IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

TRAFFIC INFORMATION, LLC Plaintiffs, v. FARMERS GROUP, INC. Defendant.	Case No. 2:14-cv-00713-JRG-RSP (Lead Case)
TRAFFIC INFORMATION, LLC Plaintiffs, v. STATE FARM INTERNATIONAL SERVICES, LLC Defendant.	Case No. 2:14-cv-00718-JRG-RSP

OPPOSED MOTION OF THE ELECTRONIC FRONTIER FOUNDATION TO UNSEAL DOCUMENTS RELATING TO TRAFFIC INFORMATION, LLC'S CLAIMS

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Intervenor the Electronic Frontier Foundation ("EFF") moves for an order of this Court to unseal State Farm International Services, LLC's ("State Farm") Answer and Counterclaims and related exhibits, found at ECF No. 63[1] ("State Farm's Answer"). Former defendant State Farm[2] does not oppose this motion. Plaintiff Traffic Information, LLC ("Traffic") opposes.

This case concerns the scope and validity of U.S. Patent No. 6,785,606 ("the '606 patent"), which Traffic claims covers "traffic information systems" broadly. Traffic's claims are apparently so broad that it has sued over 100 entities for infringement of the '606 patent and related U.S. Patent. No. 6,466,862.

The public is entitled to understand the full scope of Traffic's claims as being advanced in this Court, especially given the breadth and diversity of parties and products accused of infringement by Traffic. For this reason, and others set forth in the attached memorandum, EFF respectfully requests that the Court order State Farm's Answer unsealed.

I. Introduction

Traffic's claims regarding the scope of its patent rights raise issues of importance to EFF and the public. What constitutes infringement of the '606 patent, whether Traffic can validly assert its patent against mobile application developers given apparent licensing of the patent, and how patent law is being interpreted could impact a multitude of American businesses and

[1] Unless otherwise noted, all docket entries refer to entries in Case No. 2:14-cv-00713-JRG-RSP.
[2] State Farm was dismissed from this action on Oct. 21, 2014. *See* Order granting Stipulation of Dismissal, ECF No. 85. However, it appears from the docket that State Farm's Opposed Motion to Seal, ECF No. 64, remains pending. *See id.* (not resolving any pending motions). Furthermore, the dismissal of State Farm, or any other defendant, does not moot the issue as to whether documents are being improperly kept from public scrutiny. *See Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778-79 (3d Cir. 1994) (noting the "growing consensus among the courts of appeals that intervention to challenge confidentiality orders may take place long after a case has been terminated."); *see also* Protective Order, ECF No. 74, at ¶ 24 (noting that the Protective Order remains in force after the termination of the action, and that the court retains jurisdiction to adjudicate disputes relating to the enforcement of the Protective Order).

consumers who engage in the act of using "traffic information systems" as claimed by Traffic. Improperly sealed court records limit public scrutiny of this case, and prevent the public from understanding the true scope of Traffic's claims.

Traffic's assertion of confidentiality to its infringement contentions is improper and disserves the public. The public's interest in fully understanding the U.S. patent system, and of the infringement and validity of the '606 patent, is not outweighed by a party's desire to avoid making its arguments publicly. Indeed, patents are intended, in part, to place the public ***on notice*** of what rights to exclude a patentee claims.[3] By designating its infringement contentions as confidential, Traffic wholly subverts that policy and denies other parties and the public the opportunity to evaluate Traffic's claims. Accordingly, the Court should order that Traffic's infringement contentions, which are allegedly based solely on public information, are not confidential, and order State Farm's Answer unsealed.

II. Factual Background

Traffic's assertion that it invented "traffic information systems" has generated a significant volume of filings and litigation in this district.[4] Also significant is a charge made by one defendant, State Farm, that Traffic's claims are frivolous. *See* State Farm's Opposed Motion to Seal, ECF No. 64, at 2 ("State Farm's Answer and Counterclaim alleges facts demonstrating the baseless nature of Plaintiff's suit"). State Farm is not the only defendant to have made such a claim. Another defendant, AT&T, made a similar claim. *See Traffic Information LLC v. AT&T Mobility LLC*, Case No. 2:09-cv-00083-MHS-CMC, AT&T's Opp. to Traffic's Motion to Place

[3] *See Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 US __, 134 S. Ct. 2120, 2129 (2014) ("a patent must be precise enough to afford clear notice of what is claimed, thereby apprising the public of what is still open to them.") (internal citation and quotation omitted).

