IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
Civil Action No. 1:19-cv-00386

MARY SMITH, as Administrator of the ESTATE OF MARCUS DEON SMITH, deceased, Plaintiff, v. CITY OF GREENSBORO, et al., Defendants.	)	**PLAINTIFF'S RESPONSE TO DEFENDANTS' JOINT MOTION TO SEAL PLAINTIFF'S LETTER OF APRIL 23, 2021**

Plaintiff, by her undersigned attorneys, responds in opposition to Defendants' Joint Motion to Seal Plaintiff's Letter of April 23, 2021 (Dkt. 104) as follows:

INTRODUCTION

In an obvious attempt to suppress the facts and to intimidate the Plaintiff, her lawyers, and the community activists who have sought transparency and justice in this case, Defendant City of Greensboro ("the City"), joined by the Paramedic Defendants, has filed a motion to show cause (Dkt. 101), arguing that all discovery material in this case, regardless of whether the City has designated the material "Confidential," must remain secret. In so arguing, they seek to interpret the limited protective order entered in this case, which was entered to give the City discretion in designating police documents and related testimony "confidential," to apply to all discovery materials generated in the case, whether designated "confidential" or not.

When the City raised its ex post facto interpretation of the protective order to Plaintiff's counsel, we responded first with an email dated April 16, 2021 (attached to Defendants' Brief as Exhibit Q (Dkt. 102-17)) which summarized in a paragraph our position with regard to the protective order. When the City persisted in maintaining its untenable and all-encompassing

interpretation of the protective order, we again responded with the eleven-page April 23, 2021 letter that is the subject of the Defendants' motion to seal.

There is absolutely no reason why the letter, which sets forth our non-confidential position in detail, and includes 52 factual bullet points in support, should be sealed in the court record. At most, one bullet point, which relies on two documents that the City has wrongfully designated as "confidential," should be redacted from the publicly filed Exhibit in question. That the City attempts, in the face of the rule that strongly disfavors sealing documents in the court record, to seal the entire letter reflects, in microcosm, its overarching and completely bad faith strategy with regard to the evidence in this case - - - to unabashedly, through its policymaking officials, make false and misleading public statements about the evidence in the case, while attempting to suppress the evidence itself, and, when the Plaintiff and her lawyers set forth their position in detail, to seek to seal it in the court record and to seek sanctions for the Plaintiff's, through her lawyers, public rejoinders to the City's misinformation campaign that has now spanned more than two and one half years.

ARGUMENT

I. Legal Standard

Defendants' motion and brief inexplicably omit any reference to, or analysis of, the legal standard for filing documents under seal. Their motion should be denied on this basis alone. *See Steves & Sons, Inc. v. Jeld-Wen, Inc.*, 988 F.3d 690, 727 (4th Cir. 2021) ("It is not the obligation of this court to research and construct legal arguments open to parties, especially when they are represented by counsel, and perfunctory and undeveloped arguments . . . are waived."). In the event that Defendants attempt to correct this mistake by applying legal precedent in their reply brief, any such arguments should be deemed waived. *See Moseley v. Branker*, 550 F.3d 312, 325

n. 7 (4th Cir. 2008) (holding that "arguments not specifically raised and addressed in opening brief, but raised for the first time in reply, are deemed waived."); *Cavallo v. Star Enter.*, 100 F.3d 1150, 1152 n. 2 (4th Cir. 1996) (same).

In *In re Knight Publishing Company*, 743 F.2d 231, 235 (4th Cir. 1984), the Fourth Circuit explained that, while a district court "has supervisory power over its own records and may, in its discretion, seal documents if the public's right of access is outweighed by competing interests," the "presumption" in such cases favors public access. *See also Stone v. University of Maryland Medical System Corporation*, 855 F.2d 178, 182 (4th Cir. 1988) ("The public's right of access to judicial records and documents may be abrogated only in unusual circumstances"). Some of the factors to be considered in determining whether to seal documents include "whether the records are sought for improper purposes, such as promoting public scandals or unfairly gaining a business advantage; whether release would enhance the public's understanding of an important historical event; and whether the public has already had access to the information contained in the records." *Knight*, 743 F.2d at 235 (citing *Nixon v. Warner Comms. Inc.*, 435 U.S. 589, 597-608 (1978)). Before a district court may seal a document submitted to the court for its consideration, it must "(1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives." *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000).

