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)

[PROPOSED] OPPOSED MOTION OF THE ELECTRONIC FRONTIER FOUNDATION TO UNSEAL DOCUMENTS

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Intervenor the Electronic Frontier Foundation ("EFF") moves for an order of this Court to unseal Defendants ALR Technologies, Inc., InTouch Technologies, Inc., McKesson Technologies, Inc., and MyNetDiary, Inc.'s (collectively, the "Remaining Defendants") Motion to Declare Cases Exceptional and for Attorneys' Fees (ECF No. 81), and its associated documents, as well as all related docket entries (ECF Nos. 90, 91, 97 and 99; collectively with ECF No. 81, the "Sealed Filings"). Former defendant DeVibliss Healthcare LLC does not oppose this motion. Remaining Defendants are open to publicly filing redacted versions of their filings. 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 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

All patent cases impact the public interest; exceptional cases are of exceptional interest. Whether My Health litigated its case in a exceptional manner, and how patent law is being interpreted could impact a multitude of American businesses and consumers who both assert patents or find themselves on the receiving end of a lawsuit. Improperly sealed court records limit public scrutiny of this case, and prevent the public from understanding what constitutes an "exceptional case" in this district.

Overbroad assertion of confidentiality in court filings is improper and disserves the public. The public's interest in fully understanding the U.S. patent system, and of My Health's assertion of its patent, is not outweighed by a party's desire to avoid making its arguments publicly. By designating whole briefs and exhibits as confidential, the parties subvert a strong public policy in open courts, and deny other parties and the public the opportunity to evaluate

My Health's claims. Accordingly, the Court should order the sealed filings unsealed, redacting only that the specific information that a party can show good cause exists for sealing.

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

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

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.[2] 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").

On August 2, 2017 EFF filed a motion to intervene in order to move to unseal the Sealed Filings. The Court was scheduled to hear public arguments on the Fees Motion on August 15, 2017. *See* Order, ECF No. 104.

III. Argument

A. Common Law and the First Amendment Require Court Records to Be as Open as Possible

Given the importance of public access, courts have recognized that "[t]here is a strong presumption in favor of a common law right of public access to court proceedings." *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (citing *Nixon*, 435 U.S. at 597-99); *SEC v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993) (recognizing the common law presumption of public access to judicial documents); *U.S. v. Hold Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010); *see also* Standing Order Regarding Protection of Proprietary and/or Confidential Information to be Presented to the Court During Motion and

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

Trial Practice, Judges Rodney Gilstrap and Robert W. Schroeder, June 1, 2016, at Commentary. That presumption must not be dismissed lightly given the dangers that come from restrictions on public access. *See Richmond Newspapers*, 448 U.S. at 595 ("Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."). In this Circuit, it is an abuse of discretion for a district court to seal documents without first determining whether the rationale for sealing justifies depriving the public of access. *See SEC*, 990 F.2d at 849-50.

That presumption applies to judicial records, including court decisions and filings on which those decisions rest. *See id.* at 849; *In re High Sulfur Content Gasoline Prods. Liab. Litig.*, 517 F.3d 220, 230 (5th Cir. 2008) (applying presumption to court orders, docket minute entry, and related exhibit); *In re Sealing & Non-Disclosure of Pen/Trap/2703(d) Orders*, 562 F. Supp. 2d 876, 890 (S.D. Tex. 2008) (recognizing presumption of access to "pleadings, documents, affidavits, exhibits, and other materials filed by a party or admitted into evidence by the court. . . . that influence or underpin the judicial decision"). Other circuits have specifically classified documents filed in support of motions as judicial records that are presumptively public. *See, e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) ("[T]he contested documents—by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment—are unquestionably judicial documents under the common law.").

The burden of overcoming the presumption of public access rests on the proponent of the sealing. *See* Fed. R. Civ. P. 26(c)(1). To meet this burden, the proponent must show that sealing serves "an overriding interest" that "is essential to preserve higher values [than the presumption of public access] and is narrowly tailored to serve that interest." *United States v. Edwards*, 823

F.2d 111, 115 (5th Cir. 1987); *see also High Sulfur*, 517 F.3d at 230 (sealing is improper if it "protects no legitimate privacy interest that would overcome the public's right to be informed.").