[4] *See* Appendix A, listing cases EFF is aware of in this district involving the '606 patent and/or its related U.S. Patent 6,466,862.

Case Back on Calendar, ECF No. 163, at 1 (E.D. Tex. Jan. 3, 2012) ("AT&T faces no possible liability under Traffic's infringement theory, as Traffic reached settlement with the last of AT&T's relevant suppliers in November 2010, more than a year ago").

Patents and patent law, and specifically their misuse, are at the heart of ongoing public discussions organized at the highest levels of government about the proper function and judicial application of the U.S. patent system.[5] Use and alleged abuse of the patent system has become the subject of heated journalistic and academic inquiry.[6] The validity and infringement of the '606 patent and the possibility that a patentee might use the court system to assert frivolous claims are the types of issues of particular importance to the ongoing public review of a patentee's claims and of the functioning of the patent system more broadly.[7] Unfortunately, improper use of confidentiality designations in litigation prevents the type of investigation needed to fully understand the scope of the issues.

This is not the first time Traffic has improperly designated its infringement contentions as confidential. In a related matter, Traffic argued that even the *name* of the accused product, which was disclosed by its infringement contentions, was confidential information. *See Traffic Information, LLC v. Bank of America, LLC et al.*, Case No. 2:11-cv-00343-JRG-RSP, Traffic's Reply to Woodforest's Response to Traffic's Motion to Hold Woodforest in Civil Contempt,

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[5] *See, e.g.,* S.1013 Patent Abuse Reduction Act of 2013, https://beta.congress.gov/bill/113th-congress/senate-bill/1013; *An Overview of the "Patent Trolls" Debate*, Congressional Research Service (Apr. 16, 2013), http://www.fas.org/sgp/crs/misc/R42668.pdf.

[6] See, e.g., David L. Schwartz, *On Mass Patent Aggregators*, 114 Colum. L. Rev. Sidebar 51 (2014); Giordana Mahn, *Keeping Trolls Out of Courts and Out of Pocket: Expanding the Inequitable Conduct Doctrine*, Loy. U. Chi. L. J. (2014); New York Times, Editorial, *Clarifying, and Tightening, Patent Law* (June 4, 2014), http://www.nytimes.com/2014/06/05/opinion/clarifying-and-tightening-patent-law.html.

[7] *See, e.g.,* Andrew Williams, *Patent Reform Legislation off the Table – For Now,* Patent Docs Patent Law & News Blog (May 21, 2014), http://www.patentdocs.org/2014/05/patent-reform-legislation-off-the-table-for-now.html.

ECF. No. 165, at 2 (E.D. Tex. filed May 22, 2012). Traffic apparently claimed that disclosure of the name of the accused product would allow third parties to learn how not to infringe, and thus was "confidential." *Traffic Information, LLC v. Bank of America, LLC et al.*, Case No. 2:11-cv-00343-JRG-RSP, Woodforest's Response to Traffic's Motion to Hold Woodforest in Civil Contempt, ECF. No. 153, at 5 (E.D. Tex. filed May 14, 2012).[8] Other parties have also challenged Traffic's claims of confidentiality. *See Traffic Information, LLC v. BBVA Compass Bancshares, Inc.*, Case No. 2:11-cv-00412, Notice Challenging Confidential Designation of Traffic's Infringement Contentions, ECF No. 139 (E.D. Tex. filed May 18, 2012); *Traffic Information, LLC v. Bank of America, LLC et al.*, Case No. 2:11-cv-00343-JRG-RSP, Woodforest's Notice Challenging Plaintiff's Confidentiality Designation, ECF No. 132 (E.D. Tex. filed Apr. 27, 2012). However, it appears from review of the dockets that because of settlements or matters being stayed, Traffic's claims of confidentiality have never been adjudicated.

Here, Traffic apparently claims that its infringement contentions, although alleged[9] to be based solely on publicly available information, constitute valuable "work product" and thus is protected from public disclosure. *See* ECF No. 64 at 2. State Farm challenged this claim, and its motion remains pending. *Id.*

[8] EFF is unable to cite to Traffic's own statement as to the reasons the material was properly marked as confidential, as Traffic filed the motion for contempt under seal. *Traffic Information, LLC v. Bank of America, LLC et al.*, Case No. 2:11-cv-00343-JRG-RSP, Traffic's Motion to Hold Woodforest in Civil Contempt, ECF. No. 141 (E.D. Tex. filed May 7, 2012) (filed under seal).

