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 FOR LEAVE TO INTERVENE FOR THE LIMITED PURPOSE OF MOVING TO UNSEAL STATE FARM'S ANSWER

The Electronic Frontier Foundation ("EFF") moves the Court pursuant to Federal Rule of Civil Procedure 24(b) and common law for leave to intervene in this action for the limited purpose of filing a motion to unseal documents improperly filed under seal, in order to inform public debate over the claims of Traffic Information, LLC ("Traffic") and our patent system more generally. Specifically, EFF seeks to intervene in order to request that this Court unseal State Farm International Services, LLC's ("State Farm") Answer and Counterclaims and associated exhibits[1] (ECF No. 63, "Answer") that, on information and belief, are not confidential

[1] Unless otherwise noted, all docket entries refer to entries in Case No. 2:14-cv-00713-JRG-RSP.

information or otherwise protected from public disclosure. In essence, EFF's request is that the Court order Traffic to demonstrate good cause as to why material designated as confidential by Traffic was properly filed under seal, consistent with the requirements of the protective order in force in this case. That order (ECF No. 74) requires the proponent of a confidentiality designation to demonstrate that the material is properly so designated. *Id.* at ¶ 16. Because EFF believes that Traffic will be unable to do so, EFF further requests that any improperly designated material be made part of the public record.

MEMORANDUM OF LAW

I. Legal and factual background

"First Amendment guarantees are implicated when a court decides to restrict public scrutiny of judicial proceedings." *Doe v. Stegall*, 653 F.2d 180, 185 (5th Cir. 1981); *see also Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992) ("Once a matter is brought before a court for resolution, it is no longer solely the parties' case, but also the public's case."). Indeed, "the public has a common law right to inspect and copy judicial records." *SEC v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993); *see also Wilson v. American Motors Corp.*, 759 F.2d 1568, 1569 (11th Cir. 1985). This right grants the public standing to request that the Court unseal records. *See Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926-27 (5th Cir. 1996); *Brown*, 960 F.2d at 1016.

Rule 24 intervention is an appropriate mechanism to seek the unsealing of records. *See In re Beef Industry 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"); *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 778 (3d Cir. 1994) ("We agree with other courts that have held that the procedural device of permissive intervention is appropriately used to enable a litigant who was not an original party to an action to challenge protective or confidentiality orders entered in that action.").[2] However,

[2] The Fifth Circuit case of *Deus v. Allstate Insurance Co.*, 15 F.3d 506 (5th Cir. 1994) is distinguishable. There, the Court held that a party does not have standing to intervene to unseal

formal Rule 24 intervention is not absolutely required to grant access to materials. *See United States v. Chagra*, 701 F.2d 354, 360 (5th Cir. 1983).

Traffic's claims concern U.S. Patent No. 6,785,606 ("the '606 patent") and whether or not defendants' activities constitute infringement of that patent and whether or not that patent is valid. *See, e.g.*, ECF No. 31, Am. Compl. Against State Farm. But it is impossible, based on the public record, to determine how State Farm (or any other defendant) allegedly infringes the '606 patent. Traffic's complaints are nothing more than barebones recitations of claims that fail to put any party, including the public, on notice of the scope of Traffic's alleged patent rights. *See generally*, *id.* Indeed, Traffic has apparently advanced the position in this court and in related actions that how a party allegedly infringes its patent, including the *name of the accused product*, is *highly confidential* and not subject to public disclosure. *See* ECF No. 64, State Farm's Opposed Motion to Seal Answer to Answer to Amended Complaint ("Plaintiff insists that the material incorporated and attached as an exhibit is confidential."); *see also 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 (E.D. Tex. filed May 22, 2012) (stating that defendant did not know the name of the allegedly infringing product before service of Infringement Contentions, the Infringement

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records, "absent some underlying right creating standing for the movants." *Id.* at 525. EFF has asserted that right—a First Amendment right. *See Nixon v. Warner Comm'cns, Inc.*, 435 U.S. 589, 597 (1979) ("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, Inc. v. Virginia*, 448 U.S. 555, 572 (1980). Indeed, the Fifth Circuit subsequently recognized that the First Amendment confers standing on third parties who have been injured by confidentiality orders that limit the public's ability to receive information regarding an ongoing litigation. *Davis*, 78 F.3d 920, 926-27 (5th Cir. 1996). Furthermore, since *Deus*, the Supreme Court decided *FEC v. Akins*, 524 U.S. 11 (1998). There, the Supreme Court held that the inability to obtain information, which 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)).

