ELECTRONIC FRONTIER FOUNDATION
Protecting Rights and Promoting Freedom on the Electronic Frontier

November 30, 2017

VIA EMAIL and FIRST CLASS POST

U.S. District Clerk
David O'Toole at Room 106,
William Steger U.S. Courthouse,
211 West Ferguson St.,
Tyler, TX 75702
ClerkOfCourt@txed.uscourts.gov

**Re: General Order 17-24: General Order Amending Local Rules**

Dear Mr. O'Toole:

We write in regards to General Order 17-24 (the "General Order"), proposing amendments to the local rules. We thank the Court for this opportunity to provide feedback as to the proposed revisions, pursuant to 28 U.S.C. § 2071(b).

We write on behalf of the Electronic Frontier Foundation (EFF), a member supported non-profit organization that has worked for over 25 years to protect consumer interests, innovation, and free expression in the digital world. EFF has more than 37,000 active members from around the United States and the world. As part of our mandate, EFF regularly advocates for greater public access to judicial records, including on numerous occasions in this district. *See Traffic Information, LLC v. Farmers Group, Inc.*, No. 2:14-cv-713, slip op. (E.D. Tex. Apr. 7, 2016) (allowing EFF to intervene in order to seek unsealing of records); *Blue Spike, LLC v. Audible Magic Corp.*, No. 6:15-cv-584, 2016 WL 3870069 (E.D. Tex. Apr. 18, 2016) (same); *My Health, Inc. v. ALR Technologies, Inc.*, No. 2:16-cv-535, slip op. (E.D. Tex. Aug. 17, 2017) (same).

We submit this comment in response to proposed addition of Local Rule 7(E) regarding the filing of sealed documents (the "Proposed Sealing Rule"). As this Court rightfully recognizes in the General Order, court records are presumptively open to the public. EFF, or any other member of the public interested in litigation, should be able to freely inspect court records and learn about parties' use of the judicial system. On occasion, however, courts will limit public access to certain information; but courts will only do so where a party demonstrates good cause to keep the specific information under seal.

We applaud this Court's recognition that under current rules, "docket sheets in many cases consist of almost nothing but sealed pleadings, totally obscuring cases from public view." General Order at 3. We agree that the previous local rules often resulted in parties excessively sealing the record. This is consistent with our own experience

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following cases in this District and with academic research regarding sealing practices. *See* Bernard Chao, *Not So Confidential: A Call for Restraint in Sealing Court Records*, 2011 Patently-O Patent L.J. 6 (noting that in some districts, including the Eastern District of Texas "when confidential material was filed under seal, other material that had no claim of confidentiality was also made unavailable").[1] We are heartened to see this Court's attempt to bring greater transparency to litigation in this District, by requiring parties to file redacted versions of materials filed with the Court that contain confidential information.

We suggest five modifications to the Proposed Sealing Rule that will better accomplish this Court's stated goal of meeting the requirements of the law regarding public access to court filings.

**First, we propose that the redacted version must be produced in consultation with any party claiming confidentiality in the information.** The Proposed Sealing Rule states that "…a party filing a document under seal must publicly file a version of that document with the confidential information redacted…"

This requirement may place the burden of filing a redacted version on a party who is not in the best position to determine the nature and scope of confidential information. Specifically, many filings are sealed based on an assertion of confidentiality made by an opposing party. In such circumstances, the filing party may not be in a position to produce the required redacted version, as it will be unable to confirm what material the party claiming confidentiality legitimately believes to be confidential. As a result, the party filing the sealed document may choose to over-redact in an abundance of caution, or under-redact thereby prejudicing the party claiming confidentiality. The interests of the parties and the public would be better served by requiring any party claiming confidential information in the document to work collaboratively to produce a redacted version.

We propose the language be modified to read "… any party whose confidential information is contained in a document filed under seal must meet and confer with any other party whose confidential information is contained in that document and thereafter publicly file a single version of that document with the confidential information redacted…"

We also propose language be added to provide that "In the event that the parties disagree about the extent of confidential information in a document, the party seeking to seal the material shall file a motion identifying the material it believes should remain confidential." This clause appropriately places the burden of filing a motion on the party that seeks withhold information from the public, in accordance with the presumption of public availability of court records.

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[1] Available at: https://patentlyo.com/patent/2011/07/essay-not-so-confidential-a-call-for-restraint-in-sealing-court-records.html

**Second, we propose that the Court add language requiring any proponent of maintaining any document or information under seal be required to file a motion to seal within 7 days of the sealed document or information being filed.**

The Court should protect the public's rights of access to court records by requiring a motion to seal from any party seeking to seal any information on the public docket.

