footing with criminal hearings that are adjudicated by a court of law, and thus "declined to evaluate the matter with the same deferential eye toward First Amendment access as [the court] would government criminal proceedings." *Miami Univ.*, 294 F.3d at 822-23. *Miami University* does not hold that a summary judgment motion and related materials lose their status as court records because the court has stayed ruling on the motion.

Therefore, the summary judgment materials and depositions of Lerner and Paz are court records for which Lerner and Paz must submit the "most compelling reasons" to justify non-disclosure. *Id.* at 305.

II. Lerner and Paz Fail to Put Forth the Most Compelling Reasons for Sealing their Depositions.

There is a strong presumption in favor of openness of court records, and Lerner and Paz bear the burden of overcoming that presumption. *Shane Group*, 825 F.3d at 305. Only the most

compelling reasons will overcome the burden. *Id.* And "the greater the public interest in the litigation's subject matter, the greater the showing necessary to overcome the presumption of access." *Id.* Lerner and Paz have failed to meet this heavy burden.

Lerner and Paz provide only a conclusory statement that mere publicity regarding the release of their depositions will "renew threats and harassment." (Doc. No. 392-1, p. 13.) Such a conclusory statement does not meet the "most compelling reasons" standard. *See In re Southeastern Milk Antitrust Litig.*, 666 F.Supp.2d 908, 915 (E.D. Tenn. 2009) (A conclusory statement that a party will be injured by the release of court records is insufficient to overcome the presumption in favor of public access.) Lerner and Paz do not identify any specific content within their depositions they claim is sensitive and needs to be sealed. In fact they are not concerned with the content of the depositions at all. Lerner and Paz are only concerned about media attention that may come with the release of the transcripts. This argument does not hold up.

To begin, The Enquirer has not been permitted to review the various documents Lerner and Paz rely on to demonstrate that violence is inevitable if the depositions are unsealed, because those documents are sealed (Doc. Nos. 331-334, 344). The Plaintiffs' Reply in Support of Their Motion to Unseal Court Filings, however, states that the most recent incidents of harassment occurred in 2014. (Doc. No. 395, p. 1.) And it is not even clear if those incidents stemmed from this litigation or events outside the litigation, such as the Congressional hearings.

In any event, since 2014, Lerner and Paz have remained in the media. But despite their ongoing notoriety, they can point to no instance of harassment in the last three years.

Additionally, the cases Lerner and Paz rely on for sealing their depositions are all inapposite because they concern concealing identities or identifying information of confidential sources. *See Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) (not a public access case and concerns the release of undercover officers addresses, phone numbers, banking account information, social security numbers, polygraphs results regarding their personal life, drivers licenses, pictures, and information about immediate family members); *Doe v. Stegall*, 653 F.2d 180 (5th Cir. 1981) (relies on the good cause standard and concerns whether a parent and her children may pursue their claims anonymously); *United States v. McCraney*, 99 F.Supp.3d 651 (E.D. Tx. 2015) (concealing the identities of cooperating defendants in a criminal matter); *Dish Network, LLC v. Sonicview USA, Inc.*, 2009 U.S. Dist. LEXIS 73857 (S.D. Cal. Aug. 20, 2009) (concealing the identity of confidential informants); *United States ex rel. Lloyd v. Vincent*, 520 F.2d 1272 (2nd Cir. 1975) (excluding the public during the testimony of undercover agents necessary to conceal their identity); *Ctr. for Nat'l Sec. Studies v. United States DOJ*, 215 F.Supp.2d 94 (D.D.C. 2002) (identities of material witnesses sealed in criminal matter); *United States Tobacco Coop., Inc. v. Big S. Wholesale of Va.*, 2016 U.S. Dist. LEXIS 97450 (E.D. N.C. July 26, 2016) (the court fails to reveal sufficient information regarding the contents of the depositions and threats of violence in order to make this case meaningful).

Concealing Lerner and Paz's identity or other identifying information is not at issue here. The public already knows their identities. If the depositions contain personal information regarding their address, family member names, social security numbers, or other information that would allow the public to locate Lerner and Paz and their families, The Enquirer has no objection to the redaction of that information.

