UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

NorCal Tea Party Patriots,

Plaintiff, Case No. 1:13cv341

v.

Internal Revenue Service, *et al.*, Judge Michael R. Barrett

Defendants.

ORDER

This matter before the Court on: (1) Certain Former Individual Defendants' Motion for a Protective Order ("Motion for Protective Order") (Doc. 330); (2) the Cincinnati Enquirer, a Division of Gannet GP Media, Inc.'s Motion to Intervene ("Motion to Intervene") (Doc. 342); and (3) Plaintiffs' Motion to Unseal Court Filings and Open the May 19, 2017 Hearing to the Public (Doc. 340).

I. BACKGROUND

The Motion for Protective Order was filed by former Defendants Lois Lerner and Holly Paz (hereinafter, "Movants"), who seek an order "sealing their depositions and restricting dissemination of the sealed deposition transcripts to the attorneys in this action." (Doc. 330; PAGEID# 11002). The depositions they wish to "seal" have not yet been taken. (Doc. 339; PAGEID# 11179) (referencing "forthcoming" depositions).

Plaintiffs oppose on the basis that the "seal" Movants request is overly broad, extending "well beyond the discovery phase and the good cause standard applicable at that time." (*Id*. at 11173). Plaintiffs contend that, to support an order that "seals" the depositions beyond the discovery phase, Movants "instead must demonstrate compelling

reasons to justify use restrictions and permanent sealing of their [depositions], which they have not done." (*Id*.)

At Movants' request, the Court scheduled a May 19, 2017 oral argument on the Motion for Protective Order. In response to concerns expressed by Movants, the Court initially agreed to close the hearing. *See* April 26, 2017 Minute Entry; May 10, 2017 Notation Order.[1] Thereafter, Plaintiffs moved to unseal all briefing on the Motion for Protective Order and to open the hearing to the public. (Doc. 340). The Cincinnati Enquirer then filed its Motion to Intervene, tendering a "proposed" memorandum that seeks an order: (1) granting it access to the May 19, 2017 hearing; and (2) denying all relief requested by Movants (*i.e.*, the latter relief requested by the Enquirer, in effect, is an order that denies Movants' request to "seal their depositions and restrict dissemination of the sealed deposition transcripts to the attorneys in this action") (Doc. 342-2; PAGEID# 11217).

The parties and former Defendants have not agreed to a stipulated protective order governing merits discovery. Typically, such agreed orders require litigants to follow certain procedures before filing documents designated as "confidential" or "attorneys' eyes only" in the Court record. That said, this is a discovery dispute, and at this point, no party is seeking to file Movants' depositions in the Court record; indeed, the depositions do not yet exist. As further discussed below, the non-existence of the depositions at this juncture renders any disagreement over whether such depositions should be sealed premature.

[1] As reflected in the May 10, 2017 Notation Order, the Court noted that "the transcript of the telephone status conference will stand as the Court's disposition of the matters discussed."

II. ANALYSIS

a. Motion for Protective Order

Plaintiffs are correct that the Sixth Circuit requires litigants seeking to seal court documents to overcome a high burden. Any seal order must set forth "why the interests in support of nondisclosure are compelling, why the interests supporting access are less so, and why the seal itself is no broader than necessary." *Shane Grp., Inc. v. Blue Cross Blue Shield*, 825 F.3d 299, 306 (6th Cir. 2016). However, the depositions at issue do not yet exist, making it impossible for this Court to conduct the analysis required under *Shane Group*. As such, this Court is in no position to determine whether yet-to-be-taken depositions should be sealed. Indeed, one court interpreting *Shane Group* recently held that, while a court may "consider a proposed protective order that requires the party to move to seal documents designated [as confidential during discovery]," it may not "pre-authorize the sealing of yet to be identified documents." *White v. Douglas Autotech Co*rp., No. 5:15-CV-00256-GNS-LLK, 2016 U.S. Dist. LEXIS 97779, at *4 (W.D. Ky. July 26, 2016). Just as a court will not pre-authorize the sealing of yet-to-be-identified documents, this Court declines to pre-authorize the sealing of yet-to-be-taken depositions.

