

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF ARKANSAS
WESTERN DIVISION

RUDY F. and BETTY WEBB, husband and wife, and
ARNEZ and CHARLETHA HARPER, husband and wife,
on behalf of themselves and all others similarly situated

PLAINTIFFS

VS.

NO. 4:13-CV-232-BSM

EXXON MOBIL CORPORATION, et al.

DEFENDANTS

**DEFENDANTS' RESPONSE TO PLAINTIFFS' MOTION TO FILE
UNDISPUTED STATEMENT OF FACTS NOT UNDER SEAL
AND FOR AN ORDER OF THIS COURT DIRECTING EXXON TO
SHOW CAUSE WHY ANY DOCUMENT PRODUCED TO DATE
IS ENTITLED TO CONFIDENTIALITY**

Defendants Exxon Mobil Corporation, ExxonMobil Pipeline Company, and Mobil Pipe Line Company, for their response to plaintiffs' motion to file undisputed statement of facts not under seal and for an order of this Court directing Exxon to show cause why any document is entitled to confidentiality (Doc. No. 98), state as follows:

1. The plaintiffs filed this motion alleging that the defendants declared "*every single page*, of the 872,000 pages produced, 'CONFIDENTIAL.'" (Mot. ¶ 6). This is untrue. The defendants have produced approximately 800,000 pages to the plaintiffs, which represent approximately 213,000 documents. Of the 213,000 documents produced, over 95,000 were not designated "Confidential."

2. Furthermore, in filing this motion, plaintiffs have violated this Court's local rules and the provisions of the Agreed Protective Order, the Order these plaintiffs agreed was appropriate and the Court subsequently entered.

3. Local Rule 7.2 requires that all discovery-related motions "shall contain a statement by the moving party that the parties have conferred in good faith on the specific issue or issues in dispute and that they are not able to resolve their disagreements without the intervention of the Court. If any such motion lacks such a statement, that motion may be dismissed summarily for failure to comply with this rule." L.R. 7.2(g).

4. The plaintiffs made no attempt to confer with the defendants prior to the filing of their motion and, as a result, have failed to meet the requirement of Local Rule 7.2(g). This deficiency alone merits denial.

5. Plaintiffs also disregarded the terms of the Agreed Protective Order. The Order protects certain information obtained during the discovery process from public disclosure. The Order also prescribes a process by which a party may challenge a "Confidential" designation. (Doc. No. 71, Agreed Protective Order ¶ 4.) A party challenging a confidentiality designation must "first attempt in good faith to confer with lawyers for the producing party in an effort to resolve the issue amicably." (*Id.*)

6. There has been no attempt by the plaintiffs to resolve their challenges to the confidentiality designations without Court involvement. In fact, plaintiffs fail to reference the requirements of the Agreed Protective Order at all.

7. The Agreed Protective Order further provides that a party should only file a motion to challenge a confidentiality designation if an agreement with the producing party cannot be reached. (*Id.*) If, after conferring with opposing counsel, the challenging party proceeds to file a motion with the Court, the motion must describe with specificity the particular materials that are not properly designated as “CONFIDENTIAL.” (*Id.*)

8. The plaintiffs’ motion fails to identify with any kind of specificity the materials that the plaintiffs claim are incorrectly designated as “Confidential.” Plaintiffs’ motion does not address any specific document and does not describe the basis for their objection to any document’s designation. Instead of following the procedure that they agreed to follow, the plaintiffs ask the Court to create a new procedure. A procedure that would allow them to file their “Undisputed Statement of Facts”¹ without regard to the requirements of the Agreed Protective Order, and a procedure that would require the defendants to make (and the Court to review) a document-by-document showing of good cause as to why any page in the production is labeled “Confidential.” Such an inefficient use of judicial resources is precisely what the Agreed Protective Order’s challenge procedures were designed to avoid.

9. Remarkably, not only did the plaintiffs agree to the terms of the Agreed Protective Order as between the parties at the time of its entry, they

¹ Plaintiffs filed a “statement of undisputed material facts” in opposition to the defendants’ motion for summary judgment. (Doc. No. 101.) The defendants have objected to plaintiffs’ proposed statement of undisputed of facts because Local Rule 56.1 does not permit or contemplate the filing such a document. (Doc. No. 107.)

recently agreed to extend its reach so that documents produced by third parties could take advantage of the protective provisions. (Doc. No. 95.)

10. In accordance with the provisions of the Agreed Protective Order, the plaintiffs must identify the documents for which they are challenging a confidentiality designation and the basis for the challenge, and then make a good faith effort to resolve any issues without involving the Court. Otherwise, plaintiffs' vague allegations—premised on a false assertion that all documents were designated Confidential—leave the defendants with no opportunity to meaningfully respond to plaintiffs' concerns.

11. The defendants respectfully request that plaintiffs' motion be denied for failure to follow the requirements of Local Rule 7.2(g) and the Agreed Protective Order.

WHEREFORE, Defendants Exxon Mobil Corporation, ExxonMobil Pipeline Company, and Mobil Pipe Line Company respectfully request that the plaintiffs' motion to file undisputed statement of facts not under seal and for an order of this Court directing Exxon to show cause why any document is entitled to confidentiality be denied and for all other proper relief.

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX: (501) 376-9442
elowther@wlj.com; slancaster@wlj.com;
mkaemmerling@wlj.com

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX: (501) 376-9442
mbarnes@wlj.com; jkim@wlj.com;
mthompson@wlj.com

By: /s/ Edwin L. Lowther, Jr.
Edwin L. Lowther, Jr. (81107)
Stephen R. Lancaster (93061)
Michelle M. Kaemmerling (2001227)

By: /s/ Michael D. Barnes
Michael D. Barnes (88071)
Jane A. Kim (2007160)
Michael A. Thompson (2010146)

Attorneys for Exxon Mobil Corporation

Attorneys for ExxonMobil Pipeline Co.

WRIGHT, LINDSEY & JENNINGS LLP
200 West Capitol Avenue, Suite 2300
Little Rock, Arkansas 72201-3699
(501) 371-0808
FAX: (501) 376-9442
sirby@wlj.com; gmarts@wlj.com

By: /s/ Gary D. Marts, Jr.
Scott A. Irby (99192)
Gary D. Marts, Jr. (2004116)

Attorneys for Mobil Pipe Line Company

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2014, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which shall send notification of such filing to the following:

- Phillip Duncan – Phillip@duncanfirm.com
- Richard Quintus – Richard@duncanfirm.com
- William Rob Pointer – rob@duncanfirm.com
- Justin C. Zachary – Justin@duncanfirm.com
- Timothy P. Reed – tim@duncanfirm.com
- Thomas P. Thrash – tomthrash@sbcglobal.net
- Marcus N. Bozeman – bozemanmarcus@sbcglobal.net
- John W. “Don” Barrett – dbarrett@barrettlawgroup.com

/s/ Michael D. Barnes
Michael D. Barnes