REPORTERS COMMITTEE
FOR FREEDOM OF THE PRESS

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VIA EMAIL

November 30, 2017

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: Local Rule Amendments in General Order 17-24

Dear Mr. O'Toole:

The Reporters Committee for Freedom of the Press writes to comment on the Court's proposed new local rule on sealed documents, Local Rule CV-5(a)(7)(E). As an association of reporters and editors that works to defend the First Amendment rights and freedom of information interests of the news media, the Reporters Committee strongly supports the Court's decision to require the filing of a public, redacted version of any sealed document.

We write, however, to emphasize that the Court's local rules, including proposed Local Rule CV-5(a)(7)(E), must follow the long-recognized First Amendment and common law presumptions of public access to court filings. We urge the Court to amend proposed Local Rule CV-5(a)(7)(E) to make clear that parties who wish to file judicial records under seal must file a motion to seal in all circumstances. We also ask that the Court specify, as part of Local Rule CV-5(a)(7), that judicial records may not be filed under seal absent an order of the Court containing specific, on-the-record findings demonstrating that the First Amendment and common law presumptions of access have been overcome.

The public has a strong interest in access to federal court proceedings and records, including proceedings and records of this Court.

The U.S. Supreme Court and lower federal courts, including the Fifth Circuit, have repeatedly recognized the importance of the public's right of access to the nation's courts. *See, e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980) (stating that public access to judicial proceedings is an "indispensable attribute" of the American justice system). As the Fifth Circuit has observed, allowing the public to access judicial proceedings and records, including civil matters, "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." *S.E.C. v. Van Waeyenberghe*,

990 F.2d 845, 849 (5th Cir. 1993) (citation omitted); *see also Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) ("*Press-Enterprise I*"). The public's unfettered access safeguards the very integrity of the judicial system. *Wilson v. American Motors Corp.*, 759 F.2d 1568, 1571 (11th Cir. 1985) (citing *Brown & Williamson Tobacco Corp. v. FTC*, 710 F.2d 1165, 1178–79 (6th Cir. 1983)).

As is true for all courts, the public's interest in access to proceedings before this Court is strong. This Court's many patent cases, for example, are often of great public interest. Just this month, several patent cases before this Court have attracted public attention and news coverage, including cases about alleged patent fraud by a pharmaceutical company to prevent generic versions of its medication; a patent dispute between cellphone technology companies; an alleged "patent troll's" infringement case against a network equipment company; and a patent infringement case against shipping company FedEx. *See* Eric Sagonowsky, *Allergan Sued for Scheming to Protect Restasis—and It's Not Just About the Tribal License*, FiercePharma (Nov. 22, 2017), https://perma.cc/E6RJ-ARZZ; Steven Trader, *Ericsson Patent Not Invalid Under Alice, Judge Finds*, Law360 (Nov. 7, 2017), https://perma.cc/GMH8-XXP8; James Dornbrook, *Erise Gets Another Big Victory Against Patent Troll*, Kansas City Bus. J. (Nov. 13, 2017), https://perma.cc/4RD7-48TQ; Jess Krochtengel, *Gilstrap Won't Boot IV's FedEx Patent Row From Texas*, Law360 (Nov. 28, 2017), https://perma.cc/Z23R-W5EH. The public interest in these and other cases before this Court, and in monitoring the activities of the parties and the Court in such cases, is substantial.

The First Amendment and common law presumptions of access protect the public's right of access to judicial records by requiring the Court to make specific, on-the-record findings that sealing is narrowly tailored and essential to preserve higher values.