None of the cases cited by Lerner and Paz permitted the sealing of depositions merely because their release may spur media attention. And the depositions cannot be sealed just because the conduct described within may anger the public. This matter is of great public interest and the public has a right to know what actions its government officials took to target specific groups for extra scrutiny based on their viewpoint.

III. Lerner and Paz Fail to Even Meet the Good Cause Standard.

Lerner and Paz mistakenly argue that the good cause standard applies. But even under this standard, Lerner and Paz cannot demonstrate how sealing their depositions satisfies the good cause standard.

Lerner and Paz have not demonstrated how the content contained within their depositions will lead to threats of physical harm. Instead, Lerner and Paz rely on their Motion for Protective Order and supporting materials to support their argument ("For efficiency, Mss. Lerner and Paz incorporate all arguments made and evidence submitted in support of their prior Motion for Protective Order"). (Doc. No. 392-1, p. 9.)

Because Lerner and Paz's Motion for Protective Order and supporting documents were filed under seal, The Enquirer has had no opportunity to provide a meaningful response to the arguments and facts contained within. But, even without the benefit of reviewing Lerner and Paz's supporting documents, the crux of their argument is that any media attention will result in violence, notwithstanding the actual content of their depositions. However, Lerner and Paz will receive media attention whether or not their depositions are sealed. Merely opposing the unsealing of their transcripts has drawn media attention.

Lerner and Paz have demonstrated nothing more than the obvious fact that they have garnered media attention due to their public service. But they attracted this attention before this suit was filed, and their notoriety will live on after this suit concludes.

It is unfortunate if unhinged members of the public have harassed Lerner and Paz. But that is neither here nor there. To obtain the relief they desire, Lerner and Paz must demonstrate that disclosing specific information in the materials will increase their risk of harm beyond the status quo. Not only have they failed to make that showing, they have failed to even try.

Lerner and Paz's reliance on *Fears v. Kasich*, 845 F.3d 231 (6th Cir. 2016) is misplaced because *Fears* concerns the concealing of identities. The identities of Lerner and Paz are already known, sealing their depositions will not make the public forget who they are.

IV. Sealing the Depositions and Summary Judgment Material in their Entirety is Not Narrowly Tailored.

Even when a party can show a compelling reason to seal a court record, "the seal must be narrowly tailored to serve that reason." *Shane Group*, 825 F.3d at 305. Lerner and Paz "must analyze in detail, document by document, the propriety of secrecy, providing reasons and legal citations." *Id.* at 305-306. Lerner and Paz fail to do this.

Lerner and Paz's argument for sealing the depositions and summary judgment materials in their entirety is not based on any substance contained within but instead on a desire to avoid the "media spotlight." (Doc. No. 392-1 at p. 13.) They claim the only way to avoid placing them back in the media spotlight is to seal these court records in their entirety. This is not a sufficient reason for such a broad seal, especially given Lerner and Paz are already in the media spotlight, whether or not the depositions or summary judgment materials are sealed.

The cases Lerner and Paz cite do not support their position. In *United States v. Raffoul,* the court restricted the publics' access at trial while the defendant testified regarding the identity of the individual who had threatened him and his family if he did not import drugs. *Raffoul,* 826 F.2d 218 (3rd Cir. 1987). While the appellate court upheld the closure of the proceedings, it remanded the matter to determine whether there was a compelling reason to seal the transcripts and whether there was a workable, less restrictive alternative such as redacting the transcripts. *Id.* at 227. The transcripts were not sealed in their entirety as Lerner and Paz claim.