Nor can the parties agree amongst themselves that material should be sealed, without the Court independently determining the records should be sealed. *See In re Sealing*, 562 F. Supp. 2d at 890 (court records "may not be shielded from public view by mere agreement of the parties"); *Baxter Int'l, Inc. v. Abbott Labs.*, 297 F.3d 544, 547 (7th Cir. 2002) ("[M]any litigants would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed."). "A District Court cannot abdicate its responsibility to oversee the discovery process and to determine whether filings should be made available to the public." *Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 227 (6th Cir. 1996).

Finally, even if a party may legitimately claim confidentiality in some information contained in a court filing, that does not justify completely sealing that entry from public scrutiny. Even with documents implicating the most sensitive national security concerns, "[i]t is difficult to conceive any circumstance under which permanent sealing of the entire file, including the order itself, could ever be justified. . . . Legitimate confidentiality interests will almost always be fully accommodated by redacting the troublesome words or passages." *In re Sealing*, 562 F. Supp. 2d at 894-95.

As the Fifth Circuit has made clear, "[a] district court's discretion to seal the record of judicial proceedings is to be exercised charily[.]" *Fed. Sav. & Loan Ins. Corp. v. Blain*, 808 F.2d 395, 399 (5th Cir. 1987). The Federal Circuit has explicitly cautioned against excessive sealing practices—for example, of a party's legal arguments—that "bespeak[] an improper casual approach to confidentiality markings that ignores the requirements of public access, deprives the

public of necessary information, and hampers [a] court's consideration and opinion writing." *In re Violation of Rule 28(d)*, 635 F.3d at 1360. The Federal Circuit has recently strictly limited the amount of information that can be sealed. *See* Fed. Cir. R. 27(m)(1), available at http:// www. cafc. uscourts. gov/ sites/ default/ files/ rules- of- practice/ ProposedRules/ federal_ circuit_ rules_ public_ notice_ dec_ 2015. pdf ("A party seeking to mark confidential more than fifteen words must file a motion with this court establishing that the additional confidentiality markings are appropriate and necessary pursuant to a statute, administrative regulation, or court rule.").

B. The Public Would Benefit From Greater Understanding of the Remaining Defendants' Arguments for Fees As Well As My Health's Opposition

In determining whether the parties have shown compelling interests or good cause to seal entire court records, 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*, 9 J.L. & Pol'y 53, 58 (2000). *Cf.* Bernard H. Chao & Derigan Silver, *A Case Study in Patent Litigation Transparency*, 2014 J. Disp. Resol. 83, 88-90 (2014), available at http://scholarship.law.missouri.edu/jdr/vol2014/iss1/6/ (explaining how greater access to patent litigation records is in the public interest).

Because of My Health's assertion of infringement against numerous disparate entities' systems and apparatuses, the defendants in this case are not the only party who is interested in whether My Health acted appropriately in asserting its patent. Many states now have laws making it specifically unlawful to assert a patent in bad faith. *See, e.g.*, Md. Comm. Law § 11-1605 *et seq*. My Health's behavior in this case can be a factor in determining whether it has violated these laws. *See, e.g.*, *id.* at § 11-1603(B)(1) (listing factors for a court to consider when deciding whether or not a patent was asserted in bad faith) and *id.* at § 11-1603(B)(2) (listing

factors for a court to consider when deciding whether or not a patent was asserted in good faith). The public, including possibly State Attorneys General, the Federal Trade Commission, and those who have received patent demand letters from My Health may benefit from knowing what activities My Health has engaged in on other occasions.