The public's interests in access to judicial proceedings and records are protected by a strong presumption of public access to these proceedings and records under the First Amendment. The Supreme Court has held that judicial proceedings that satisfy the "experience and logic" test, which requires courts to consider whether proceedings have historically been open to the press and general public and whether public access plays a significant positive role in their functioning, are presumptively open under the First Amendment. *See Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 8–9 (1986) ("*Press-Enterprise II*"). Several U.S. Courts of Appeal have held that the First Amendment right of access applies to court records as well. *See, e.g.*, *Matter of New York Times Co.*, 828 F.2d 110, 114 (2d Cir. 1987) (finding a First Amendment right of access to pretrial documents in the criminal context); *Associated Press v. U.S. Dist. Court*, 705 F.2d 1143, 1145 (9th Cir. 1983) (same); *see also Brown & Williamson*, 710 F.2d at 1177 (6th Cir.) (holding that the First Amendment limits judicial discretion to seal civil suit documents).

When the First Amendment right of access attaches, the presumption cannot be overcome without specific, on-the-record findings of the need for closure. *Richmond Newspapers*, 448 U.S. at 581. These findings must demonstrate that "closure is essential

to preserve higher values and is narrowly tailored to serve that interest." *Press-Enterprise I*, 464 U.S. at 510. A general, "conclusory assertion" about vague threats of harm to the parties is not enough. *See Press-Enterprise II*, 478 U.S. at 15 (finding that the risk of prejudice to a criminal defendant's fair trial right "does not automatically justify refusing public access"). Instead, "individualized determinations are always required before the right of access may be denied." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.20 (1982) (citing *Richmond Newspapers*, 448 U.S. at 581).

The Supreme Court and the Fifth Circuit have also recognized a common law right of access to judicial records. *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978); *Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 454 (5th Cir. 2015) (citing *Van Waeyenberghe,* 990 F.2d at 848). This qualified right, like the First Amendment right, is derived from the interest of citizens in keeping "a watchful eye on the workings of public agencies," including the courts. *Nixon*, 435 U.S. at 598. The Fifth Circuit has held that a district court must balance the interests for and against access when considering a motion to seal records subject to the common law presumption of access. *Test Masters*, 799 F.3d at 454. Evidence that the district court undertook that balancing must appear in the record, and its discretion to seal "is to be exercised charily." *Van Waeyenberghe*, 990 F.2d at 848–50.

Thus, under both the First Amendment and the common law, the presumption of public access to court records may be overcome only by *specific, on-the-record findings by the trial court*. *See, e.g.*, *United States v. Sealed Search Warrants*, 868 F.3d 385, 395 (5th Cir. 2017) ("[T]he Fifth Circuit has consistently required the district court to explain its decisions to seal or unseal.").

Local Rule CV-5(a)(7) should require parties to file a motion to seal in all circumstances and should allow sealing only upon an order of the Court.

This Court has recognized the presumptions of public access to court filings as the basis for adopting proposed Local Rule CV-5(a)(7)(E). *See* Comment to Proposed Local Rule CV-5(a)(7)(E). Indeed, the requirement in proposed Local Rule CV-5(a)(7)(E) that a party filing a document under seal also file a public, redacted version of the sealed document is consistent with the mandate of the First Amendment presumption of access that sealing be "narrowly tailored." *Press-Enterprise I*, 464 U.S. at 510.

However, Local Rule CV-5(a)(7)(E), read with the rest of Local Rule CV-5(a)(7), also appears to allow a party, in certain circumstances, to file a document under seal without first submitting a motion to seal and obtaining a court order. While Local Rule CV-5(a)(7)(B) permits filing under seal only by motion or when "the Court already has granted authorization," proposed Local Rule CV-5(a)(7)(E) appears to "grant authorization" to parties to file documents under seal without first filing a motion to seal in certain circumstances. Specifically, the proposed rule permits sealing of "information that has been designated as confidential or proprietary under a protective order or non-disclosure agreement" or "information otherwise entitled to protection from disclosure under a statute, rule, order or other legal authority." Allowing a party to file a document

under seal without first obtaining specific judicial approval in these two circumstances is inconsistent with the First Amendment and common law presumptions of access.

