

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

WI-LAN INC.,

Plaintiff,

v.

ALCATEL-LUCENT USA INC. *et al.*,

Defendants.

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Civil Action No. 6:10-cv-521-LED
Civil Action No. 6:13-cv-252-LED
CONSOLIDATED CASES

JURY TRIAL DEMANDED

**WI-LAN INC., TELEFONAKTIEBOLAGET LM ERICSSON, ERICSSON INC.,
SONY MOBILE COMMUNICATIONS AB, AND SONY MOBILE
COMMUNICATIONS (USA) INC.'S PARTIALLY OPPOSED
JOINT MOTION TO SEAL CERTAIN TRIAL EXHIBITS**

I. INTRODUCTION AND BACKGROUND

Plaintiff Wi-LAN Inc. (“Wi-LAN”) and Defendants Telefonaktiebolaget LM Ericsson, Ericsson Inc. (“Ericsson”), Sony Mobile Communications AB, and Sony Mobile Communications (USA) Inc. (“Sony Mobile”) (collectively, “Movants”) jointly move to seal a small number of trial exhibits that are listed on Plaintiff’s Exhibits Admitted at Trial 07/08/2013–07/15/2013 (Dkt. No. 468) and Defendants’ Exhibits Admitted at Trial 07/08/2013–07/15/2013 (Dkt. No. 469).¹ In an effort to balance the protection of the parties’ and various nonparties’ sensitive business information with the public interest in accessing judicial records and maintaining an open and transparent judicial system, the exhibits Movants seek to seal represent only a small and particularly sensitive subset of the exhibits admitted at trial. Furthermore, Movants do not seek to seal any portion of the trial transcript. The documents for which Movants request a sealing order contain highly sensitive business, technical, and personal information from Wi-LAN, Ericsson, Sony Mobile, and nonparties, the disclosure of which would not further the public interest, but instead would serve only to injure the businesses of the Movants and nonparties.

During the discovery phase of this action, the parties to the lawsuit and nonparties produced documents designated as “Confidential” or “Confidential – Attorneys’ Eyes Only” under the Protective Order entered on December 19, 2011 (Dkt. No. 145). Furthermore, nonparty Qualcomm Inc. (“Qualcomm”) produced documents designated as “Qualcomm – Outside Attorneys Eyes Only” under the Supplemental Protective Orders entered on April 23, 2012 (Dkt. No. 191) and June 25, 2012 (Dkt. No. 205). By their terms, these Protective Orders

¹ Movants Wi-LAN, Ericsson and Sony Mobile jointly move to seal all exhibits that are the subject of this motion. Non-joining Defendants Alcatel-Lucent USA Inc., (“Alcatel-Lucent”), HTC Corp., HTC America, Inc., and Exedea Inc. do not (collectively “HTC”) oppose this motion in part, as indicated below.

recognize that documents containing confidential, proprietary and/or commercially sensitive information would be produced. *E.g.* Dkt. No. 145 at 1–2. Documents designated as “Confidential,” “Confidential – Attorneys’ Eyes Only,” or “Qualcomm – Outside Attorneys Eyes Only” under the Protective Orders are protected from public disclosure and remain protected from such disclosure even after final termination of the litigation. *Id.* at 21–22. Because certain trial exhibits contain proprietary and/or highly confidential information that the parties or nonparties designated as “Confidential,” “Confidential – Attorneys’ Eyes Only,” or “Qualcomm – Outside Attorneys Eyes Only” under the Protective Orders, Movants jointly file this motion to seal certain trial exhibits, the disclosure of which would cause harm to the parties’ competitive standing by disclosing confidential business information, confidential personal information, or other business confidences.

Movants therefore respectfully request that the Court grant this Motion to Seal Certain Trial Exhibits as specified more particularly below.

