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

MY HEALTH, INC. Plaintiff, v. ALR TECHNOLOGIES, INC. Defendant.	Civil Action No. 2:16-cv-00535-RWS-RSP (LEAD CASE)

OPPOSED MOTION OF THE ELECTRONIC FRONTIER FOUNDATION TO INTERVENE FOR THE LIMITED PURPOSE OF UNSEALING COURT RECORDS

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Proposed intervenor the Electronic Frontier Foundation ("EFF") respectfully moves to intervene in this case for the limited purpose of: (1) securing an order unsealing documents (the "Sealed Filings," defined below) as described in the attached Proposed Complaint in Intervention; and (2) securing an order sealing or redacting any documents only to the extent necessary through the use of public-redacted filings, and only if the Court determines that there is good cause to seal that portion of the Sealed Filings. A Proposed Complaint in Intervention is attached as Exhibit 1. Former Defendant DeVilbiss Healthcare, LLC does not oppose this motion. Defendants ALR Technologies, Inc., InTouch Technologies, Inc., McKesson Technologies, Inc., and MyNetDiary, Inc. (collectively, the "Remaining Defendants") does not oppose EFF's intervention for the limited purpose of moving to unseal, and are generally not opposed to filing public-redacted versions of documents that are currently sealed. In response to repeated requests to meet and confer, Joseph Pia, counsel for Plaintiff My Health, Inc. ("My Health"), stated that he would only talk to a Texas-licensed attorney (although he was informed that counsel for EFF are admitted to practice before this court). Since My Health refused to meet and confer, EFF assumes it opposes this motion in its entirety.

I. INTRODUCTION

EFF should not have to file this motion. Court records are presumptively open. EFF, or any other member of the public interested in this case, should be able to freely inspect court records and learn about parties' use of the judicial system, limited only by a party's ability to show good cause to prevent the public from accessing records.

Yet records in this matter are completely sealed from the public, including whole motions, without any public-redacted versions being made available, and without any showing of good cause. Not only are the parties' exhibits regarding whether this is an exceptional case

completely sealed, so are entire briefs. This is despite the fact that they presumably contain such non-sealable information as legal authority, public facts, or even the public case caption. Even if there were some material that could be sealed properly, there can be no justification for sealing the parties' legal arguments. The fact that so much material was withheld without the parties demonstrating any need for secrecy confirms that the current sealing of documents in this case cannot stand.

This Court is about to hear public arguments regarding whether this case is exceptional.[1] Whether My Health litigated in an exceptional manner is not only of interest to those who have received licensing demands or litigation suits from My Health, it is also of interest to the public at large.

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.[2] Use and alleged abuse of the patent system has become the subject of heated journalistic and academic inquiry.[3] Whether and how patents can be

[1] As of the date of this filing, no party has asked the Court to seal the hearing currently set for August 15, 2017. *See* Standing Order Regarding Protection of Proprietary and/or Confidential Information to be Presented to the Court During Motion and Trial Practice, Judges Rodney Gilstrap and Robert W. Schroeder, June 1, 2016 (requiring an advance request to seal the courtroom, and requiring good cause). When Counsel for EFF asked the Remaining Defendants whether the parties intended to file such a request, Remaining Defendants indicated they did not intend to do so. My Health refused to meet and confer with EFF, and thus its position is unknown. *See* Certificate of Conference, *infra*.

[2] *See, e.g.*, Brian T. Yeh, *An Overview of the "Patent Trolls" Debate*, Congressional Research Service (Apr. 16, 2013), http://www.fas.org/sgp/crs/misc/R42668.pdf.

[3] *See, e.g.*, Colleen V. Chien & Michael Risch, *A patent reform we can all agree on*, Wash. Post (Nov. 20, 2015), https://www.washingtonpost.com/news/in-theory/wp/2015/11/20/why-do-patent-lawyers-like-to-file-in-texas/; The Editorial Board, *Curbing Abusive Patent Lawsuits*, N.Y. Times (May 6, 2015), http://www.nytimes.com/2015/05/06/opinion/curbing-abusive-patent-lawsuits.html.

wielded in an exceptional manner is of particular importance to the ongoing public review of a patentee's claims and of the functioning of the patent system more broadly.[4] Unfortunately, improper use of confidentiality designations in litigation prevents the type of investigation needed to fully understand the scope of the issues. *See generally* Bernard H. Chao & Derigan Silver, *A Case Study in Patent Litigation Transparency*, 2014 J. Disp. Resol. 83 (2014), available at http://scholarship.law.missouri.edu/jdr/vol2014/iss1/6/.

II. FACTUAL BACKGROUND

This case concerns the validity of U.S. Patent No. 6,612,985 (the "'985 Patent") and whether My Health litigated its claims of patent infringement against multiple, unrelated defendants in an exceptional manner. According to third-party litigation analytics tool Lex Machina, the '985 Patent has been involved in over 40 district court cases, and five Patent Trial and Appeal Board proceedings.

