Nos. 23-2638, -3093

In the United States Court of Appeals
FOR THE EIGHTH CIRCUIT

LAURA HAMMETT
PLAINTIFF-APPELLANT,
v.
PORTFOLIO RECOVERY ASSOCIATES, LLC, *and* DOES, 1–99,
DEFENDANTS-APPELLEES.

On Appeal From The United States District Court
For The Eastern District of Arkansas
Case No.4:21-cv-00189
The Honorable Lee P. Rudofsky

DEFENDANT-APPELLEE PORTFOLIO RECOVERY ASSOCIATES, LLC'S OPPOSITION TO PLAINTIFF'S MOTION TO UNSEAL DISTRICT COURT DOCUMENTS

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INTRODUCTION

Plaintiff's Motion, docketed as a Motion To Unseal District Court Documents, challenges various district-court decisions related to the entry of a standard protective order, stipulated to by the parties, to protect Portfolio Recovery Associates, LLC's ("PRA") proprietary commercial information from public disclosure. PRA does not dispute Plaintiff's ability to challenge those district-court decisions—specifically, the district court's order entering a protective order, an order denying Plaintiff's challenge to confidentiality designations, orders granting motions to seal and redact certain documents, and an order denying a motion for reconsideration on a motion to seal—before this Court. But PRA does oppose Plaintiff's premature attempt to present these challenges through a Motion, which is procedurally improper. In any event, Plaintiff's arguments are meritless, because the district court did not abuse its discretion in entering a stipulated protective order and in implementing that order in this case by upholding PRA's confidentiality designations and allowing PRA to file commercially sensitive information under seal.

This Court should deny Plaintiff's Motion.

STATEMENT OF THE CASE

Plaintiff Hammett first filed suit against PRA on March 10, 2021. Doc.1. In the operative Complaint, Doc.6, Plaintiff alleged five causes of action against PRA for violations of the Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692 *et seq.*, violations of the Telephone Consumer Protection Act ("TCPA"), 47 U.S.C. § 227, intentional infliction of emotional distress and outrage, negligent infliction of emotional distress, and invasion of privacy by intrusion upon seclusion, all related to PRA's debt-collection efforts beginning in 2013.

Throughout the district court proceedings, Plaintiff challenged PRA's efforts to protect its confidential information from exposure on the public record. During the Federal Rule of Civil Procedure 26(f) conference, the parties discussed entry of a standard protective order ("PO"), but Plaintiff was not agreeable to entry of such an order on any terms. Doc.27, ¶¶ 2–3. Thus, PRA moved for entry of a standard PO, seeking the ability to protect trade secrets and internal financial and proprietary commercial information in the course of discovery. Doc.27, ¶¶ 7–15. As PRA explained, it has spent substantial amounts of time and money developing and maintaining trade secrets, as well as its

internal financial and proprietary commercial information with respect to the telephone systems, including the hardware and software it uses in the course of its business. Doc.27, ¶ 8. PRA sought the ability to designate such materials as confidential, in order to prevent public disclosure and significant commercial injury. Doc.27, ¶¶ 12–13. After the district court suggested minor revisions to the PO submitted by PRA, Plaintiff stipulated to entry of the revised protective order by the court. Doc.46.

The stipulated PO outlined the procedures for designating confidential materials, as well as a process for challenging designations and filing confidential materials with the court. The stipulated PO allowed either party to designate as confidential materials "revealing proprietary, financial, and/or commercially sensitive data, marketing, sale, or planning information, medical records and mental health records and similar categories of information not known to the general public," Doc.46, ¶ 5, as well as materials "the producing party reasonably believe[d] disclosure to the receiving party may cause competitive or other business injury to the producing party," Doc.46, ¶ 6. The order also provided that a receiving party could object to the producing party's

designations by submitting any objections in writing within ten business days and then conferring with counsel within another ten business days. Doc.46, ¶ 12. If at the end of the second ten-day period the parties could not "agree on the propriety of the objected-to designation(s)," the objecting party was permitted to apply to the court for an order changing or reviewing the designation. Doc.46, ¶ 12. The order further provided that if either party wanted to file any confidential materials, it could do so by following the local rules for filing documents under seal. Doc.46, ¶ 13.