II. ANALYSIS

A. Legal Standards

Courts have recognized that under normal circumstances the public has a common law right to inspect and copy court records. *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 848 (5th Cir. 1993) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978)). The purpose of the common law right to access judicial records “serves 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.” *Id.* at 849 (internal citations and quotations omitted). This right, however, is not absolute. *Motorola, Inc. v. Analog Devices, Inc.*, No. 1:03-CV-131, 2003 WL 25778434, at *1 (E.D. Tex. June 6, 2003). Rather, it is within the court’s discretion to seal specific records in judicial proceedings. *Id.* In

exercising its discretion to seal records, a court balances the public's common law right of access against the interests favoring nondisclosure. *Van Waeyenberghe*, 990 F.2d at 848. While there is no bright line rule as to when a sealing order should be made, *see Belo Broad. Corp. v. Clark*, 654 F.2d 423 (5th Cir. 1981), courts have consistently sealed judicial records “where court files might have become a vehicle for improper purposes.” *Motorola*, 2003 WL 25778434, at *1; *see Belo*, 654 F.2d at 434 (discussing the Supreme Court's recognition of several circumstances in which the right of access was outweighed by the court's power to insure that its records are not used as vehicles for improper purposes). Thus, “courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant's competitive standing.” *Nixon*, 435 U.S. at 598.

B. A Sealing Order Is Necessary to Protect Proprietary and Highly Confidential Information Contained in Certain Exhibits Admitted During the Jury Trial of this Matter

A sealing order should be entered here because the interests of the Movants and nonparties—such as Qualcomm and various third parties that entered into confidential business agreements with the Movants—in their confidential business information far outweigh the common law right of access to these particular court records. Access to these confidential business documents would not serve the purpose of the common law right to access because the documents themselves do not reveal anything about the judicial process or the judicial system. Rather, the documents Movants seek to seal relate solely to the businesses of Wi-LAN, Ericsson, Sony Mobile, Qualcomm, and other nonparties, namely, their competitive strategies, business plans, contractual agreements, sales and pricing details, licensing practices, and technical information—documents that, if disclosed, would cause the kind of competitive harm the Protective Orders were designed to prevent. *See also Nixon*, 435 U.S. at 598 (“[C]ourts have refused to permit their files to serve . . . as sources of business information that might harm a

litigant's competitive standing.”) The public availability of the confidential business documents Movants seek to seal would allow competitors to obtain confidential information that normally would not be available publicly.

By seeking to seal only certain of the most sensitive documents produced by Movants and various nonparties, and not the trial transcript, Movants strike a balance that upholds the public interest in open court proceedings while maintaining the confidentiality of sensitive information. Indeed, any rule that discussing portions of exhibits or discussing exhibits in general terms at trial should preclude a sealing order would be antithetical to maintaining an accessible, open court system. If such a rule were adopted, it would encourage litigants to always ask to seal court proceedings anytime confidential information might be revealed. This would interrupt the flow of court proceedings and also close them to the public. Permitting discussion of limited information in open court and later allowing sensitive exhibits to be sealed so that other confidential information contained in those documents, but not discussed in court, remains protected is the most reasonable way of balancing the public and private interests. *See, e.g., Motorola*, 2003 WL 25778434, at *2 (Finding that the rationales for public access to Court records are not frustrated where identical records without the confidential information are available to the public.)

1. Movants request — without opposition — that exhibits containing confidential information of third parties be sealed.

For at least the reasons stated above, Movants respectfully request that the Court seal the following trial exhibits containing confidential and/or proprietary information of third parties, including Qualcomm and AT&T. Non-joining Defendants Alcatel-Lucent and HTC do not oppose the sealing of these exhibits.

| Admitted Trial Exhibits | |
|-------------------------|--------|
| PX-114 | DX-395 |
| PX-172 | DX-396 |
| PX-220 ² | DX-397 |
| DX-393 | DX-398 |
| DX-394 | DX-439 |

2. Movants request — without opposition — that exhibits containing confidential information of Ericsson and Sony Mobile be sealed.

In addition to the documents listed above, Movants request that the Court seal the following exhibits, which although pre-admitted during trial, were never referenced or discussed during the trial.³ Non-joining Defendants Alcatel-Lucent and HTC also do not oppose the sealing of these exhibits.

| Admitted Trial Exhibits | |
|-------------------------|--------|
| PX-106 | DX-278 |
| DX-214 | DX-280 |
| DX-221 | DX-281 |
| DX-225 | DX-323 |

² PX 220 is an excerpt from a contract between Ericsson and its customer AT&T, which contains confidential technical information regarding Ericsson's base stations as well as confidential financial information regarding the cost structure and terms of the agreement between the two companies. This exhibit was mentioned only twice during trial. *See* Trial Tr. July 9 PM, at 44-45; Trial Tr. July 10 AM, at 104. In each instance, the questioning involved only two lines of this 18-page document, and did not disclose AT&T's confidential financial terms, which is the type of information Courts have sealed in the past. *See Ironclad, L.P. v. Poly-America, Inc.*, No. 3:98-CV-2600, 2000 WL 1400762, at *15 (N.D. Tex. July 22, 2000) (Sealing documents containing sensitive cost structure analysis).