Starting in May 2016, My Health filed lawsuits against the Remaining Defendants alleging infringement of the '985 Patent. *See, e.g.*, Compl., ECF No. 1 (May 19, 2016) (alleging that defendant ALR Technologies, Inc. infringed the '985 Patent).[5] On February 21, 2017, Magistrate Judge Payne issued a Report, recommending that the Court grant the Remaining Defendants' various motions to dismiss, finding that the '985 Patent is invalid for failing to meet the requirements of 35 U.S.C. § 101. *See* Report and Recommendation, ECF No. 69 (Feb. 21, 2017). The Court's order adopting the Report and Recommendation is now final and non-appealable. *See* Order Adopting Report and Recommendation, ECF No. 78 (Mar. 27, 2017) &

[4] *See, e.g.*, Scott Sandell, *A venture capitalist's second thoughts on patent reform*, Wall St. J. (May 31, 2015), http://www.wsj.com/articles/a-venture-capitalists-second-thoughts-on-patent-reform-1433109152.

[5] Unless otherwise noted, all docket citations are to Case No. 2:16-cv-00535-RWS-RSP.

Order from the Court of Appeals for the Federal Circuit Dismissing Appeal, ECF No. 105 (July 3, 2017).

Meanwhile, on January 25, 2017, this Court entered a protective order purportedly allowing the parties to file documents and information under seal. *See* Protective Order, ECF No. 64. The Protective Order does not contain a finding that there is good cause to seal documents on the public docket, nor does it discuss the confidentiality of any particular information. *Id.*

On April 10, 2017, the Remaining Defendants filed a Motion to Declare the Cases Exceptional and for Attorneys' Fees (the "Fees Motion"), presumably pursuant to 35 U.S.C. § 285.[6] Fees Motion, ECF No. 81 (Apr. 10, 2017). The Fees Motion, as well as all of its exhibits, and all other associated filings, were filed completely under seal. *See generally* ECF Nos. 81, 90, 91, 97, 99 and associated exhibits ("the Sealed Filings").

III. ARGUMENT

A. EFF Has Standing to Intervene to Vindicate the Public's Right of Access Under the First Amendment and Common Law

EFF's right to intervene in this case, like the public's right to access the Sealed Filings, comes from the common law and the First Amendment. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–98 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ."). That right is afforded protection because "[p]ublic access is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Richmond Newspapers*, 448 U.S. at 595–96; *see also*

[6] The basis for the Remaining Defendants' Motion can only be surmised given that the entirety of the briefing is under seal.

In re Express-News Corp., 695 F.2d 807, 808–09 (5th Cir. 1982) ("'The operation of the . . . judicial system itself . . . is a matter of public interest, necessarily engaging the attention of the news media. . . . The public has no less a right under the First Amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas or information.").

It is well-established that nonparties have standing to intervene to gain public access to sealed court documents. *See Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926–27 (5th Cir. 1996) (nonparty news agencies had standing to challenge court's confidentiality order); *Ford v. City of Huntsville*, 242 F.3d 235, 240 (5th Cir. 2001) (confidentiality order preventing nonparty from accessing settlement agreement gave standing to nonparty to intervene); *see also United States v. Aldawsari*, 683 F.3d 660, 664 (5th Cir. 2012) (nonparty had standing to intervene to challenge gag order); *United States v. Holy Land Found. For Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) (nonparty had standing to intervene to unseal court records); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("any member of the public has standing to view documents in the court filed that have not been sealed in strict accordance with [governing law], and to move the court to unseal the court file in the event the record has been improperly sealed").[7] If nonparties could not intervene to challenge such orders, the First

[7] EFF is aware that in the Fifth Circuit case of *Deus v. Allstate Insurance Co.*, 15 F.3d 506 (5th Cir. 1994), the court held that a third party does not have standing to intervene to unseal records, "absent some underlying right creating standing for the movants." *Id.* at 525. That case is distinguishable, however, as EFF has asserted that right: a First Amendment right. Later Fifth Circuit decisions specifically recognize this as conferring standing. *See Davis*, 78 F.3d at 926–27; *see also Nixon*, 435 U.S. at 597 ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents.") (internal footnotes omitted); *Richmond Newspapers*, 448 U.S. at 570–72. Furthermore, since *Deus*, the Supreme Court decided *Federal Election Commission v. Akins*, 524 U.S. 11 (1998). There, the Supreme Court held that the inability to obtain information, which

Amendment's protections would become meaningless. *See CBS Inc. v. Young*, 522 F.2d 234, 237-38 (6th Cir. 1975) ("We are not persuaded by the argument that petitioner lacks standing because it is not a party to the civil litigation. The fact remains that its ability to gather the news concerning the trial is directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it.").