After PRA designated several of the documents it produced to Plaintiff as confidential under the stipulated PO, Doc.71 at 2, Plaintiff decided to assert a blanket challenge to *every* confidentiality designation PRA made in the case, asking the court to make public detailed, propriety claims-handling procedures and policies, phone records, address sources, and other documents produced in discovery, Doc.68. Plaintiff filed such motion largely without complying with the procedures outlined in the stipulated PO requiring her to object to the designations in writing within ten business days and confer with counsel for PRA. *See* Doc.46.

The district court rejected Plaintiff's blanket challenge, informing her that if she wanted to challenge PRA's designations she could do so by filing "specific motion[s] to discuss each specific piece of information" she would like to be re-designated. Doc.124 at 16:25–17:1.

When PRA later moved the court to file confidential documents under seal or with redactions, Docs.50, 62, 74, 77, 105, 158, 167, Plaintiff revived her complaints regarding PRA's designations, filing responses in opposition and reasserting many of the same general arguments as to why she opposed confidentiality, Docs.54, 65, 79, 163, 176. The district court granted each of PRA's motions over Plaintiff's objections. Docs.51, 110, 114, 115, 119, 192. And when Plaintiff moved for the court's reconsideration on one of these orders, Doc.54, the court rejected her motion, finding that the relevant three documents were all properly designated as confidential, Doc.98 at 23:22–23.

On August 16, 2022, the district court granted summary judgment in favor of PRA on all five counts of Plaintiff's complaint. Doc.173. The court found that Plaintiff had abandoned several of her claims and rejected the others on various grounds. Doc.173. In the same order, the court also ruled on Plaintiff's request to file a second amended complaint,

largely holding that any amendments would be futile, Doc.173 at 58–70, but the court did allow her to proceed with a new claim that PRA falsely asserted that Plaintiff owed $2,297.63, Doc.173 at 70. However, on June 15, 2023, the district court again granted summary judgment in favor of PRA, finding Plaintiff did in fact owe the stated amount and none of the communications at issue were made with the animating purpose of inducing payment upon a debt. Doc.237, 238. On July 14, 2023, Plaintiff filed a notice of appeal to this Court "from the final judgment entered on June 15, 2023 and all other orders in this case including but not limited to post judgment orders." Doc.249.

Now pending before this Court is Plaintiff's "Motion for Public Access to the Record" ("Mot.") in which Plaintiff asserts that the district court "denied [her] numerous challenges" to PRA's confidentiality designations, Mot.3, and "allowed [certain] redactions despite [her] argument," Mot.5.

ARGUMENT

I. Plaintiff's Motion Is Procedurally Improper

A. An appellant may challenge before this Court, as of right, district-court decisions that enter protective orders, allow filings under

seal or with redactions, and deny motions for reconsideration. *See, e.g.*, *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973) (reviewing entry of protective orders); *Webster Groves Sch. Dist. v. Pulitzer Pub. Co.*, 898 F.2d 1371, 1376 (8th Cir. 1990) (reviewing decisions on motions to seal); *K.C. 1986 Ltd. P'ship v. Reade Mfg.*, 472 F.3d 1009, 1017 (8th Cir. 2007) (reviewing decisions on motions for reconsideration). To preserve and exercise this right, all that an appellant must do is include the district court's decision(s) in her notice of appeal, *see* Fed. R. App. P. 3(c)(1)(B), and then fully develop arguments challenging those orders in her merits briefing, *see* Fed. R. App. P. 28(a)(5) ("statement of the issues presented for review"). Then, upon receipt of the merits briefing and the hearing of oral argument, if any, this Court will enter a judgment on the merits of the appellant's challenges to those district-court orders, reviewing each challenge under the abuse-of-discretion standard. *See, e.g.*, *Gen. Dynamics Corp.*, 481 F.2d at 1212 (reviewing entry of a protective order); *Webster Groves Sch. Dist.*, 898 F.2d at 1376 (motions to seal); *K.C. 1986 Ltd. P'ship*, 472 F.3d at 1017 (motions for reconsideration).

Motion practice before this Court under Federal Rule of Appellate Procedure 27 is not the procedurally proper way for an appellant to challenge the merits of a district-court order on appeal—including an order entering protective orders, orders allowing filings under seal or with redactions, or an order denying a motion for reconsideration. Indeed, Rule 27(c) explicitly states that "[a] circuit judge may act alone on any motion, but may not" in doing so "determine an appeal," Fed. R. App. P. 27(c), and this Court has been clear that appellants may only proceed with appeals on matters raised in their opening appellant brief, *Hacker v. Barnhart*, 459 F.3d 934, 937 n.2 (8th Cir. 2006). Motions may be used for procedural issues like extensions, or to seek dismissal when a party has not complied with the proper procedures for appeal. *See United States v. Carter*, 404 F. App'x 95, 97 n.4 (8th Cir. 2010). But they cannot be used to let a judge "determine an appeal." Fed. R. App. P. 27(c).