Middle District of North Carolina Local Rule 5.4, "Filing Documents Under Seal," states in pertinent part:

(a) **Sealing is Disfavored.**

> (1) Unless authorized by statute, rule, or court order, no litigant or third party may file any pleading, brief, exhibit, or other document under seal.
>
> (2) Documents may be filed under temporary seal in accordance with LR 5.4 and LR 5.5, pending Court review of the required motion to seal.. . .
>
> (4) The Court may impose sanctions, including attorney's fees, for filing unsupported or overly broad motions to seal, or for making unsupported or overly broad confidentiality designations that are not appropriately narrowed following a request and that necessitate the filing of a motion to seal by another party.
>
> (5) The provisions of LR. 5.4 and 5.5 are intended to minimize the filing of sealed documents, to protect the public right of access, to ensure the docket is clear so that documents can be found easily, and to allow for review of motions to seal in a way appropriate for the case and that reduces cost, time, and confusion.

The Middle District of North Carolina's "Guidelines for the Filing of Confidential Information in Civil Cases" states in pertinent part:

> [W]hen filing sealed documents, the filing party should file **two complete sets of documents**, one public and one under temporary seal. The public version should have placeholders or redactions clearly designating where portions have been sealed, and the sealed version should have highlighting on the portions for which sealing is sought.

(emphasis in original).[1]

II. Plaintiff's April 23, 2021 Letter Should Not Be Sealed

Defendants assert, without citation to any case law, that the April 23, 2021 letter should be sealed in its entirety because it: (1) "is a transparent attempt to further the public campaign of pretrial commentary and release of discovery materials"; (2) discusses testimony and exhibits from a deposition that "in its entirety is currently deemed 'Confidential Information'"; (3) "references a number of deposition exhibits that themselves [sic] also designated as 'Highly Confidential'"; and (4) "includes false information about what documents were and were not used as deposition exhibits." *See* Def. Br. at 4-6. All of these arguments are duplicitous strawmen and do not come close to meeting the actual legal standard for filing documents under seal. The page-by-page analysis of the April 23, 2021 letter which follows clearly demonstrates

[1] Contrary to these Guidelines, Defendants did not file a public version of the letter with placeholders or redactions designating the portions of the letter it contends should be sealed.

that Defendants have acted in bad faith in seeking to seal the letter and that their motion should be denied.

Plaintiff's Original Email (Pages 1-2)

On page one and two of the letter we quote from our initial response email of April 16, 2020 - - - a document that Defendants have filed in open court as Exhibit Q to their Motion to Show Cause. It reads:

> As an initial matter, we reassert that we have not violated the protective order as we understood it at the time we reluctantly agreed to it and how we continue to understand it. As we said in our email of April 16, 2021:
>
> > The protective order only governs the disclosure of "Confidential Information" and since Dr. Sperry's report does not contain "Confidential Information," the protective order does not prohibit its disclosure. We have been very careful throughout this case not to make public anything that has been designated confidential and we will continue to do so. We agreed to the protective order with the understanding that it governs the use and disclosure of "Confidential Information" and nothing more.

The April 23rd letter then goes on to recite several instances where former Chief of Police Wayne Scott, the City in two press releases, and City Councilwoman Michelle Kennedy had all publicly professed to be in favor of transparency in the Marcus Smith case. Clearly there is no basis for suppressing this portion of the letter.