[9] EFF cannot assess the validity of this claim, given State Farm's Answer is filed under seal. In the meet and confer between EFF and Traffic, Traffic did not dispute State Farm's allegation that Traffic's infringement contentions were based solely on publicly available information.

III. Argument

A. Common law and the First Amendment require court records to be as open as possible

Both common law and the First Amendment establish a presumption of public access to court records. *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) ("There is a strong presumption in favor of a common law right of public access to court proceedings.") (citing *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978); *see also Davis v. East Baton Rouge Parrish Sch. Bd.*, 78 F.3d 920, 928-29 (5th Cir. 1996); *Doe v. Stegall,* 653 F.2d 180, 185 (5th Cir. 1981) ("First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings."). "[H]istorically both civil and criminal trials have been presumptively open." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, n17 (1980). *See also, Craig v. Harney*, 331 U.S. 367, 374 (1947) ("A trial is a public event. What transpires in the court room is public property."); *Wilson v. Am. Motors Corp.*, 759 F.2d 1568, 1569, 1571 (11th Cir. 1985) (right of access attaches to "pleadings, docket entries, orders, affidavits or depositions duly filed, and transcripts or reporter's notes of hearings or trial proceedings").

The burden of showing a right to seal information from the public rests on the proponent of the sealing. *See* Fed. R. Civ. P. 26(c)(1). "A party asserting good cause bears the burden, for each particular document it seeks to protect, of showing that specific prejudice or harm will result if no protective order is granted." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1131 (9th Cir. 2003). "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. International Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992); *see also Romero v. Drummond Co., Inc.*, 480 F.3d 1234, 1248 (11th Cir. 2007) ("conclusory and speculative" justifications for sealing are not

sufficient to show good cause).

EFF is a public interest organization, actively involved in the patent reform debate. *See* Declaration of Vera Ranieri at ¶¶ 6-16. EFF relies on publicly available documents, including court filings, to inform the public about the debate and to report on abusive patent litigation tactics. *Id.* at ¶¶ 9-10, 16. As such, EFF's First Amendment rights to gather the news and report on the use of our judicial system to enforce patent rights are implicated by the Traffic's closure of the public docket to inspection. *See Davis*, 78 F.3d at 923, 927-928 (noting the news organizations' previous investigations into related issues, and noting that sealing orders implicated the organizations' First Amendment rights to receive speech).

B. The public would benefit from greater understanding of Traffic's claims and State Farm's defenses.

In determining whether Traffic is entitled to designate its contentions as confidential, this court should consider "the interests of litigants in other suits, the needs of regulatory agencies, concerns of public interest groups, and the interests of future [defendants]." Hon, Jack B. Weinstein, "Secrecy in Civil Trials: Some Tentative Views," *Journal of Law and Policy (Symposium II: Secrecy and the Civil Justice System)* (2000), at 4. Because of Traffic's assertion of infringement against numerous disparate entities' systems and apparatuses, defendants in this case are not the only parties who are interested in whether Traffic's claims will succeed. As Traffic expressly acknowledged, knowing how Traffic reads its claims will allow others to design-around Traffic's claims or otherwise avoid infringement. *See Traffic Information, LLC v. Bank of America, LLC et al.*, Case No. 2:11-cv-00343-JRG-RSP, Traffic's Reply to Woodforest's Response to Traffic's Motion to Hold Woodforest in Civil Contempt, ECF. No. 165, at 2-3 (E.D. Tex. filed May 22, 2012) (arguing that the "removal of confidential designation would inflict harm on Traffic . . . by making it easier for infringers to avoid taking a license" and

"existing and potential infringers desire to design around the patent claims"). This does not lead to the conclusion that the information may properly be designated confidential, as Traffic argues. Instead, it counsels ***for*** unsealing, as it would permit "the public [to] better ascertain what [Plaintiff] believes is the scope of its patent," and "allow[ ] the public to avoid infringing activity and/or acquire a license." *Constellation LLC v. Avis Budget Group, Inc.*, No. 5:07-cv-38, 2007 WL 7658921, at *3 (E.D. Tex. Oct. 30, 2007) (Craven, J.) (denying protection for infringement contentions).