B. Here, Plaintiff's Motion is procedurally improper, as it attempts to challenge multiple district-court orders on their merits, which Plaintiff must instead present in her merits briefing before this Court. Specifically, Plaintiff's Motion attempts to challenge several district-court orders related to PRA's requests to protect its confidential

information from disclosure during the course of litigation: the order entering the stipulated PO, Doc.46, an order denying Plaintiff's challenge to PRA's confidentiality designations, Doc.68, orders granting motions to seal or redact documents, Docs.51, 110, 114, 115, 119, 183, 192, and an order denying a motion for reconsideration, Doc.90. Mot.3–5, 11–13, 23. Yet, the Federal Rules of Appellate Procedure require Plaintiff to present those challenges in her merits briefing, thus affording PRA the full and fair opportunity to respond in due course. *See* Fed. R. App. P. 28. Indeed, PRA does not dispute that Plaintiff has the right to challenge these decisions in this appeal, through merits briefing, given that Plaintiff stated in her Notice of Appeal that she was appealing the district court's final order as well as "all other orders in this case," Doc.249—which would include the district court's orders related to confidentiality, *see* Fed. R. App. P. 3(c)(1)(B). Further, Plaintiff does not need this Court to reverse these district-court orders to properly litigate her case here: under this Court's local rules, "[i]n all pro se appeals, the entire district court record is available for review," 8th Cir. R. 30A(a)(2), and Plaintiff is free to cite any of the parties' filings—sealed or unsealed, redacted or

unredacted—in her merits briefing for this Court's review, so long as she respects the currently sealed or redacted status of all filings.

II. If This Court Were To Consider Plaintiff's Motion On The Merits It Still Fails, As She Has Offered No Basis To Disturb The District Court's Proper Exercise Of Discretion To Maintain The Confidentiality Of The Various Sensitive Documents Sealed Below

Even if this Court concludes that Plaintiff's Motion is procedurally proper, *but see supra* Part I, her Motion fails on the merits. Plaintiff's Motion challenges the district court's order granting entry of a stipulated PO, Doc.46; order denying Plaintiffs' blanket challenge to PRA's confidentiality designations below, Doc.124 at 16–17; orders granting motions to seal or redact documents, Docs.51, 110, 114, 115, 119, 183, 192; and order denying a motion for reconsideration on an order granting a motion to seal, Doc.90. *See* Mot.3–5, 11–13, 23. The district court did not abuse its discretion in entering any of these orders, thus this Court must deny Plaintiff's Motion.

First, the district court did not abuse its discretion in entering a standard PO. Doc.46.

For decades, courts across the country have routinely allowed what are called "umbrella" or "blanket" protective orders that initially protect

all documents that the producing party designates in good faith as confidential. 10A Fed. Proc., L. Ed. § 26:294 (Aug. 2023); *see also* 8 Charles Alan Wright et al., *Federal Practice & Procedure* § 2035 (2d ed. 1994); *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990). Federal Rule of Civil Procedure 26(c) requires a showing of "good cause" for entry of a protective order, but the use of umbrella protective orders "replaces the need to litigate the claim to protection document by document, and postpones the necessary showing of 'good cause' required for entry of a protective order until the confidential designation is challenged." *Chicago Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1307 (11th Cir. 2001) (per curiam).

The standard PO stipulated to in this case fits squarely within the description above, allowing the parties to designate as confidential "sensitive and/or proprietary" information that "the producing party reasonably believes disclosure to the receiving party may cause competitive or other business injury to the producing party," Doc.46, ¶ 6, and creating a system for the receiving party to challenge those designations if needed Doc.46, ¶ 12. Plaintiff complains in her Motion

about PRA's "unilateral[ ]" ability to designate documents as confidential, preventing them from ever "becom[ing] a part of the public record." Mot.3. But that is how all umbrella POs operate, and Plaintiff maintained the ability to challenge PRA's designations, Doc.46, ¶ 12—which she did, *see* Docs. 54, 65, 68, 79, 163, 176. The standard PO entered by the district court did not eliminate the "good cause" requirement, but merely "postpone[d] the necessary showing of 'good cause' . . . until the confidential designation[s] [were] challenged." *Chicago Tribune*, 263 F.3d at 1307. Allowing PRA to designate its information as confidential did not prevent Plaintiff from reviewing and utilizing the information in her litigation of this case. Thus, the stipulated PO caused no conceivable prejudice to Plaintiff in the proceedings before the district court.[1]

Second, the district court did not abuse its discretion in its application of the stipulated PO, denying Plaintiff's blanket challenge to PRA's confidentiality designations. Doc.124 at 16–18.

