

**HONORABLE CATHY ANN BENCIVENGO
U.S. DISTRICT JUDGE
CIVIL CASE PROCEDURES**

Chambers

United States District Court
Southern District of California
221 West Broadway, Suite 4165
San Diego, CA 92101
Tel: (619) 557-7688
Courtroom: 4C

Courtroom Deputy

Lori Hernandez
(619) 557-6901

Court Reporter

Mauralee Ramirez
ordertranscript@gmail.com

Unless otherwise ordered, matters before Judge Bencivengo shall be conducted in accordance with the rules stated below. Unless specifically stated, these rules do not alter the requirements of this Court's Civil Local Rules or the Federal Rules of Civil Procedure.

I. Communications With Chambers

A. Letters, faxes or emails: Letters, faxes or emails to Chambers are prohibited unless specifically requested by the Court. If letters, faxes or emails are requested, copies of the same must be simultaneously delivered to all counsel and, absent prior approval by Chambers, must not exceed three pages in length, using twelve point font. Correspondence with the Court must state the manner in which it was served on all other counsel (e.g., "By Hand," "By Express Mail"). Copies of correspondence between counsel must **not** be sent to the Court unless specifically requested by the Court.

B. Telephone Calls: *Parties seeking a motion date for a noticed motion should refer to Section II.* In light of the Court's procedure for setting motion dates, telephone calls to Chambers are rarely appropriate. Such calls may **only** be made by **counsel** with knowledge of the case. ***Calls from secretaries, legal assistants, paralegals, or parties represented by counsel are prohibited.*** Counsel should not call Chambers with procedural questions or to inquire whether any action has been taken with regard to a previously-submitted filing. The Court does not provide time estimates for its written rulings. Court personnel are prohibited from giving legal advice or discussing the merits of a case. When calling chambers, be prepared to identify your case by case name and case number so your call can be directed to the appropriate law clerk. If your call is not answered, you may leave a voicemail, including your name, contact information, case number, and a detailed message. Upon reviewing your voicemail, the Court may return the call if necessary.

C. Courtesy Copies: Courtesy copies of filings that collectively exceed 20 pages in length shall be submitted to the Clerk's office by the second business day subsequent to the filing date, and the copies submitted **must contain the ECF-generated header** on each page. Courtesy copies shall be provided in cases where multiple filings in a single court day together exceed 20 pages in length. For voluminous filings, the Court prefers the documents to be tabbed and placed in 3-ring binders. Proofs of service need not be provided. If the original filing contained font, illustrations, charts, photographs or the like in color, the courtesy copies shall contain color copies as well.

For documents filed or lodged under seal, only the full, unredacted versions of those documents shall be provided in the Court's courtesy copy.

Please consult the Electronic Case Filing Administrative Policies and Procedures Manual for further information regarding the courtesy copy requirement.

II. Noticed Motions

A. Motion Dates: Parties filing a noticed motion must set the hearing date to be thirty-five (35) days from the motion's filing date.¹ Parties should *not* contact chambers for a motion hearing date.² Opposition and reply briefs are due based on the noticed date. The hearing date on a motion does not indicate a date when appearances are necessary; rather, it sets the briefing schedule for the motion pursuant to the applicable local rules. Consequently, the filing party should *not* specify a hearing time on its motion, and shall include the following language in the caption of the motion: PER CHAMBERS RULES, NO ORAL ARGUMENT UNLESS SEPARATELY ORDERED BY THE COURT. A party may request oral argument by filing a separate request that explains why oral argument would be helpful to the Court. If the Court grants a request for oral argument or *sua sponte* decides to hear oral argument, the Court will issue an order setting forth the date and time for oral argument.

B. Proposed orders: Proposed orders shall only be submitted on non-dispositive, procedural motions in accordance with Section 2(h) of the Electronic Case Filing Administrative Policies and Procedures Manual. Counsel should email proposed orders in Word format directly to efile_bencivengo@casd.uscourts.gov.

C. Summary Judgment Motions: Notwithstanding Civ.L.R. 7.1.f.1, Separate Statements of Fact shall **NOT** be filed.

D. Exhibits/Unreported Cases: All exhibits submitted in support of motions should be excerpted to include only relevant material. All exhibits must be clearly labeled, dated, tabbed, and indexed. Copies of documents already contained on the electronic docket shall not be included as exhibits. Such documents should be cited in the text of the motion as

¹ For example, if the motion is filed on September 1, 2016, the motion date should be October 6, 2016.