B. EFF Satisfies Rule 24's Requirements for Permissive Intervention

Although not absolutely required, *see, e.g.*, *United States v. Chagra*, 701 F.2d 354, 360 (5th Cir. 1983), Rule 24(b) intervention is an appropriate mechanism to request public access to sealed court documents. *See In re Beef Indus. Antitrust Litig.*, 589 F.2d 786, 788–89 (5th Cir. 1979) ("[T]he procedurally correct course for the [parties seeking modification of a protective order] would have been first to obtain status in the suits as intervenors"); 7C Charles Alan Wright & Arthur R. Miller, Federal Prac. and Proc. Civ. § 1911 (3d ed. 2007) ("courts generally have interpreted their discretion . . . . broadly and have held that it can be invoked by nonparties who seek to intervene for the sole purpose of challenging confidentiality orders.").

Specifically, Federal Rule of Civil Procedure 24(b)(1)(B) provides that intervention may be permitted where the movant timely seeks intervention and "has a claim or defense that shares with the main action a common question of law or fact." Thus, permissive intervention is appropriate when the intervention request is timely, the intervenor's 'claim or defense and the main action have a question of law or fact in common,' and granting intervention will not unduly

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was withheld despite an alleged right to receive it, was sufficient to show injury-in-fact in order to satisfy Constitutional standing requirements. *Id.* at 21. Finally, to the extent *Deus* purports to restrict a challenge to limiting access to information filed with the courts, it is inconsistent with Supreme Court precedent that states that "representatives of the press and general public 'must be given an opportunity to be heard on the question of their exclusion.'" *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 609 n.25 (1982) (quoting *Gannett Co. v. DePasquale*, 443 U.S. 368, 401 (1979) (Powell, J., concurring)).

delay or prejudice the original parties in the case.

EFF has twice been recognized in this district as an appropriate intervenor in seeking to unseal court records. *See* Order Granting Mot. to Intervene, *Blue Spike, LLC v. Audible Magic Corp.*, Case No. 6:15-cv-00584, ECF No. 95 (Apr. 18, 2016); Order Granting Mot. to Intervene, *Traffic Information, LLC v. Farmers Group, Inc.*, Case No. 2:14-cv-00713, ECF No. 138 (Apr. 7, 2016). As in those cases and as detailed below, all of the factors necessary for permissive intervention are met here.

1. EFF's motion is timely. The public has an interest in better understanding the scope of My Health's claims of patent rights as well as whether My Health litigated it claims in a reasonable manner. Indeed, EFF previously published analysis and commentary regarding My Health's claims of infringement of both patent and trademark claims, as well as at least one defendant's claim that My Health's allegations were baseless. *See* Vera Ranieri, *Stupid Patent AND Trademark of the Month: My Health®*, Electronic Frontier Foundation, May 31, 2016 (available at https://www.eff.org/deeplinks/2016/05/stupid-patent-and-trademark-month-my-healthr).

The Remaining Defendants' Fee Motion is currently pending, with a hearing scheduled for August 15. *See* Order Setting Hearing on Motion, ECF No. 104 (June 6, 2017). Thus the public remains interested in the papers that form the basis of this hearing, and in any subsequent order that issues as a result. *See Ford*, 242 F.3d at 240 (noting a delay of one month did not mean a motion to intervene was untimely, and that "because appellant seeks only to litigate the issue of the confidentiality order and not to reopen the merits of the dispute between the original parties, even a greater delay in the intervention would not have prejudiced the parties.").

EFF is also an appropriate intervenor. EFF is a public interest organization that advocates

for, among other things, reform of the patent system. *See generally* Electronic Frontier Foundation, Patents, https://www.eff.org/patent; Order Granting Mot. to Unseal, *Blue Spike, LLC v. Audible Magic Corp.*, Case No. 6:15-cv-00584, ECF No. 106 (May 17, 2016) (finding that "EFF is a public interest organization, actively involved in the patent reform debate."). As part of its public advocacy regarding patent policy, EFF publishes a widely-read blog which often relies on public court filings in order to disseminate information regarding the patent system to the public. *See* Ranieri Decl., Exhibit 2, at ¶¶ 6–13 (detailing EFF's participation in the patent reform debate). EFF also files amicus briefs, submits public comments to the Patent and Trademark Office, and organizes public events. *Id.* at ¶¶ 14–17. EFF's participation in the otherwise insular world of patent litigation has been positively recognized by a judge on the Court of Appeals for the Federal Circuit. *See* Hon. Timothy B. Dyk, Ten Prescriptions for Patent Law at 352 (arguing that "Patent reform should include efforts to broaden the base of participation and public involvement in the patent system as a whole. . . . An insular community, out of the public spotlight, is one that will have potential problems" and noting EFF's participation).[8]