[1] Plaintiff later sought to modify the terms of the stipulated PO. Doc.68. However, modification of a stipulated order requires a demonstration of intervening circumstances constituting good cause for modification. *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 954 (8th Cir. 1979). The Court rejected Plaintiff's request to modify the PO, Doc.112, properly finding there were no "changed circumstances," Doc.124 at 17.

Under Rule 26(c) the burden is on the party claiming confidentiality to show "good cause" for protection, but umbrella protective orders, like the one at issue in this case, place the onus on the party receiving materials marked as confidential to challenge such designations in a targeted manner. *Cipollone v. Liggett Grp., Inc.*, 785 F.2d 1108, 1122 (3d Cir. 1986); *In re Alexander Grant & Co. Litig.*, 820 F.2d 352, 356 (11th Cir. 1987). District courts will reject blanket objections to confidentiality designations that do not point to specific documents or pieces of information the litigant wishes to challenge. *See, e.g.*, *Procaps S.A. v. Patheon Inc.*, No. 12-24356-CIV, 2013 WL 4773433, at *7–8 (S.D. Fla. Sept. 4, 2013); *Medcorp, Inc. v. Pinpoint Techs., Inc.*, No. 08-cv-00867-MSK-KLM, 2009 WL 3588362, at *3–4 (D. Colo. Oct. 23, 2009).

In compliance with the district court's stipulated PO, PRA designated numerous documents as confidential—including call histories and account notes, representative training and FDCPA manuals, documents related to the purchase of Plaintiff's loan, phone details and address sources, and declarations describing the proprietary technology developed, leased, and used by PRA to comply with the TCPA. Doc.71 at 13. Plaintiff then challenged these designations through a motion before

the district court, Doc. 68, but she did not identify with any specificity which documents or pieces of information she wanted re-designated, as courts require, *In re Alexander Grant & Co. Litig.*, 820 F.2d at 356; *Procaps S.A.*, 2013 WL 4773433, at *7–8; *MedCorp, Inc.*, 2009 WL 3588362, at *3–4. Accordingly, the district court properly denied her motion due to its lack of specificity. Doc.124 at 16–17.

In any event, PRA's confidentiality designations were justified, which provides alternative grounds to support the district court's denial of Plaintiff's designation challenges.

Courts routinely find good cause to protect "confidential and competitively sensitive information," *see, e.g.*, *IDT Corp. v. eBay, Inc.*, 709 F.3d 1220, 1224 (8th Cir. 2013), as Rule 26(c) specifically provides that courts may order "that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way," Fed. R. Civ. P. 26(c)(1)(G). And when considering whether to allow parties to mark commercially sensitive information as confidential or seal or redact materials, courts consider a range of factors, including the time and effort taken to develop the information and the value of the information to competitors. *See, e.g.*,

Burke v. Ability Ins. Co., No. 12-4051-KES, 2013 WL 842512, at *5 (D.S.D. Mar. 6, 2013); *Hoefer Wysocki Architects, LLC v. Carnegie Mgmt. & Dev. Corp.*, No. 11-00678-CV-W-GAF, 2012 WL 13028901, at *3 (W.D. Mo. Jan. 25, 2012); *Pochat v. State Farm Mut. Auto. Ins. Co.*, No. Civ. 08-5015-KES, 2008 WL 5192427, at *9–10 (D.S.D. Dec. 11, 2008).

Here, the documents PRA designated as confidential were of the exact commercially sensitive nature that Rule 26(c) permits courts to protect. That is because the information that PRA sought to protect was of clear value to competitors, PRA had taken steps to maintain its confidentiality, and PRA had a reasonable belief that disclosure of the information would have caused serious harm to the company in the marketplace. Doc.71 at 12–21; *see also Burke*, 2013 WL 842512, at *5; *Hoefer Wysocki Architects*, 2012 WL 13028901, at *3; *Pochat*, 2008 WL 5192427, at *9–10.

Third, the district court did not abuse its discretion in granting motions to seal and redact propriety information. Docs.51, 110, 114, 115, 119, 183, 192.

