

particularly with respect to an accounting on damages of the patient payables of the dental practice, until it has been established that there are genuine issues of material fact on whether a contract existed between the Plaintiff and Defendant Lokensgard.

It is therefore ORDERED that discovery shall proceed as to Counts 1, 2 and paragraph 64 of Count 3 of the Plaintiff's Complaint, and as to the Defendants' defense of the statute of fraud and Defendant Lokensgard defense denying formation of a contract, and the Plaintiff's assertion of partial performance as a defense to the statute of frauds.

It is additionally ORDERED that summary judgments with respect to these prioritized issues shall be filed so as to be heard by June 23, 2017.

It is further ORDERED that discovery is stayed on all other parts of the lawsuit, consisting of: paragraphs 65-68 of the Complaint, and Dr. Lokensgard's Counterclaim alleging breach of fiduciary duty, unjust enrichment and negligence due to the alleged mismanagement of Defendant Lokensgard's practice by the Plaintiff.

Additionally, it is ORDERED that by January 6, 2017, Counsel for Defendant Mahan & Associates, LLC shall send a proposed agreed order for substitution of One Mosaic as a party for Mahan and Associates, LLC to Plaintiff's Counsel, and then by January 13, 2017, a notice shall be filed with the Court whether substitution can be made by agreement or whether a contested motion is necessary.

It is also ORDERED that an interim telephone conference is set for March 9, 2017, at noon to determine whether the discovery on the limited issues described above is workable

and productive, or whether modifications to this discovery and prioritization of issues needs to be made. The Docket Clerk shall initiate the call.

It is additionally ORDERED that by January 13, 2017, a protective order shall be entered by the parties. For Counsel's information in preparing that order, the Court provides the following protocol it uses.

— Pursuant to Davidson County Local Rule 6.06, the private information listed therein can be redacted in court filings.

— Documents can initially be filed under seal with later resolution of any objections to unsealing the documents. The Court does not require a hearing before the documents are initially filed under seal. *See In Re NHC-Nashville Fire Litigation*, 293 S.W.3d 547, 570-72 (Tenn. Ct. App. 2008).

— At the conclusion of the case in the trial court or upon a motion prior thereto, an order shall be entered documenting and justifying the sealing of each document that has been filed under seal with the Court.

— Good cause for keeping filed documents under seal includes that the litigation involves private litigants or concerns, and is of little legitimate public concern; and/or that the documents constitute trade secrets; and private financial information of individuals or closely-held, non-public entities such as partnerships, limited partnerships, subchapter S corporations, limited liability companies or partnership. *See In Re NHC-Nashville Fire Litigation*, 293 S.W.3d at 565.

The above protocol is derived from *Ballard v. Herzke*, 924 S.W.2d 652, 659 (1996) and *In Re NHC-Nashville Fire Litigation*, 293 S.W.3d 547, 570-72 (Tenn. Ct. App. 2008). As provided therein, this Court distinguishes between unfiled discovery documents versus documents, discovery or otherwise, filed with the Court under seal. Unfiled discovery documents are not public or judicial records and, therefore, there is no presumptive right of public access to unfiled discovery.

As to documents filed with the Court—whether obtained in discovery under a protective order or by other means—there exists a presumptive right of public access. This is recognized in Davidson County Local Rule 7.02

The Court also derives from *Ballard* and *In Re NHC* that these cases recognize as good cause for protecting documents, by placing them under seal on the court record, the privacy of financial information of individuals or closely-held, non-public entities such as limited liability companies. This is particularly true when disclosure is not necessary to communicate on the public record the outcome of the litigation.

Further, the Court sees that *In Re NHC* the trial court was found not to have abused its discretion by establishing a protocol for documents to be initially filed under seal with later resolution of any objections to unsealing the documents. The trial court was also found not to have erred by resolving motions for partial summary judgment before addressing objections to unsealing documents.

The rationale of the appellate court in *In Re NHC* was that the smooth functioning of the pretrial process should not be impaired by subjecting pretrial management to cumbersome or repeated First Amendment review. 293 S.W.3d at 568. The appellate court recognized competing interests and pragmatic needs of the trial court especially when there are a mammoth number of documents. The appellate court recognized that judicial resources are limited and that a trial court has other matters on its docket. In particular, the appellate court stated, “the prioritizing required to balance all of these competing interests must be committed for the sound discretion of the trial judge. Given all of the circumstances, we find no abuse of that discretion in the trial court’s decision to (1) issue a blanket protective order and then hear objections to unsealing specific filed documents, and (2) decide the merits of the pending motion for partial summary judgment before hearing the objections on unsealing the filed documents.” In so ruling, the appellate court took into account “the complexity of the case, the shear volume of documents involved, and the overall circumstances,” and found no abuse of discretion with respect to the trial court’s decision to leave certain documents under seal.

From this case law, the Court has set the above protocol.

Lastly, Counsel are cautioned that in *Ballard*, the Supreme Court recognized that a blanket protective order in discovery is not impermeable when the documents are filed in court. *Ballard* recognizes that blanket protective orders for discovery may be modified by a court when the documents are filed. *Ballard* adopted the Third Circuit’s approach for

determining whether to unseal a document subject to a blanket protective order in discovery. That approach utilizes the balancing test for determining whether to impose a protective order in the first instance, with consideration given to one additional factor upon the document being filed—the reliance by the original parties on the protective order.

Ellen Hobbs Lyle

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CHANCELLOR
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