Furthermore, cases such as this one form part of a public debate about the state of the U.S. patent system.[10] Indeed, the current public debate has resulted in Congress introducing fourteen bills during the last session.[11] The White House recently issued five executive orders "designed to protect innovators from frivolous litigation and ensure the highest-quality patents in our system."[12] Patent reform is widely expected to be introduced in the next Congress.[13] Public understanding of the parties' arguments, and the resulting judicial application of patent law with respect to the '606 patent, is of public interest due to its role in the larger patent debate, especially given that Traffic has sued over 100 entities. By forcing the sealing of its infringement contentions, Traffic removes important documents from the scope of public understanding.

[10] Randall Rader, Colleen Chien, and David Hricik, *Make Patent Trolls Pay in Court*, The New York Times, June 4, 2013 at A25; Edward Watt, *Obama Orders Regulators to Root Out 'Patent Trolls,'* The New York Times, June 4, 2013.
[11] Patent Progress, Guide to Patent Reform Legislation (2013), http://www.patentprogress.org/patent-progresss-guide-patent-reform-legislation/.
[12] The White House Secretary Office of the Press Secretary, *Fact Sheet: White House Task Force on High Tech Patent Issues* (June 4, 2013), http://www.whitehouse.gov/the-press-office/2013/06/04/fact-sheet-white-house-task-force-high-tech-patent-issues.
[13] *See, e.g.*, Dennis Crouch, *Patent Reform 2015: Republican Agenda*, PatentlyO.com, Nov. 5, 2014 *available at* http://patentlyo.com/patent/2014/11/patent-reform-republican.html.

C. The balance of interests favors public disclosure of court documents as Traffic cannot claim any legitimate confidentiality in State Farm's Answer.

"Unsealing Orders present an important issue because they address the important balance between the public's interest in understanding judicial proceedings and the parties' right to access the courts without being unduly required to disclose confidential information." *Apple, Inc. v. Samsung Electronics Co., Ltd*., 727 F.3d 1214, 1220 (Fed. Cir. 2013). Only where a "strong governmental interest or a competing individual right outweighs the First Amendment rights asserted" will a confidentiality order be maintained. *Davis*, 78 F.3d at 928.

Traffic cannot show this competing right. The information claimed to be "confidential" apparently consists solely of Traffic's theory of infringement compiled from publicly available information, and subsequently disclosed to this Court and opposing counsel. *See* ECF 64 at 2. Thus Traffic's infringement contentions are nothing more than a legal argument as to how it contends State Farm infringes. *See Fractus SA v. Samsung Electronics Co., Ltd.*, Case No. 6:09-xc-00203-LED-JDL, Order Denying Motion for Protective Order, ECF No. 410, at 2 (E.D. Tex. June 7, 2010) ("*Fractus*") ("Plaintiff's analysis of the accused products is merely a legal infringement position and not confidential."). Indeed, it cannot be that such information is subject to confidentiality, given that "marking legal arguments as confidential is subject to sanction because no good faith reading of [the Court's rule] could support a party's marking of its legal arguments as confidential." *Gilead Sciences, Inc. v. Sigmapharm Labs.*, Case No. 14-1456, Order to Show Cause, ECF No. 47 (Fed. Cir. Nov. 19, 2014) ("*Sigmapharm*"). Traffic's claim to confidentiality is not supported: "[a]s Rumpelstiltskin spun straw into gold, so have [the patentees] attempted to spin these publicly available documents into confidential information." *Acer Am. Corp. v. Tech. Properties*, No. C08-00877 JFHRL, 2009 WL 1363551 (N.D. Cal. May 14, 2009); *see also Constellation LLC.*, 2007 WL 7658921 (denying protection for infringement

contentions).

Traffic has previously claimed that its contentions are "work product" and thus subject to protection from disclosure. *See* ECF 64 at 2. Traffic must acknowledge that the contentions are no longer protected by any work-product privilege because they have been disclosed to State Farm's attorneys. The fact that information might have been work product *prior* to disclosure does not mean it remains "confidential" once disclosed to the opposing party. *See Constellation,* 2007 WL 7658921, at *2 ("Constellation has not established that the infringement contentions contain trade secrets or other information entitled to the 'Confidential' designation…. Once disclosed to the opposing party, such 'legal strategy' is not inherently worthy of the 'Confidential' designation."); *see In re Chrysler Motors Corp. Overnight Evaluation Program Litig.*, 860 F.2d 844, 846 (8th Cir. 1988) (party "waived any work product protection by voluntarily disclosing the [material] to its adversaries").