² This rule supersedes the requirement of L.R. 7.1(b) that a motion date must be obtained from chambers.

[Doc. No. ___ at ___] referencing the docket number of the document cited and using the ECF generated page number for pinpoint cites. For cases not assigned to a reporter for publication, WESTLAW citations should be given, if available. Citations to cases not available in WESTLAW or LEXIS/NEXIS should be accompanied by copies of the cases cited.

E. List of Terms/Names: For technical motions (especially in patent cases), one week prior to the motion hearing, the parties are requested to email to chambers (not to be filed) a list of pertinent technical terms and/or proper names, the purpose of which is to assist the court reporter in the transcription of the hearing.

III. Telephonic Appearances

A. Policy Governing Telephonic Appearances

Telephonic appearances are allowed only if specifically approved or requested by the Court. All requests by parties to appear telephonically shall be made by filing a document entitled “Ex Parte Application for Telephonic Appearance,” setting forth good cause for the request to appear telephonically. The ex parte application shall be filed at least one week prior to the hearing.

All telephonic appearances must be made through **CourtCall**, an independent conference call company, pursuant to the procedures set forth below. If an individual schedules a telephonic appearance and then fails to respond to the call of a matter on calendar, the Court may pass the matter or may treat the failure to respond as a failure to appear. Scheduling simultaneous telephonic appearances in multiple courts does not excuse a failure to appear. Individuals making use of the conference call service are cautioned that they do so at their own risk. Hearings generally will not be rescheduled due to missed connections.

B. Arranging a Telephonic Appearance

Once approval is given by the Court, telephonic appearances may be arranged by calling **CourtCall at (866) 582-6878** not later than **12:00 noon** the court day prior to the hearing date. This deadline for coordinating the telephonic appearance with CourtCall does not alter the Court’s requirement set forth above that ex parte applications to the Court for a telephonic appearance shall be made no later than one week before a scheduled hearing.

C. Procedure for Telephonic Appearance

CourtCall will provide counsel with written confirmation of a telephonic appearance, and give counsel a number to call to make the telephonic appearance. **It is counsel’s responsibility to dial into the call not later than 10 minutes prior to the scheduled hearing. CourtCall does not place a call to counsel.**

The initial charge per participant for a CourtCall appearance is \$30 for the first 45 minutes you are connected. For each additional 15 minute increment the charge is \$7.00. If you do not timely call and connect with the CourtCall operator, you will be billed for the call and the hearing may proceed in your absence.

Telephonic appearances are connected directly with the courtroom's public address system and electronic recording equipment so that a normal record is produced. To ensure the quality of the record, the use of cellular phones, speaker phones, public telephone booths, or phones in other public places is prohibited except in the most extreme emergencies. Participants should be able to hear all parties without difficulty or echo.

At the time of your hearing, you may initially be in the listening mode in which case you will be able to hear the case before yours just as if you were in the courtroom. After your call is connected to the courtroom, the Judge will call the case, request appearances, and direct the manner in which the hearing proceeds. Each time you speak, you should identify yourself for the record. The court's teleconferencing system allows more than one speaker to be heard, so the Judge can interrupt a speaker to ask a question or redirect the discussion. When the Judge informs the participants that the hearing is completed, you may disconnect and the next case will be called.

Telephonic appearances by multiple participants are only possible when there is compliance with every procedural requirement. Sanctions may be imposed when there is any deviation from the required procedures or the Court determines that a person's conduct makes telephonic appearances inappropriate. Sanctions may include dropping a matter from calendar, continuing the hearing, proceeding in the absence of an unavailable participant, a monetary sanction, and/or a permanent prohibition against a person appearing telephonically.

IV. Ex Parte Motions

Before filing any *ex parte* motion, counsel shall contact the opposing party to meet and confer regarding the subject of the *ex parte* motion. All *ex parte* motions shall be accompanied by a declaration from the movant documenting (1) efforts to contact opposing counsel, (2) counsel's good faith, in person or by telephone meet and confer efforts to resolve differences with opposing counsel, and (3) opposing counsel's general position regarding the *ex parte* motion. Any *ex parte* motion filed with the Court shall be served on opposing counsel via facsimile, electronic mail with return receipt requested, or overnight mail. *Ex parte* motions that are not opposed within **two Court days** shall be considered unopposed and may be granted on that ground.