³ DX-323 is Sony Mobile's Fourth Amended Responses and Fourth Amended Appendix to Wi-LAN's Third Set of Individual Interrogatories [Nos. 3 and 4]. While the existence of this document was referenced at trial, the contents of the exhibit were not read into the record.

Movants request that these exhibits be sealed because they contain sensitive technical or financial information of Defendants Ericsson or Sony Mobile and were not discussed or disclosed at all during the trial.

For example, PX 106 is a detailed technical specification regarding the design of one of the integrated circuits used in Ericsson's base stations. It was pre-admitted by Wi-LAN on the first day of trial, but Wi-LAN did not ultimately question any witness regarding its contents.

The other exhibits (DX 214, 221, 225, 278, 280, 281, and 323) were pre-admitted by Defendants, but Defendants ultimately decided that it was unnecessary to present any testimony regarding these documents. All of these exhibits contain confidential sales and/or pricing data regarding the accused Ericsson and Sony Mobile products, and also include information about third-party customer prices and cost structures, and thus, should be sealed. Disclosure of this information would put Ericsson and Sony Mobile at a great disadvantage with respect to their competitors by providing those competitors with access to Ericsson's and Sony Mobile's confidential sales/pricing and technical information that they would not otherwise have, and that they could use to their own advantage. *See Nixon*, 435 U.S. at 598 (“[C]ourts have refused to permit their files to serve . . . as sources of business information that might harm a litigant’s competitive standing.”); *see also Ironclad, L.P.*, No. 3:98-CV-2600, 2000 WL 1400762 at *15 (Sealing documents containing sensitive cost structure analysis).

Because there was no open-court disclosure of the information contained in these Ericsson and Sony Mobile documents, sealing these exhibits would not thwart any of the purposes underlying the common-law right to access judicial records. Accordingly, because there was no open-court disclosure and the sensitivity of this technical and financial information is so great, Movants request that these exhibits be sealed.

3. Movants request that the following exhibits containing confidential information of Wi-LAN be sealed.

Movants Wi-LAN, Ericsson, and Sony Mobile also request that the Court seal the following trial exhibits that represent confidential business and license agreements between Wi-LAN and third parties, highly sensitive sales and financial information, and other confidential internal business documents and analyses belonging to Wi-LAN and certain third parties, the disclosure of which would serve only to injure Wi-LAN's and those third parties' businesses.⁴ Non-joining Defendants Alcatel-Lucent and HTC oppose the sealing of these exhibits, with the exception of DX-309, which Alcatel-Lucent and HTC do not oppose sealing.

| Admitted Trial Exhibits | |
|-------------------------|--|
| PX-157 | PX-170 |
| PX-159 | DX-309 |
| PX-162 | DX-403 |
| PX-163 | DX-14, PX-187, PX-122R |
| PX-166 | |
| PX-167 | DX-55, DX-60, DX-62, DX-63, PX-200 |
| PX-168 | |
| PX-169 | |

Wi-LAN, like many businesses, closely guards the terms of its licenses and other business agreements, including sensitive, non-public financial information, and other confidential terms and conditions. The nonparties that have also signed the agreements at issue

⁴ Some of these exhibits reflect copies or variants of the same underlying confidential document. For example, DX-14 and PX-187 each contain the full text of three confidential agreements between Wi-LAN and nonparty Airspan, and PX-122R includes one of the same agreements. DX-55, DX-60, DX-63, and PX-200 are all copies of the same confidential Wi-LAN accounting memo, and DX-62 is another confidential accounting memo. With the exception of one confidential internal presentation (DX-403), the remainder of the listed exhibits (PX-157 through PX-170, DX-309) are confidential license agreements between Wi-LAN and third parties.

similarly closely guard the contents of these documents. Likewise, Wi-LAN's confidential internal documents containing sensitive sales or pricing data, technical details, and business analyses warrant protection from disclosure to protect their businesses. *See Nixon*, 435 U.S. at 598. While certain limited terms of particular agreements with nonparties (PX-157 through 170) were revealed at trial, the vast majority of the agreements' terms were not discussed in open court. Similarly, only small portions of other confidential documents were discussed.

