IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

ELAINE BLANCHARD, KEEDRAN FRANKLIN, PAUL GARNER and BRADLEY WATKINS, (Dismissed per Court Order) Plaintiffs,	)	
and	)	
ACLU OF TENNESSEE, Inc. Intervening Plaintiff,	)	
v.	)	No. 2:17-cv-02120-jpm-DKV
THE CITY OF MEMPHIS, Defendant.	)	

RESPONSE TO DEFENDANT'S MOTION TO HOLD PLAINTIFF'S MOTION TO FILE UNDER SEAL IN ABEYANCE

Plaintiff files this response in opposition to Defendant's Motion to Hold Plaintiff's Motion to File Under Seal in Abeyance (Doc. No. 82) [hereinafter, "Motion to Hold In Abeyance"]. Defendant asks the Court to withhold ruling on Plaintiff's Motion to File Under Seal until after the Court rules on Defendant's Motion for Summary Judgement on the Issue of Standing. For the reasons set forth below and in Plaintiff's Response to Defendant's Motion to Allow Filing Under Seal (Doc. No. 85), the Court should deny this Motion.

In its Motion to File Under Seal (Doc. No. 78), Plaintiff asked the Court to seal two exhibits filed with its Motion for Summary Judgment because they contained personally identifying information of third parties to the litigation. Because the remaining exhibits and deposition

transcript excerpts had been designated by Defendant as "Confidential" or "Attorneys Eyes Only" under the Protective Order entered in this case (Doc. No. 52), Plaintiff filed the remaining exhibits, excerpts, its motion, and its brief under seal to allow Defendant the opportunity to present to the Court reasons why they should be sealed.

Defendant then filed this Motion to Hold Plaintiff's Motion to File Under Seal in Abeyance. While the Motion asks the court to hold Plaintiff's motion, in substance, Defendant asks the court to temporarily seal Plaintiff's Motion for Summary Judgment, Memorandum in Support, and all exhibits and deposition excerpts until the Court has ruled on Defendant's Motion for Summary Judgment. For the Court to even temporarily seal the documents, Defendant must meet the Sixth Circuit standard set forth in Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299 (6th Cir. 2016).

The default position of evidence filed of record with the court is that it should be open to public review. *See* Shane Grp., Inc. v. Blue Cross Blue Shield of Michigan, 825 F.3d 299, 305 (6th Cir. 2016). In fact, there is a strong presumption in favor of leaving court records open. Id. "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). The greater the public interest is in the subject matter of the litigation, the greater the burden necessary to overcome the presumption of openness. Shane Grp. Inc., 825 F.3d at 305. Asserting that the information may harm a party's reputation or might prove embarrassing is not enough to meet this burden. Brown & Williamson Tobacco Corp. v. F.T.C., 710 F.2d 1165, 1179 (6th Cir. 1983). Even when a party can meet this exacting burden, the seal must be narrowly tailored to serve the reasons given. Shane Grp., Inc., 825 F. 3d at 308. The fact that information or records were designated as Confidential and

prevented from disclosure under a protective order is not alone reason to order the evidence to be sealed. Id. at 306.

Plaintiff's Response to Defendant's Motion to Allow Filing Under Seal set forth Plaintiff's argument that there is a strong public interest in this case. (Doc. No. 85 at pp. 2-3). Defendant's reasons to seal Plaintiff's Motion for Summary Judgment and attendant documents do not meet the high standard established in the Sixth Circuit. Defendant asks the Court to seal the documents pending a determination on Defendant's Motion for Summary Judgement on the issue of Plaintiff's standing.

Defendant cites no case for the proposition that the existence of a dispute over standing, an argument that Defendant has already made and on which the court has previously ruled, justifies sealing evidence filed in the court record from public view — even for a short period of time. Even if Defendant were to ultimately prevail on any particular argument raised in this case would not change the fact that court records are presumptively public.

Nor does the argument that a potential victory on standing would obviate the need of a determination on the merits present a compelling reason as to satisfy Defendant's burden to justify sealing documents. The case has proceeded through discovery and dispositive motions have been filed. The public has an interest in reviewing those motions and the evidence attached if they so choose. Defendant argues that, should it prevail, the Court would not need to review the documents filed in the case and determine whether they should be sealed. (Motion to Hold in Abeyance, Doc. No 82 at p. 6). This is simply not the case. The record is not automatically sealed from public scrutiny simply because the case is dismissed. The Court will still need to determine whether the documents filed in the public record meet the standard for being sealed. There is no judicial economy in waiting for the Court to rule on dispositive motions as the Court's analysis

must still be performed based on the rationale for sealing proffered by the Defendant. In fact, Defendant admits that "most of the documents currently under seal will likely be removed from seal pursuant to Shane Group." Id. This inevitability does not change even if the case were to be ultimately dismissed.

Defendant states that it would be "unfair . . . to needlessly expose sensitive internal document relating to how MPD is attempting to protect the public from potential safety concerns to public view if the ACLU-TN does not have standing to bring the claim." Id. at p. 1. Whether Defendant believes that public disclosure of the information will harm its reputation or prove embarrassing is not enough to meet the burden to justify sealing evidence. See Brown & Williamson Tobacco Corp., 710 F.2d at 1179.

Defendant has also failed to articulate what about any of the exhibits or information contained in Plaintiff's pleadings is so sensitive that it warrants sealing. Defendant relies only on a blanket pronouncement that it would be harmed. Defendant does not describe with anything approaching specificity what harm it would suffer. Because the nature of the sensitivity and harm have not been disclosed, the Court cannot properly address whether Defendant's request overcomes the strong presumption that court records should remain open to public view.

Even if Defendant had proffered a suitable justification to warrant sealing these exhibits, Defendant fails to identify what particular information is so sensitive that it warrants sealing. Orders to seal must be drawn narrowly. Shane Grp., Inc., 825 F. 3d at 308. If information can be redacted then the remaining information should be made available to the public.

Defendant may not rely on conclusory statements or its hope that it will succeed on a legal argument to meet the high bar articulated in Shane Group. See Brown & Williamson Tobacco Corp., 710 F.2d at 1180 ("'[A] naked conclusory statement that publication of the Report will

injure the bank in the industry and local community falls woefully short of the kind of showing which raises even an arguable issue as to whether it may be kept under seal.'" quoting Joy v. North, 692 F.2d 880 (2d Cir.1982)).

For the foregoing reasons, Plaintiff requests that Defendant's Motion to Hold Plaintiff's Motion File Under to Seal in Abeyance be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 6, 2018 the foregoing document was electronically filed with the Clerk of the Court using CM/ECF and served via the Court's ECF system to:

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