V. Protective Orders and Requests to File Under Seal in Civil Cases

Although the Court acknowledges the parties' desire to maintain the confidentiality of documents produced in discovery, "[w]hen discovery material is filed with the court [] its

status changes.” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1134 (9th Cir. 2003). The public policy reasons behind a presumption of access to judicial documents apply. *Id.* The common law and the Constitution afford the public a qualified right of access to judicial records and proceedings. *Times Mirror Co. v. U.S.*, 873 F.2d 1210, 1211 n.1 (9th Cir. 1989); *Pintos v. Pacific Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010).

In the Ninth Circuit there is a strong presumption in favor of access to court records and a party must show **compelling reasons** to file materials under seal as part of a non-discovery motion, even if they were produced subject to a discovery protective order. *See Foltz*, 331 F.3d at 1135-36. Once the protected discovery documents are made part of a dispositive [or non-discovery] motion, “they lose their status of being raw fruits of discovery” and no longer enjoy protected status without some overriding interests in favor of keeping the material confidential. *See id.*, at 1136.

Court records should be sealed to keep confidential only what must be kept secret, temporarily or permanently, as the situation requires. The party seeking to file under seal must provide articulable facts showing a compelling reason to limit public access to court filings. That a litigant might be embarrassed or exposed to additional liability or litigation, without more, is not sufficient. *Foltz*, 331 F.3d at 1136. A court’s decision to seal material must be based on a compelling reason and the order allowing a filing under seal must articulate the factual basis for its ruling without relying on hypothesis or conjecture. *Pintos*, 605 F.3d at 679. “A ‘good cause’ showing will not suffice to fulfill the ‘compelling reasons’ standard that a party must meet to rebut the presumption of access to dispositive pleadings and attachments.” *Id.* (citing *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006)).

Because the party that designated material as confidential should have the burden (and expense) of moving to file such documents under seal, the following procedures shall apply when a party intends to file a non-discovery motion before Judge Bencivengo that cites to or attaches documents designated confidential.

1. If the party filing the non-discovery motion (or opposition thereto) intends to cite or attach documents or information that it believes should be filed under seal, the moving party must file a motion to file documents under seal at least **seven calendar days** prior to the date on which it intends to file the non-discovery motion. The proposed sealed documents should **NOT** be lodged on CM-ECF with the motion to file documents under seal. Rather, a courtesy copy of the (filed) motion to file documents under seal, along with a courtesy copy of the unredacted (unfiled) materials that the party wants to file under seal, shall be delivered to Judge Bencivengo’s Chambers within 24 hours of filing. After receiving a ruling from the Court on the motion to file documents under seal, the party may file its substantive motion (or opposition) consistent with the Court’s order and may then lodge any

documents authorized to be sealed on CM-ECF by linking the sealed lodged documents to the original motion to file documents under seal.

2. If the party filing the motion (or opposition thereto) intends to cite or attach documents or information that another party has designated as confidential pursuant to a protective order entered in the case, it shall serve notice to the designating party by email, no later than **eight business days** prior to the date it intends to file the non-discovery motion or opposition, specifically identifying the documents and information it is contemplating using in connection with the motion or opposition. The designating party shall then have **four business days** from the date of the notice to file a motion to file documents under seal. The proposed sealed documents should **NOT** be lodged on CM-ECF with the motion to file under seal. Rather, a courtesy copy of the (filed) motion to file documents under seal, along with a courtesy copy of the unredacted (unfiled) materials that the party wants to file under seal, shall be delivered to Judge Bencivengo's Chambers within 24 hours of filing. After receiving a ruling from the Court on the motion to file documents under seal, the party may file its substantive motion (or opposition) consistent with the Court's order and may then lodge any documents authorized to be sealed on CM-ECF by linking the sealed documents to the original motion to file documents under seal. If the designating party does not timely file a motion to file documents under seal, the confidential designation will be deemed waived, and the party seeking to use the documents or information shall file it publicly in connection with its motion or opposition.

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