A party's unilateral designation of a document as "confidential" is not sufficient to withhold that document from public view, absent independent court analysis. *See Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996) ("A District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public.") Blanket protective orders that do not make particularized findings as to the confidentiality of particular information cannot provide sufficient basis under the law to withhold information from the public. *See Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992) (holding that "broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test [for a protective order]."); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357-58 (Fed. Cir. 2011) ("For good cause to exist [to seal information], the party seeking to limit the disclosure of discovery materials must show that specific prejudice or harm will result if no protective order is granted.") (internal quotation omitted); *see also SEC v. Van Waeyenberghe*, 990 F.2d 845, 849-50 (5th Cir. 1993) (court abused its discretion in failing to articulate any justification for sealing document).

The motion does not need to be complex. It should describe generally the nature of the information, and provide specific and sufficient reason, if any, to maintain the information under seal. This procedure is followed in many other courts, including those regularly hearing complex litigation, and has proven to be relatively successful in allowing greater public access to judicial records. *See, e.g.*, N.D. Cal. L.R. 75-9.

We propose the court include the following language at the end of the Proposed Sealing Rule: "In all circumstances where information is filed under seal, whether or not redacted versions have been filed, any party contending information should be withheld from the public must file, within seven days of the sealed filing, a motion articulating good cause to seal the information that party contends is confidential. Absent such motion or on an order denying any such motion, the clerk will immediately unseal the information."

**Third, we propose that the language defining confidential information as "information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement" be removed from the proposed rule.**

As discussed above, a party cannot unilaterally impose confidentiality on court records. Moreover, blanket protective orders cannot form the basis for sealing records

given their lack of particularity as to the appropriateness of the sealing or the specific harm that would occur if the material were revealed.

In addition, in EFF's experience, parties regularly designate information as confidential under a blanket protective order that, upon closer examination, does not meet the requirements for sealing court records. *See, e.g.*, *Allergan Inc. v. Teva Pharms. USA, Inc.*, Case No. 2:15-cv-01455, Order at 1, Dkt. No. 383 (E.D. Tex. July 28, 2017) (noting that the parties had sealed docket entries based on a claim that the material was "designated as protective order material" but upon review, the Court saw "no obviously confidential information" and that "half of the exhibits are public information" including seven published patents, yet the material had been filed with the court under seal).

If the language is not struck, we propose the language be modified to read: "information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement and where a motion to seal addressing the specific basis for confidentiality in the information has been or will be filed."

**Fourth, we propose that the language "unless the entire document is confidential information," which appears to allow a party to forgo filing a redacted version of a document if it claims confidentiality in the entire document, be removed from the proposed rule.**

Courts have recognized that redactions are generally sufficient, and it is only on rare occasions that an entire document needs to be withheld from the public. *See, e.g.*, *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 894-95 (S.D. Tex. 2008) ("It is difficult to conceive any circumstance under which permanent sealing of the entire file, including the order itself, could ever be justified. . . . Legitimate confidentiality interests will almost always be fully accommodated by redacting the troublesome words or passages.").

Including a clause that allows a party to forgo the filing of a redacted version of a document if there is a claim to confidentiality in the whole document may incentivize parties to over-redact by designating an entire document as confidential in order to avoid a perceived burden of filing redacted versions of documents.

If the language is not struck, we propose that the following language be added: "Should a party contend that an entire document is confidential, and thus no redacted public version can be made available, the party shall explain within its motion to seal why the entire document is confidential and how redactions are insufficient to address confidentiality concerns."

**Finally, we propose that the time to file redacted versions be increased to be seven days.** The General Order proposes that a party filing a document under seal must publicly file a redacted version of that document "within two days." Such a short time frame may prove to be unworkable, especially for complex filings with multiple

attachments. EFF is concerned that parties rushing to meet such a short deadline might redact too heavily, undermining the problems the proposed rule is attempting to mitigate. Also, as discussed above, the claim of confidentiality is often due to materials produced by an opposing party. Extending the deadline to submit redacted versions would permit the party claiming confidentiality, often an opposing party who had no advance knowledge of the exact contents of the filing, sufficient time to appropriately redact any document.

We propose the language be modified to read: "within seven days."

Very truly yours,

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Electronic Frontier Foundation