Factual Bullet Points In Support of Our Position (Pages 2-9)

The City next claims that we relied on deposition and other discovery information, particularly that which is contained in City Manager David Parrish's deposition that has to date not been sanctified by the City as being non-confidential. This demonstrably false assertion apparently seeks to suppress our 52 factual bullet points that established, without doubt, to the City's lawyers and the Mayor, that it is the Defendant City and its policymaking agents, rather than we, who have been running a public disinformation campaign starting on September 8, 2018

and continuing to the present, a campaign that was and is orchestrated, *inter alia*, by former Chief Scott, Mayor Nancy Vaughan, City Attorney Charles "Chuck" Watts, and several City Council members. We introduced this publicly documented position as follows:

> Turning to your accusation that we are "coordinating efforts . . . to cause public pretrial commentary about the litigation," we can only say that we are flabbergasted by this accusation, given the reality of the public discourse that has been carefully and unremittingly manipulated, from before Marcus Smith's body was cold until the present, by Greensboro's former Chief of Police and his Professional Standards Division (PSD); its Mayor; the public relations arms of the City and the GPD; the City Manager; the City Attorney and his police lawyer assistant; the Police Association's lawyer, (who also doubled as the pre-lawsuit lawyer for the hogtying officers); and certain council members - - - an official cover-up, pure and simple, financed by taxpayer money, that, as public interest lawyers, litigating a case of highly significant public interest under the anti-Ku Klux Klan Act, we are bound to combat on behalf of our client, her supporters, and the Greensboro community at large. Here are some "highlights" of the coordinated public cover-up:

We then proceeded to itemize, bullet point by bullet point, the facts that support our argument. In the Appendix attached hereto, we have painstakingly detailed the public and non-confidential bases for each of these 52 bullet points, together with the actual documents that support them. Contrary to Defendants' assertions, only one of the fifty-two bullet points (bullet point 19) is supported by materials that the City has branded as "confidential," and that designation is highly questionable in that instance. Four others are based on non-confidential City emails, while all of the remaining 47 bullet points, including those that reference Parrish deposition exhibits, are also fully supported by public information, most frequently by the public statements of the City and its policymakers. Additionally, no deposition testimony is relied upon in any of the bullet points.[2] The public and non-confidential bullet points break

[2] Defendants also complain that some of the bullet points "include[] false information about what documents were and were not used as deposition exhibits." *See* Def. Br. at 6. As the City well knows, and as shown in the Appendix, Plaintiff identified some of the public documents referenced in the bullet points by the numbers that were used for identification purposes when the documents were sent to the court reporter and defense counsel for possible use in the zoom deposition of each particular City witness. Some of those potential exhibits, particularly in the Vaughan deposition, were not re-marked or used with

down into the following categories:

- Public Statements by Defendant City Policymakers as Reported in News Articles, TV Appearances, and Reporter Transcriptions: 32 Bullet Points (8, 12, 14, 16-18, 20, 21, 23, 24, 27-32, 34-48, 52)
- Defendant City Press Releases and Mayoral Statement: 7 Bullet Points (1, 2, 4, 6, 14, 27, 33)
- Public Letters and Emails: 5 Bullet Points (3, 5, 8, 9, 15)
- Non-confidential City Emails: 6 Bullet Points (10-12, 25- 27)[3]
- Defendant City Communications to Reporters: 2 Bullet Points (7, 22)
- Articles About the George Floyd Settlement and the Minneapolis Police Department's Initial Press Release: 2 Bullet Points (1, 49)
- City Council Transcriptions: 2 Bullet Points (50, 51)
- Publicly Released Autopsy Report: 2 Bullet Points (13, 14)[4]
- GPD Compilation Video with Chief Scott's Commentary: 1 Bullet Point (15)
- GPD Public Directive on Restraint: 1 Bullet Point (39)
- Publicly Filed Mediator's Report: 1 Bullet Point (45)

Hence, the overwhelmingly public nature of the information contained in the bullet points weighs strongly against sealing the letter. *See Knight*, 743 F.2d at 235.