In *United States v. McCraney,* the court unsealed the plea agreements, finding they did not identify the cooperating defendants. *McCraney,* 99 F.Supp.3d at 660. However, the court required an addendum to be attached to each agreement stating whether no additional information is included or set out the agreement considering a downward departure for cooperation. *Id.* It was only the addendums for each plea agreement that the court allowed to be sealed to avoid revealing the identities of the cooperating defendants. *Id.*

And in *United States v. Hernandez,* the government asked to exclude all spectators from the courtroom during the testimony of their lead witness based on threats that had been made against the informant and his family. *Hernandez,* 608 F.2d 741, 746 (9th Cir. 1979). The court allowed the direct examination to be closed, but after it was discovered that the informant's telephone number and address were already listed in the phone book, the government withdrew its request for a closed session and the cross-examination of the witness was done in open court. *Id.* Therefore, *Hernandez* actually supports The Enquirer's argument that Lerner

and Paz's depositions and summary judgment materials should be unsealed because they are already in the media spotlight and sealing these records cannot stop that.

The wholesale sealing of the deposition transcripts and summary judgment materials is not narrowly tailored. Lerner and Paz failed to specify any specific information contained within those court records that can lead to a safety risk. They have also failed to support their argument that wanting to avoid media attention is sufficient for such a broad restriction given they are already receiving media attention.

Moreover, Lerner and Paz's argument that the public will suffer no prejudice from sealing the court records because "there are myriad other ways the public can learn about the incidents giving rise to this litigation" is nonsense. Lerner and Paz's testimony regarding the IRS's conduct in targeting specific groups for extra scrutiny cannot be obtained from any other source. And even if it could, Lerner and Paz have provided no legal support for this position.

As for Lerner and Paz's alternative solution, sealing those portions of their depositions that are not specifically cited to in the summary judgment materials, is simply not a workable solution. Local Rule 7.2(e) requires the parties to file the entire deposition transcript for a full and fair presentation of the matter. Therefore, Lerner and Paz's argument that any text not specifically cited to in the summary judgment materials will play "no role" in the Court's adjudication of the legal issues goes directly against the purpose behind Local Rule 7.2(e). The court wants the opportunity to review the full text of the deposition transcripts for a fair and clear picture of the facts.

In a footnote, Lerner and Paz also seek to maintain the videotapes of Lerner and Paz's depositions under seal, arguing the videotapes are not judicial documents. (Doc. No. 392-1, fn.

9.) Lerner and Paz rely on *United States v. McDougal* out of the Eighth Circuit, regarding the sealing of the videotape deposition testimony of President Clinton that was played during trial pursuant to Criminal Rule 15, instead of having him testify in person. *McDougal*, 103 F.3d 651, 653 (8th Cir. 1996). The Court found the videotape was not a court document. *Id.* at 656. The court reasoned that while the public had the right to observe the testimony at the time and in the manner it was delivered to the jury, pursuant to Criminal Rule 53, witness testimony may not be recorded. *Id.* at 657. So allowing President Clinton's videotape to be unsealed would have treated him differently from other live witnesses. *Id.* at 657. Criminal Rules 15 and 53 are not at issue here and, unlike the public in *McDougal*, the depositions of Lerner and Paz have not been played in open court for the public to view.

The *McDougal* court goes on to state that even if the videotape was a court record, it could remain sealed. *Id.* The court, however, used a lower standard of review, specifically rejecting the strong presumption standard used to review public access cases in other circuits, including the Sixth Circuit. *Id. See Shane Group*, 825 F.3d at 305 ("The courts have long recognized, therefore, a strong presumption in favor of openness as to court records."). *McDougal*, thus, provides little guidance to this Court.

Because the entire deposition transcripts for Lerner and Paz, along with the videotapes, have been filed with this Court for consideration of the pending summary judgment motion, both must be unsealed for public access.

V. Conclusion

For the foregoing reasons, the Court should grant The Enquirer's Motion to Unseal and Deny Lerner and Paz's Motion to Seal.

Respectfully submitted,

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ATTORNEYS FOR INTERVENOR THE CINCINNATI ENQUIRER, A DIVISION OF GANNETT GP MEDIA, INC.

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017 I electronically filed the foregoing Motion to Unseal with the Clerk of Court by using the CM/ECF system, which will send notice of electronic filing, if applicable, to all parties of record.

/s/ John C. Greiner
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