Contentions were confidential, and thus when defendant published the identity of the named product via a public filing defendant violated the protective order and committed contempt).

Governments, stakeholders, and the public are currently debating how to best implement our patent system. *See generally, An Overview of the "Patent Trolls" Debate*, Congressional Research Service (Apr. 16, 2013), http://www.fas.org/sgp/crs/misc/R42668.pdf. The cases brought by Traffic, and its claims to confidentiality as to how a company allegedly infringes, play a part in this broader public debate. By sealing records whole-cloth, Traffic has improperly inhibited the public debate and limited the public's ability to understand the scope of Traffic's claims and, more generally, patent law. This is particularly egregious in light of the fact that Traffic has sued over 100 parties for alleged infringement of the '606 patent, or the related U.S. Patent No. 6,466,862.

II. This Court should grant EFF leave to intervene

EFF brings this motion to intervene to request that this Court unseal records that have been improperly sealed through Traffic's inappropriate use of a confidentiality designation, and require Traffic to promptly explain why it is entitled to deprive the public of information it would normally be entitled to receive. EFF's motion is timely given the continuing pendency of State Farm's Opposed Motion to Unseal and the continuing pendency of Traffic Information's claims against other parties.

EFF's motion also does not unduly delay or prejudice the adjudication of the rights of any party. EFF's motion is limited to one docket entry and its associated exhibits, and State Farm's motion to unseal remains pending.

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. 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* Decl. of Vera Ranieri, Ex. B, at ¶¶ 6-11 (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 ¶¶ 12-15. The assertion of Traffic's patent or a related patent against over 100 parties is troubling to EFF, given both the volume of parties sued and the likelihood that Traffic's claims have already been exhausted.[3] The ability of Traffic to burden the court system by asserting possibly exhausted or frivolous claims, would inform the public of the need for reform of our patent system. And if Traffic's claims of infringement are legitimate (despite appearances to the contrary), the public would benefit from the requested information as part of the public record. The public would better understand the scope of Traffic's claims in order to avoid infringement, furthering "the policy that legitimate design-around efforts should always be encouraged as a path to spur further innovation." *TiVo Inc. v. EchoStar Corp.*, 646 F.3d 869, 883 (Fed. Cir. 2011).

Thus, as part of its position defending the public's interest by shining a light on potentially abusive patent litigation tactics, EFF now moves to intervene because EFF believes that the public is entitled to receive as much information as possible from *all sources*, including the courts, regarding Traffic's claims and their legitimacy. These interests satisfy Rule 24(b)(2)'s "claim or defense" requirement, which is construed liberally. *See Newby v. Enron Corp.*, 443 F.3d 416, 424 (5th Cir. 2006) (noting that "[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)," and citing cases).

[3] On information and belief, Traffic is suing developers of mobile phone applications whose products may be substantially or fully licensed pursuant to settlements with either handset manufacturers or mobile carriers. *See, e.g.*, *Traffic Information LLC v. Apple et al.*, Case No. 2:08-cv-00404-TJW (E.D. Tex. filed Oct. 20, 2008) (suit against handset manufacturers); *Traffic Information LLC v. AT&T Mobility LLC*, Case No. 2:09-cv-00083-MHS-CMC (E.D. Tex. filed Mar. 20, 2009) (suit against mobile carriers). Indeed, AT&T argued that Traffic had no claim of infringement against AT&T for exactly that reason. *See id.*, AT&T's Opp. to Traffic's Motion to Place Case Back on Calendar, ECF No. 163, at 1 (filed 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").

III. Conclusion

The Court should grant EFF's Motion to Intervene under either Rule 24 or the common law, and permit EFF to bring its Motion to Unseal Documents based on the memoranda attached as Exhibit A.

Respectfully submitted,

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 all parties who may be affected by the relief sought in this motion, including counsel for Traffic and State Farm, in a good faith effort to resolve the issues. Counsel for State Farm informed the undersigned that they do not oppose or take no position 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 EFF's intervention. Plaintiff and EFF disagreed as to the ability of EFF to intervene, 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