Lack of Good Cause (Page 9)

The City continues to maintain in its brief that paragraph 10 of the protective order provides it with a blanket prohibition barring the dissemination of all non-confidential information, including the April 23rd letter, which was certainly prepared and served upon its

the witness, due to time restraints. In any event, they are all public documents. (See Appendix, Listing, pp. 5-6, bullet points 30, 31, 34-42)

[3] Two of the 6 non-confidential emails (bullet points 14 and 27) are also recited in public statements.

[4] In a display of unmitigated disregard for a good faith concept of "confidentiality," the City marked as "Highly Confidential" the version of the autopsy report that they produced. (Vaughan Exhibit 19)

lawyers as part of this litigation - - - to wit to dissuade them from their completely unwarranted motion practice attack on Plaintiff through her lawyers. *See* Def. Br. at 4. In our letter we rebutted their assertion by relying on these publicly grounded bullet points to demonstrate that there was no good cause under Fed. R. Civ. P. 26 for the City to keep from public view its policymaking agents' non-confidential testimony:

> It is with this fact-based public record that our past and present interpretation of the prohibitions mandated by the protective order - - - and the City's attempt to impose blanket secrecy in this case of overriding public interest and significance in derogation of Plaintiff's and her supporters' First Amendment rights in such cases (*see NAACP v. Button*, 371 U.S. 415 (1963)) - - - must be evaluated. The overriding question is whether there is even a shred of "good cause" under the protective order for the City's interpretation. The resounding answer to this question, is NO! What is the good cause for suppressing Mayor Vaughan's sworn, non-confidential testimony about the lies in the September 8th press releases? For hiding from public view her testimony about why she publicly equated Marcus Smith with George Floyd? For suppressing Chief Scott's non-confidential sworn testimony about the press releases or the false statements he made while introducing the GPD compilation video to the public? For suppressing Chief James' non-confidential testimony about why the hog-tying policies were changed after Marcus' death? For keeping from public scrutiny James' and Scott's non-confidential explanations for why there is now a reporting requirement for when "additional restraint" is used when there was none - - - and therefore no record of how many times, against whom, and in what specific way hogtying was used - - - before Marcus Smith was killed? For now suppressing Vaughan, Scott, James, and City Manager Parrish's non-confidential explanations for why policy and training was supposedly followed by the GPD in the Marcus Smith hogtying case, and why they claim there was and is was no public coverup in the case? For secreting that all the City witnesses, in non-confidential testimony, professed ignorance of the term and method of "hogtying" despite its definition and demonstration in training materials? And the list goes on and on.

Our Interpretation of the Protective Order (Pages 9-10)

After laying out the compelling publicly documented factual predicate for our good faith rejoinder to Defendant City's unwarranted attack, we explained in more detail our good faith interpretation of the protective order's limited application, an interpretation that was subsequently confirmed in Judge Webster's April 28, 2021 order where he wrote: "In addition, a protective order was entered in this case on July 16, 2020 governing the production of

confidential information during discovery. (Docket Entry 79.)" *See* Dkt. 96, p. 3. In doing so we also further elaborated, in an entirely non-confidential way, on the requirement of good cause:

> Clearly, we did not intend for the protective order to prohibit the dissemination of all pretrial discovery in this case. Not only would we never have agreed to such a provision, which would, in effect, place the entire case under protective order, we could not in good faith have agreed to such a provision because doing so would violate the requirement under Fed. R. Civ. P. 26(c) that the parties demonstrate "good cause" for issuance of a protective order and that the protective order must be narrowly tailored to serve that cause. Protective orders are an exception to the general rule that pretrial discovery must occur in the public eye. Even if the parties agree that a protective order should be entered, they still have "the burden of showing that good cause exists for issuance of that order. It is equally apparent that the obverse also is true, i.e., if good cause is not shown, the discovery materials in question should not receive judicial protection . . . ." *Public Citizen v. Liggett Group, Inc.*, 858 F.2d 775, 789 (1st Cir. 1988), *cert. denied*, 488 U.S. 1030 (1989) (quoting *In re "Agent Orange" Prod. Liab. Litig.*, 821 F.2d 139, 145-146 (2d Cir.), *cert. denied sub nom. Dow Chem. Co. v. Ryan*, 484 U.S. 953 (1987)); *see also Jepson, Inc. v. Makita Elec. Works, Ltd.*, 30 F.3d 854, 858 (7th Cir. 1994) (even when parties agree to entry of a protective order, they still must demonstrate the existence of good cause). Our understanding of paragraph 10 of the protective order is that it only applies to pretrial discovery that contains designated Confidential Information. The reasonableness of our understanding is demonstrated by the fact that the four paragraphs directly preceding paragraph 10 and the six paragraphs directly following paragraph 10 all relate to the use of Confidential Information, as does the protective order in its entirety as well as does the motion and brief you filed in support of the protective order.

Addressing North Carolina Bar Rule of Professional Conduct 3.6 (Pages 10-11)

We next addressed in a completely non-confidential manner, Defendant City's attempt to threaten us with the baseless allegation of an ethical violation, a threat their lawyers repeat in their brief:

> The above litany of public statements by publicly elected City officials and police officers cloaked with the color of law, also dispels any notion that such dissemination of non-confidential information runs afoul of North Carolina State Bar Rule of Professional Conduct 3.6. The rule, which is designed to regulate public comment by attorneys, most particularly to protect defendants in criminal cases that are either near or on trial, carves out an exception that certainly covers any and all fact-based statements by the Smith family lawyers as well as any non-confidential disseminations made by them. As the litany of City made statements above definitely shows, the City, its highest ranking officials, its witnesses, its public attorney, and its Police Department have all used their bully pulpit to spread a false and misleading public narrative that is highly and wrongfully prejudicial to the Smith family and this public interest lawsuit, and has relentlessly misinformed the Greensboro community at large. That misinformation (i.e.

> lies) starts with the false press release that omitted the key fact - - - that Marcus was hogtied - - - and continues to the present with statements by City Attorney Watts that Marcus Smith's life is worth next to nothing, by Councilman Outling that there was no misconduct in the case, and by Mayor Vaughan that there was and is no cover-up. The rule expressly provides opposing counsel the right to publicly dispel this false and prejudicial narrative. Conversely the continued public advocacy of this narrative begs the question - - - if this narrative, which also appears to be the City's defense, is true, then why is the City seeking to shield the non-confidential testimony of its official actors on these and other relevant topics from the light of public scrutiny? And how does their own sworn testimony prejudice them?

Lewis Pitts and the Smith Legal Team (Page 11)

Citing to a September 2019 article by one of Plaintiff's attorneys, Flint Taylor, the City asserted that Mr. Pitts is part of Plaintiff's legal team. Previously, in June of 2020, Defendant City's Attorney Charles "Chuck" Watts falsely called the Smith lawyers "Pitts' litigation team," and leveled the slanderous charge that the Black clergy of Greensboro were "being pimped by Lewis Pitts." (Bullet Point 36). We responded to those allegations, non-confidentially, as follows:

> In response to your query about Lewis Pitts, we collectively agreed soon after the motion to dismiss was decided and before discovery began that Mr. Pitts would not be a member of the legal team and therefore would not be privy to confidential information produced in this case. We continue to adhere to that agreement. Our legal team, at this point, consists of Messrs. Taylor, Holt and Elson.

Nonetheless, the City continues to attack Mr. Pitts as part of our legal team in its motion to show cause.

Conclusion (Page 11)

In conclusion, we emphasized, again in a manner that in no way speaks of confidential matters, that the Marcus Smith case is of paramount public interest under the Anti-Ku Klux Klan Act, and, by the Mayor's own June 7, 2020 statement, must be considered together with the George Floyd case. *See, e.g, Triad City Beat*, editorial of May 21, 2021, "The Dehumanization of Marcus Smith" (https://triad-city-beat.com/editorial-the-dehumanization-of-marcus-smith/).

