IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

_____,	§	
	§	
Plaintiff(s),	§	
	§	
v.	§	CIVIL ACTION NO. _____
	§	
_____,	§	
	§	
Defendant(s).	§	

STANDING ORDER ON FILING MATERIALS UNDER SEAL

This order governs any requests to file materials in this case under seal.

The United States Court of Appeals for the Fifth Circuit recently warned that – where, "increasingly, courts are sealing documents in run-of-the-mill cases where the parties simply prefer to keep things under wraps" – "the working presumption is that judicial records should not be sealed." *Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417, 419 (5th Cir. 2021) (emphasis added).

The Fifth Circuit explained that "courts should be ungenerous with their discretion to seal judicial records, which plays out in two legal standards.... The first standard, requiring only good cause, applies to protective orders sealing documents produced in discovery. The second standard, a stricter balancing test, applies [o]nce a document is filed on the public record – when a document becomes a judicial record." *Id.* at 419 (cleaned up) (emphasis added); *see also id.* (noting that, "at the adjudicative stage, when materials enter the court record, the standard for shielding records from public view is far more arduous" (emphasis removed)).

The panel acknowledged that, "even under the stricter balancing standard, litigants sometimes have good reasons to file documents (or portions of them) under seal, such as protecting trade secrets or the identities of confidential informants." *Id.* at 419. But the Court of Appeals

expressed particular concern that the court "must undertake a case-by-case, document-by-document, line-by-line balancing of the public's common law right of access against the interests favoring nondisclosure" where "documents marked confidential provided the basis for summary judgment – a dispositive order adjudicating the litigants' substantive rights (essentially a substitute for trial)." *Id.* at 419-20 (cleaned up).

"The secrecy of judicial records, including stipulated secrecy, must be justified and weighed against the presumption of openness that can be rebutted only by compelling countervailing interests favoring nondisclosure. All too often, judicial records are sealed without any showing that secrecy is warranted or why the public's presumptive right of access is subordinated. This mistake harms the public interest, however interested the public is likely to be." *Id.* at 421.

A Fifth Circuit panel more recently again explained that the Court of Appeals "heavily disfavor[s] sealing information placed in the judicial record"; that it "require[s] information that would normally be private to become public by entering the judicial record"; that "publicly available documents … already belong to the people, and a judge cannot seal public documents merely because a party seeks to add them to the judicial record"; that "[t]hat a document qualifies for a protective order under [Federal Rule of Civil Procedure] 26(c) for discovery says nothing about whether it should be sealed once it is placed in the judicial record"; and that, "to the extent that any sealing is necessary, it must be congruent to the need." *June Med. Servs., L.L.C. v. Phillips*, 22 F.4th 512, 519-21 (5th Cir. 2022) (cleaned up).

As another judge has explained, "[w]hile 'judges, not litigants' are tasked with determining whether to seal a document and that task ultimately requires them to undertake the case-by-case, document-by-document, and line-by-line balancing of the public's right of access against

presented interests favoring nondisclosure, see *Le*, 990 F.3d at 419, it is certainly within a court's discretion to summarily deny a request to seal when it is apparent that the submitter has not conducted its own document-by-document, line-by-line review." *Trans Tool, LLC v. All State Gear Inc.*, No. SA-19-CV-1304-JKP, 2022 WL 608945, at *6 (W.D. Tex. Mar. 1, 2022) (emphases added). And "[l]itigants and others seeking secrecy have the burden to overcome the strong presumption favoring public access" and "'must explain in particularity the necessity for sealing.'" *Id.* (emphasis added) (quoting *BP Expl. & Prod., Inc. v. Claimant ID 100246928*, 920 F.3d 209, 211 (5th Cir. 2019)).

Following this governing law, the Court "heavily disfavor[s] sealing information placed in the judicial record" and discourages such requests. *June Med. Servs.*, 22 F.4th at 519-20.

The Parties may agree between themselves to designate documents "confidential" during discovery. The typical standard there involves the Parties assessing whether they want that material in the public domain. *See id.*; *Le*, 990 F.3d at 419-20. But filing that material with the Court under seal is a different matter. *See, e.g.*, *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) ("Public access [to judicial records] serves to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness." (cleaned up)).

To comply with this governing law, the Court **ORDERS** that:

1. a Party seeking to file a specific document under seal must move for leave to do so and must:
    a. identify precisely what information (pages, lines, etc.) the Party wants sealed;
    b. conduct a line-by-line, page-by-page analysis explaining and briefing why

the risks of disclosure outweigh the public's right to know; and

c. explain why no other viable alternative to sealing exists;

2. if a Party seeks leave to file any motion, response, reply, or brief under seal, the motion to seal must include a proposed public version of the motion, response, reply, or brief with any and all assertedly confidential information redacted;
3. Parties should not seek to file under seal any information that is already publicly available, *see June Med. Servs.*, 22 F.4th at 520; and
4. all facts recited in any motion to seal must be verified by the oath or declaration of a person or persons with personal knowledge, which will assist the Court in making fact findings that can withstand appellate scrutiny, *see United States v. Edwards*, 823 F.2d 111, 119 (5th Cir. 1987) (if closure of a presumptively open proceeding is to withstand a First Amendment challenge, the court must make specific fact findings that substantial probability exists that an interest of a higher value will be prejudiced and that no reasonable alternatives will adequately protect that interest).

The Court recognizes that the Party seeking to seal documents may not possess personal knowledge of the facts to be included in a motion for leave to file under seal. In these instances, the Parties should either prepare joint motions for leave to file documents under seal – with the Party with personal knowledge verifying the facts in the section on justification – or the Parties should make separate filings.

(*Signature page follows*)

SO ORDERED: ____ day of _____, 20__.

_____
Hon. Judge Ada E. Brown,
United States Federal District Judge