In determining whether to grant a motion to seal, a court must consider "the degree to which sealing a judicial record would interfere

with the interests served by the common-law right of access and balance that interference against the salutary interests served by maintaining confidentiality of the information sought to be sealed." *IDT Corp.*, 709 F.3d at 1123. Just as courts may enter protective orders for protection of commercially sensitive information, they may grant motions to seal or redact such information. *Id.* Whether or not to seal a court file is a decision "best left to the sound discretion of the trial court." *United States v. Webbe*, 791 F.2d 103, 106 (8th Cir. 1986) (citation omitted).

Here, there was good cause for the district court to seal or redact documents containing PRA's confidential and commercially sensitive information. Each time PRA intended to file documents designated as confidential or pleadings referencing confidential information, it moved for the court's leave to file under seal or to redact confidential information. Docs.50, 62, 74, 77, 105, 158, 167. Plaintiff opposed some of these motions, Docs.54, 65, 79, 163, 176, reasserting the same general arguments that she put forth before the court on her motion challenging PRA's confidentiality designations. As explained in detail throughout the district court record, PRA's confidentiality designations were proper and made in good faith, and the district court was entirely justified in

granting motions to protect PRA's proprietary business records, strategies, policies and procedures, confidential business contracts, and other records. Docs.71, 98, 124; *see also IDT Corp.*, 709 F.3d at 1223; *Burke*, 2013 WL 842512, at *5; *Hoefer Wysocki Architects*, 2012 WL 13028901, at *3; *Pochat*, 2008 WL 5192427, at *9–10. Nothing that Plaintiff asserts in her Motion now demonstrates that the district court abused its discretion in entering these orders. *See* Mot.4–5, 8–9, 23.

Finally, the district court did not abuse its discretion in denying Plaintiff's motion for reconsideration of PRA's motion to seal a bill of sale, an affidavit related to that bill of sale, and an account summary for Plaintiff. Docs.90, 98 at 23:17–23.

"A district court has wide discretion over whether to grant a motion for reconsideration of a prior order," *SPV-LS, LLC v. Transamerica Life Ins. Co.*, 912 F.3d 1106, 1111 (8th Cir. 2019) (quoting *In re Charter Commc'ns, Inc., Sec. Litig.*, 443 F.3d 987 (8th Cir. 2006)), and this Court will "reverse a denial of a motion for reconsideration only for a clear abuse of discretion," *id.* (quoting *Paris Limousine of Okla., LLC v. Exec. Coach Builders, Inc.*, 867 F.3d 871, 873 (8th Cir. 2017)).

Here, the district court properly denied a motion for reconsideration of an order in which it granted PRA's motion to seal documents of the sensitive commercial nature that clearly fall within the scope of protection courts have recognized. As PRA explained before the district court, there was no public interest in disclosure of the relevant documents, and disclosure would dampen PRA's ability to negotiate favorable terms effectively going forward, revealing to PRA's competitors its business strategy with respect to purchasing pools of assets, as well as its proprietary system of record to track customer accounts. Doc.98 at 20–23. Thus, the documents fit squarely within the types of proprietary business information courts have agreed to protect and thus present good cause for protection. *See IDT Corp.*, 709 F.3d at 1223; *Burke*, 2013 WL 842512, at *5; *Hoefer Wysocki Architects*, 2012 WL 13028901, at *3; *Pochat*, 2008 WL 5192427, at *9–10. The district court cannot have possibly abused its "wide discretion" in denying a motion for reconsideration in these circumstances. *See SPV-LS*, 912 F.3d at 1111.

CONCLUSION

This Court should deny Plaintiff's Motion To Unseal District Court Documents.

Dated: October 16, 2023

Respectfully submitted,

/s/Misha Tseytlin

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CERTIFICATE OF COMPLIANCE

I hereby certify that this Opposition to Plaintiff's Motion complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word, in 14-point Century Schoolbook font. This Opposition also complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(a) because it contains 3,592 words.

Dated: October 16, 2023

/s/ Misha Tseytlin
MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on the 16th day of October, 2023, I electronically filed the foregoing Opposition with the Clerk of the Court for the U.S. Court of Appeals for the Eighth Circuit through the CM/ECF system, which will send electronic service to all registered participants in this case. Pursuant to Circuit Rule 25A(m), the Clerk of Court will serve a paper copy on Ms. Hammett.

Dated: October 16, 2023

/s/ Misha Tseytlin
MISHA TSEYTLIN