Clearly, the contents of this letter, as well as the broader information that the City seeks to suppress in its motion to show cause, do not "promote a public scandal" but rather "would enhance the public's understanding of an important historical event." *See Knight*, 743 F.2d at 235. It is also important to remember that the Marcus Smith case takes place in the long shadow of the Greensboro massacre, a white supremacist stain upon the City's public conscience for which it took the City more than 40 years to admit the complicity of its police department. Thus we wrote:

> In conclusion, we remind you once again that this is a 42 U.S.C. § 1983 case brought in the public interest to vindicate important constitutional rights. Additionally, it implicates important police policies and practices that have been publicly discussed, debated, and implemented, and conduct by public officials entrusted by the voters and taxpayers with faithfully and transparently obeying the U.S. Constitution. The public, and particularly the African-American, homeless, and mental health communities, have shown an abiding and consistent interest in the case that has only heightened as the Movement for Black Lives has gained strength, and the obvious similarities to the George Floyd case have been highlighted by the Mayor, by the $27 million dollar settlement in the Floyd case, and by the conviction of Derek Chauvin.

Consideration of Our Position by the City Council in Public Session (Page 11)

The City also argues that the April 23rd letter "is a transparent attempt to further the campaign of public commentary" because we directly state that we want the letter to be "presented . . . in an open session at which public comment is encouraged." *See* Def. Br. at 4. In fact, what we actually wrote was a lawyer to lawyer plea for a reasonable resolution of a litigation "dispute" ginned up by lawyers who wanted to impose blanket secrecy in this case. That was our obvious intent, one that was focused on resolving the question without motion practice. This is what we wrote in full context:

> While Chief Scott falsely claimed transparency in the wake of the homicide, councilwoman Kennedy's demand this week for real transparency, together with the renewed call for an independent investigation, underscores the imperative that you, as the City's retained lawyers in this case, take at least a small step on the road to transparency

> by recognizing the reasonableness of our position with regard to non-confidential information.
>
> If you are not inclined to do so, we ask that you present our letter to the full City Council for discussion, debate and vote in an open session at which public comment is encouraged.

Thus, it was only if the City, through its lawyers, refused to accede to our reasonable request that we asked for them to present our letter to City Council. We have been led to believe that it is the City Council that decides litigation questions, and, given the past history of the Mayor, theCity Council and their Attorney making repeated false and sometimes apparently misinformed public statements about the Plaintiff, her counsel, settlement offers, heirship issues, and the evidence in this case, we wanted to be assured that the Council hadaffixed its public imprimatur to counsel's secrecy campaign.

To our knowledge, no public discussion of this important question has been conducted by the City Council at the time of this writing; instead, the City, expending tens of thousands of taxpayer dollars, has filed a motion to seal this letter, and, with the Mayor leading the charge, a motion to show cause, with a 29 page brief that not only attacks Plaintiff and her counsel, community activists Lewis Pitts and Hester Petty and independent journalist Ian McDowell, but also seeks blanket secrecy in a blatant attempt to chill public discourse on this paramount issue of police accountability in the City of Greensboro.

CONCLUSION

As detailed above, the April 23rd letter should not be sealed as it articulates and is based on public information. If the Court deems it appropriate, a copy of the letter with bullet point 19 redacted could be filed as Exhibit S in the public record.

Dated: May 23, 2021

Respectfully submitted,

/s/ Graham Holt
One of Plaintiff's Attorneys

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT

The undersigned hereby certifies that the foregoing document complies with Local Rule 7.3(d)'s limitation of no more than 6,250 words (excluding captions, signature lines, certificate of service and any cover page or index) as counted by word processing software.

Dated: May 23, 2021

/s/ Graham Holt
Graham Holt

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Graham Holt
Graham Holt