Thus, as part of its position shining a light on potentially abusive patent litigation tactics, EFF believes that the public should receive as much information as possible from all sources, including the courts, regarding My Health's (or indeed any patent owner's) claims and their legitimacy. The public has a right to access and review court records, especially where such records may reveal that My Health is burdening the court system with frivolous lawsuits merely to pressure defendants into settling. These interests satisfy Rule 24(b)(2)'s "claim or defense"

[8] Available at https://journals.law.stanford.edu/sites/default/files/stanford-technology-law-review/online/tenprescriptions_0.pdf.

requirement, which is construed liberally. These interests also show how EFF and the public's interests in open court proceedings are not adequately represented by the parties to this suit. The parties, who already have access to materials, are not incentivized to file public-redacted versions of documents for public inspection.

And although the Remaining Defendants do not as a general matter oppose broader disclosure of court records, My Health apparently remains opposed to filing any documents that would reveal the substance of the legal and factual arguments raised by the parties in this case.

2. EFF has a claim or defense that shares common questions with the main action. *See* Exhibit 1 (proposed Complaint in Intervention, as required by Federal Rule of Civil Procedure 24(c)). As previously discussed, "[n]onparties to a case routinely access documents and records under a protective order or under seal in a civil case through motions for permissive intervention under Rule 24(b)(2)." *Newby v. Enron Corp*., 443 F.3d 416, 424 (5th Cir. 2006) (citing cases).

3. EFF's motion also does not unduly delay or prejudice the adjudication of the rights of any party. EFF's motion is limited to specific docket entries and their associated exhibits, and only seeks access to judicial records that were improperly withheld from the public. *See* Proposed Motion to Unseal, filed concurrently herewith, (explaining the requirements for sealing court records from the public and how the parties have not met them). There is no prejudice to the parties if EFF's intervention is allowed, as EFF's motion is timely, does not ask this Court to revisit substantive issues already decided, and does not delay any decision on issues yet to be decided. *See Ford*, 242 F.3d at 240.

C. The First Amendment Requires Giving the Public, Including EFF, Access to Court Records Unless the Parties Can Show Compelling Reasons to Block Such Access

As discussed in more detail in EFF's Proposed Motion to Unseal, the public has both First Amendment and common law rights to access court filings. *See* EFF's Proposed Mot. to

Unseal, filed concurrently herewith, at 3-6.

The public's right cannot be overridden by the parties' agreement (such as in the Protective Order in force here, *see* ECF No. 64), or by using the fact that there may be *some* confidential information to prevent access to *all* information. *See* Proposed Mot. to Unseal, at 5.

EFF should be granted leave to intervene in order to protect rights belonging to both EFF and the public at large.

IV. CONCLUSION

For the foregoing reasons, the Court should allow EFF to intervene and file its Proposed Motion to Unseal.

Dated: August 2, 2017

ELECTRONIC FRONTIER FOUNDATION

By: */s/ Vera Ranieri*
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CERTIFICATE OF SERVICE

I, Vera Ranieri, hereby certify that on August 2, 2017 the within document was filed with the Clerk of the Court using CM/ECF which will send notification of such filing to the attorneys of record in this case.

/s/ Vera Ranieri
Vera Ranieri

CERTIFICATE OF GOOD FAITH CONFERENCE

I hereby certify that counsel for the movant, EFF, attempted in good faith to meet and confer with all parties to this action. In response to an email request, former defendant DeVilbiss Healthcare, LLC stated that it did not oppose the relief requested by EFF.

EFF successfully met and conferred with counsel for the Remaining Defendants on July 28, 2017 and again on August 2, 2017. Counsel for Remaining Defendants informed EFF that they do not oppose EFF's intervention for the limited purpose of moving to unseal, and that they are open to publicly filing redacted versions of their fees motion.

However, EFF's attempts to meet and confer with Plaintiff My Health were unsuccessful. On July 19, 2017, EFF informed My Health of EFF's request for public access to sealed court documents in the above-captioned matter via email, and requested My Health's position regarding unsealing and requested a telephonic meet and confer if EFF and My Health could not reach agreement. My Health did not respond to this email.

On July 25, 2017, EFF again requested My Health's position regarding unsealing documents and again requested a telephonic meet and confer, noting the requirement in the Local Rules. My Health did not respond to this email.

On July 26, 2017, EFF again requested My Health's position and EFF's request for a meet and confer. My Health responded only with "Which of your attorneys is licensed in Texas?" EFF responded that it was unclear as to the relevance, but clarified that both Vera Ranieri and Daniel Nazer were admitted to the U.S. District Court for the Eastern District of

Texas.

In response, counsel for My Health stated only, "I will speak with a Texas licensed attorney." My Health thus refused to meet and confer with EFF. As such, there remains an open issue for the court to resolve.

/s/ Vera Ranieri
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