However, the Court *is* empowered to enter an Order governing the use or disclosure of the Paz and Lerner depositions during the discovery phase, until such time that a litigant properly seeks to place them in the Court record. *Shane Grp.*, 825 F.3d at 305 ("Secrecy is fine at the discovery stage, before the material enters the judicial record. Thus, a district court may enter a protective order limiting the use or disclosure of discovery materials upon a mere showing of 'good cause[.]'") (internal citation omitted). Here, good cause exists to maintain the confidentiality of the depositions during the discovery phase, as a contrary order would strip the Court of its ability to order meaningful relief should the Court

at a later date determine that public disclosure of the depositions would compromise Movants' safety. To that end, the Court will enter a limited protective order as follows: the litigants, which for purposes of this Order also includes Movants, may *designate* (not seal) the Paz and Lerner depositions as "Confidential—Attorneys' Eyes Only." Such a designation shall serve to restrict access, dissemination, and use of the designated materials to counsel for Plaintiffs, Defendants, and Former Individual Management Defendants Lois G. Lerner and Holly Paz, in this action. At the appropriate time, any litigant wishing to file designated materials in the Court record must first seek leave. At that juncture, any litigant wishing that the designated materials be sealed in the Court record will bear the burden of overcoming the presumption of access to court documents, in accordance with *Shane Group*.[2]

Having resolved the Motion for Protective Order on the briefs, the May 19, 2017 hearing is **VACATED**. To the extent that Plaintiffs' Motion to Unseal (Doc. 340) requests to open the foregoing hearing, that Motion is **DENIED AS MOOT**. To the extent that Plaintiff's Motion to Unseal (Doc. 340) seeks to unseal all briefing on the Motion for Protective Order (Doc. 330), the Court finds those issues intertwined with whether the future Paz and Lerner depositions should ultimately be sealed, and therefore will reserve ruling on the remainder of the Motion (Doc. 340) until the matter of sealing the depositions is properly before the Court.

[2] Ultimately, the Court would be remiss if it did not acknowledge that, based upon Movants' Motion for Protective Order, Plaintiffs are essentially on notice that Movants *will* designate the Paz and Lerner depositions as "Confidential—Attorneys' Eyes Only." Plaintiffs should thus proceed accordingly.

b. Motion to Intervene

The Cincinnati Enquirer seeks an order permitting public access to the May 19, 2017 hearing and denying Movants' request to seal the depositions. (Doc. 342-2; PAGEID# 11217). However, the May 19, 2017 hearing has been vacated, and the Movants' request to "seal" yet-to-be-taken depositions from the Court record has been denied as premature. The Enquirer's Motion to Intervene is thus **DENIED AS MOOT**, subject to refiling if and when any litigant seeks to seal the depositions at issue in the Court record.

This conclusion is not inconsistent with *Shane Group*, wherein the Sixth Circuit held that while "secrecy is fine at the discovery stage," "very different considerations apply" at the adjudication stage. 825 F.3d at 305.

III. CONCLUSION

For the foregoing reasons, and consistent with the above, the Court:

(1) **GRANTS IN PART** and **DENIES IN PART** the Motion for Protective Order (Doc. 330), and therefore **VACATES** the May 19, 2017 hearing on the Motion;

(2) **DENIES AS MOOT** the Motion to Intervene (Doc. 342);

(3) **DENIES AS MOOT** Plaintiffs' Motion to Unseal (Doc. 340) to the extent that it seeks to open the May 19, 2017 hearing, which has been vacated, and holds the remainder of the Motion (Doc. 340) in **ABEYANCE**.

IT IS SO ORDERED.

s/ Michael R. Barrett
Michael R. Barrett
United States District Judge