To the extent Traffic claims a right of confidentiality based on an alleged harm to its commercial interests, the argument is also unavailing, and cannot meet the "good cause" requirement of Rule 26 that is necessary to keep information from public view. *See* Fed. R. Civ. P. 26(c)(1) (protective orders issue only upon a showing of "good cause"); *see also Sigmapharm*, Order to Show Cause, at 1 (noting that "Federal Rule of Civil Procedure 26(c)(1) requires that protective orders restricting the disclosure of information may only be issued for 'good cause'" and ordering Sigmapharm to show cause as to why it redacted material from the public docket). Traffic appears to be an entity whose sole business is asserting patents. If true, Traffic cannot demonstrate any competitive harm relating to the disclosure of how it understands its right to exclude, as that information should already be discernable from the patent itself. *See Nautilus*, 134 S. Ct. at 2129 ("a patent must be precise enough to afford clear notice of what is claimed,

thereby apprising the public of what is still open to them.").[14] Furthermore, courts that have considered whether such information meets the "good cause" standard have rejected the argument. *See Constellation,* 2007 WL 7658921, at *2.

Based on conversations with Traffic before the filing of this motion, it appears that Traffic is relying on *ExitExchange Corp. v. Casale Media, Inc.*, No. 2:10-cv-297, 2012 WL 996960 (E.D. Tex. Mar. 23, 2012), as a basis to claim confidentiality in its infringement contentions. However, that case does not address whether a legal position, such as that disclosed in infringement contentions based solely on publicly available information, is entitled to confidentiality. *Id.* Indeed, any such ruling would be contrary to the strong weight of authority suggesting otherwise. Nor can the protective order entered in this case relieve Traffic from showing 'good cause' for sealing the documents. *See* Protective Order, ECF No. 74, at ¶¶ 1, 16 (noting that a party "may designate" information as confidential, and must file a motion for a protective order if the designation has been challenged); *see also In re Violation of Rule 28(d)*, 635 F.3d at 1358 (citing cases noting that the parties' agreement to a confidentiality designation does not abrogate requirement of showing 'good cause'). Indeed, the Protective Order entered in this case made no determination that any showing of good cause was made as to any confidentiality designation, and explicitly noting that the parties "are presently without sufficient information to accept the representation(s) made by any party" as to the legitimacy of any such designation. Protective Order, ECF No. 74, at ¶¶ 1-3.

Finally, to the extent any information can be legitimately considered confidential—a proposition that appears highly unlikely—there can be no legitimate interest in keeping entire

[14] Indeed, any such argument would seem to be an admission that its patent does not meet the requirements of 35 U.S.C. § 112(b).

court records secret. Any legitimately confidential or proprietary information can be properly protected from disclosure by release of carefully redacted court records. Traffic cannot show that withholding entire documents is necessary to protect it from competitive harm through public disclosure. Overbroad withholding of entire documents from public scrutiny adds no additional protection for the parties' legitimate privacy concerns, and acts only to limit the common law and First Amendment rights of access. Non-confidential facts and arguments concerning Traffic's claims, and the judicial interpretation of them, will serve "'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.'" *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (quoting *Littlejohn v. Bic Corp.*, 851 F.2d 673, 682 (3rd Cir. 1988)).

IV. Conclusion

For the foregoing reasons, the Court should find that common law right to access court records, the First Amendment, the public interest in this case, and the functioning of our judicial and patent systems more generally, far outweigh Traffic's weak interest in barring State Farm's Answer from disclosure. EFF requests that the Court unseal State Farm's Answer and place it on the public docket.

Dated: December 8, 2014

ELECTRONIC FRONTIER FOUNDATION

/s/ Vera Ranieri

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CERTIFICATE OF GOOD FAITH CONFERENCE

I hereby certify that counsel for the movant, Vera Ranieri, conferred with counsel for Plaintiff and State Farm, in a good faith effort to resolve the issues. Counsel for State Farm informed the undersigned that it does not oppose the relief sought herein. The undersigned conferred with counsel for Plaintiff in a meet and confer held on November 20, 2014 via telephone, and discussions continued via email after that date. On December 4, 2014, Traffic informed the undersigned that Plaintiff opposes the unsealing of State Farm's Answer. Plaintiff and EFF disagreed as to the confidentiality of Plaintiff's Infringement Contentions, and left the parties at an impasse. Thus an open issue remains for the court to resolve.

/s/ Vera Ranieri
Vera Ranieri

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 8, 2014, I caused a true copy of the foregoing to be filed using the Court's Electronic Case Filing system, which served a copy on all counsel of record via e-mail.

/s/ Vera Ranieri
Vera Ranieri