The Reporters Committee recognizes that documents or information exchanged between the parties in discovery are not, as a general matter, subject to the First Amendment or common law presumptions of access. However, once records are filed with the Court—rather than simply exchanged by parties through discovery or other methods—they become judicial records subject to the common law presumption of access. *See Van Waeyenberghe*, 990 F.2d at 849; *see also Brown v. Advantage Eng'g, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case."). And records filed with the Court that satisfy the "experience and logic" test are also subject to the First Amendment presumption of access. *See Press-Enterprise II*, 478 U.S. at 8–9.

When judicial records are subject to the First Amendment or common law presumptions of access, the Court must make on-the-record findings and identify the specific protected interest that justifies overcoming the presumptions of access. Relying on the parties to make a determination that records may be filed under seal or on previously granted protective orders, considered under different standards, is not enough. A district court cannot abdicate or delegate its responsibility to ensure that the First Amendment and common law presumptions of access have been overcome before judicial records may be filed under seal. *See Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943, 945 (7th Cir. 1999) ("The judge is the primary representative of the public interest in the judicial process and is duty-bound therefore to review any request to seal the record (or part of it).").

Under the proposed new rule, protective orders and non-disclosure agreements relating to discovery may become de facto sealing orders, even though such protective orders are not subject to the higher standard of a presumption of openness, *see* Fed. R. Civ. P. 26(c), and non-disclosure agreements may be entered into between the parties without any involvement of the Court. As proposed, Local Rule CV-5(a)(7)(E) appears to permit the permanent sealing of records subject to a protective order or non-disclosure agreement with no on-the-record determination by the Court that the specific circumstances do, indeed, justify overriding the public's rights of access.

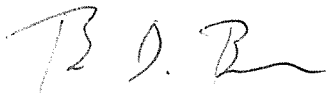
In addition, the proposed new rule appears to permit a party to file judicial records under seal when the party determines that it contains information "entitled to protection from disclosure under a statute, rule, order or other legal authority." The Reporters Committee acknowledges that statutes or other legal authorities may entitle information filed with the Court to protection from disclosure. However, again, it is the *Court*, not the parties, that must make the determination that a specific statute or other authority applies to particular information contained in records filed with the Court and that the First Amendment and common law presumptions of access have been overcome.

Not only is a rule that permits the parties to designate records confidential and file them under seal without a specific court order contrary to the First Amendment and

common law presumptions of access, but it is also ripe for abuse by parties who may wish to file records under seal without justification. For example, in 2016, this Court granted the motion of the Electronic Frontier Foundation ("EFF") to intervene and unseal judicial records that had been filed under seal in *Blue Spike LLC v. Audible Magic Corporation*. Order at 1, *Blue Spike LLC v. Audible Magic Corp.*, No. 6:15-cv-584 (E.D. Tex. May 17, 2016). In opposing EFF's motion to unseal, one of the parties, Blue Spike, relied on a protective order entered in the case as the basis for sealing. *Id.* at 3. However, in response to the Court's order to unseal, Blue Spike admitted that none of its filings had contained *any* confidential information. Blue Spike LLC's Notice to the Court Concerning the Court's Order Dated May 17, 2016, *Blue Spike LLC v. Audible Magic Corp.*, No. 6:15-cv-584 (E.D. Tex. June 3, 2016). If parties are permitted to file records under seal without judicial oversight, these types of abuses will continue.

For these reasons, the Reporters Committee urges the Court to make clear in Local Rule CV-5(a)(7)(E) that parties in all circumstances must file a motion to seal accompanying the documents they wish to file under seal. In addition, the Reporters Committee asks that the Court clarify as part of Local Rule CV-5(a)(7) that records subject to the First Amendment and common law presumptions of access cannot be filed under seal absent a court order that makes specific, on-the-record findings that the presumptions of access have been overcome. These revisions would demonstrate that the Court takes its responsibilities of public access and openness seriously, and would properly ensure that, as required under the First Amendment and the common law presumptions of access, judicial records are sealed only when higher values demand such secrecy.

Sincerely,



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