The sealing of documents also implicates other parties' interests beyond just those concerned about My Health's patent and its assertion. Documents produced and created in litigation can be highly material to related proceedings at the Patent Office. For example, the Federal Circuit has held that a party engaged in inequitable conduct by failing to disclose facts learned during litigation that were contrary to positions taken at the Patent Office by counsel involved in a related re-examination proceeding. *See Ohio Willow Wood Co. v. Alps South*, 813 F.3d 1350, 1358-59 (Fed. Cir. 2016). My Health's patent is currently the subject of an instituted *inter partes* review proceeding. *See McKesson Corp. et al v. My Health, Inc.*, IPR2017-00312 (Instituted June 6, 2017).

Furthermore, cases such as this one form part of a public debate about the state of the U.S. patent system.[3] Unsealing would better promote public understanding of the current state of patent litigation, as "[p]ublic confidence [in our judicial system] cannot long be maintained where important judicial decisions are made behind closed doors and then announced in conclusive terms to the public, with the record supporting the court's decision sealed from public view." *High Sulfur*, 517 F.3d at 230 (alteration in original).

[3] Randall R. Rader, Colleen V. Chien, and David Hricik, *Make Patent Trolls Pay in Court*, N.Y. Times, June 4, 2013, at A25; Edward Wyatt, *Obama Orders Regulators to Root Out 'Patent Trolls,'* N.Y. Times (June 4, 2013), http://www.nytimes.com/2013/06/05/business/president-moves-to-curb-patent-suits.html.

Unsealing would help the public better understand the administration of justice in this district and whether patent litigation reform is, in fact, needed. This particularly implicates EFF's First Amendment and common law rights to gather news and report on the use of our judicial system to enforce patent rights. *See Davis*, 78 F.3d at 923, 927-28. Those are the very activities the First Amendment is meant to protect. *See Mills v. Alabama*, 384 U.S. 214, 218 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs."). EFF is a public interest organization, actively involved in the patent reform debate. *See* Declaration of Vera Ranieri, attached as Exhibit A, at ¶¶ 3-17. 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 ¶¶ 6-18. EFF has written about My Health's patent and allegations of infringement in the past, and has a continuing interest in understanding My Health's litigation activities. *Id.* at ¶¶ 10-11.

"[T]he power to seal court records must be used sparingly in light of the public's right to access[.]" *Holy Land*, 624 F.3d at 690-91 (5th Cir. 2010) (holding that the court abused its discretion in sealing records where there was no countervailing interest in nondisclosure shown by the party advocating for sealing). The parties, if they wish to maintain court records under seal, must show their rights to confidentiality overcome the strong competing right in public access. To the extent they attempt do to so by relying on a previously issued protective order not specific to the materials sought to be sealed, such reliance would be misplaced. *See* Protective Order, ECF No. 64. The law mandates that the Court require the parties—as proponents of numerous confidentiality designations—to meet their burden by affirmatively demonstrating the necessary particularized showing of harm before a court may designate a particular word,

sentence, paragraph, or document as confidential and withhold it from the public record. *See* Fed. R. Civ. P. 26(c)(1); *see also Oliner v. Kontrabecki*, 745 F.3d 1024 (9th Cir. 2014).

C. Any Information That Can Legitimately Be Withheld From the Public Can Be Done So Through the Use of Public-Redacted Filings

"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.

To the extent any information can be legitimately considered confidential, there can be no legitimate interest in keeping entire court records secret. Any legitimately confidential or proprietary information can be properly protected from disclosure by release of carefully redacted court records. *Cf. Davis*, 78 F.3d at 928-29 (restrictions on press access to juror information must be narrowly tailored); *see also Georgetown Rail Equip. Co. v. Holland L.P.*, Case No. 2016-2297, Order to Show Cause (Fed. Cir. Aug. 1, 2017) (ordering the parties to show cause as to why the court's opinion should not be unsealed and, if the parties propose redactions, ordering the parties to "propose specific words to replace each of the proposed redactions in an unsealed opinion"); *In re Sealing*, 562 F. Supp. 2d at 894-95. It is likely that the parties 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. Making public non-confidential facts and arguments concerning the Remaining Defendants' arguments and My Health's opposition 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

EFF requests that the Court unseal the Sealed Filings and place them on the public docket.

Dated: August 2, 2017

ELECTRONIC FRONTIER FOUNDATION

/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 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
Vera Ranieri