For example, for many of the admitted exhibits that are the subject of this motion, only one or two pages were actually used in open court. *See, e.g.*, Trial Testimony 26:20-27:19 (July 9, 2013 Afternoon Session) (discussing in general fashion only two pages of PX-122R out of 150 pages); *id.* at 103:22–107:4 (discussing the circumstances surrounding PX-187 and limited terms of the agreement, while showing to the jury only the first page of the document); Trial Transcript 139:8-141:20 (July 10, 2013 Morning Session) (referring to a small portion, and possibly only a single page, of DX-403). Other admitted exhibits were not discussed at all beyond the bare fact of their existence. For example, admitted exhibit DX-309 is a confidential license agreement between Wi-LAN and a nonparty that was mentioned only by a defense expert who simply offered, in passing, the opinion that it was not a comparable license without substantively discussing any terms of that license. *See* Trial Transcript 156:13–157:2 (July 11, 2013 Afternoon Session) (mentioning PX-165 (not admitted during trial), which is the same license as DX-309). Similarly, the specific contents of DX-62, an confidential accounting memorandum, likewise does not appear to have been substantively discussed.⁵

⁵ Even where documents were substantively discussed during the trial, the full contents of the exhibits were not read into the record. For example, much of the analysis and quantitative detail contained in PX-200, another confidential internal accounting memorandum, was not stated in open court when that exhibit was discussed.

By requesting that the Court seal these exhibits, Movants seek to protect confidential business information that remained out of the public eye during trial. Indeed, as noted above, courts have sealed documents discussed in open court in order to protect businesses from the illegitimate and harmful use of those documents by others. *See Fractus, S.A. v. Samsung Elecs. Co.*, No. 6:09-cv-00203-LED-JDL, Dkt. No. 1158 (E.D. Tex. Dec. 12, 2012) (sealing trial exhibits including some discussed in open court); *Ironclad, L.P.*, No. 3:98-CV-2600, 2000 WL 1400762 at *15 (sealing trial exhibits despite having been revealed in open court to members of the public).

Without a sealing order, potential licensing partners and others would have access to this sensitive and confidential business information that would otherwise be unavailable, and will no doubt use this confidential information to their advantage during their negotiations with Movants. Disclosure of the details of these agreements and analyses, beyond the limited portions discussed in open court at trial, would thus place Movants at a serious disadvantage as to critical aspects of their businesses, while serving no legitimate public purpose. Furthermore, potential licensing partners may be hesitant to enter into agreements if these exhibits are not sealed, because they may believe that the full text of agreements could more easily become public information. Permitting this limited set of exhibits to be sealed, while allowing the transcripts of proceedings themselves to remain accessible, strikes a fair balance while encouraging litigants not to interrupt open proceedings any time a document containing confidential information might be used.

III. CONCLUSION

For the foregoing reasons, Movants respectfully request that the Court seal the trial exhibits identified above.

Dated: August 21, 2013

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Respectfully submitted,

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CERTIFICATE OF CONFERENCE

The undersigned certifies that Plaintiff Wi-LAN Inc. and Defendants Ericsson and Sony Mobile (“Movants”) have complied with the requirements of Local Rule CV-7(h). Specifically, counsel for the Movants discussed the substance of this Motion with counsel for Alcatel-Lucent and HTC during several telephonic conferences and via e-mail. Movants and non-moving Defendants were unable to reach agreement with regard to certain trial exhibits identified in this Motion. Accordingly, an impasse has been reached with regards to those issues (which are the matters at issue in this Motion), leaving an open issue for the Court to resolve.

/s/Ajeet P. Pai

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service on this the 21st day of August, 2013.

/s/Ajeet P. Pai

Ajeet P. Pai