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

WI-LAN INC., Plaintiff, v. ALCATEL-LUCENT USA INC.; TELEFONAKTIEBOLAGET LM ERICSSON; ERICSSON INC.; SONY MOBILE COMMUNICATIONS AB; SONY MOBILE COMMUNICATIONS (USA) INC.; HTC CORPORATION; HTC AMERICA, INC.; EXEDEA INC. Defendants.	Civil Action No. 6:10-CV-521-LED JURY TRIAL DEMANDED

ALCATEL-LUCENT AND HTC'S OPPOSITION TO
WI-LAN, ERICSSON, AND SONY MOBILE'S PARTIALLY OPPOSED JOINT
MOTION TO SEAL CERTAIN TRIAL EXHIBITS

I. INTRODUCTION

Wi-LAN asks the Court to seal numerous admitted trial exhibits containing its allegedly confidential information despite the fact that these exhibits were discussed extensively in open court. Wi-LAN began the recent trial abundantly aware of the risks that its information would be discussed in open court. It now seeks, however, to limit the public's access to this information, ignoring the fact that public access to judicial records serves to enhance the trustworthiness of the judicial process, allows the public to understand the judicial system, and helps to curb judicial abuses. As such, there is a strong presumption in favor of open access to judicial records in order to legitimize the judicial process, a cornerstone of our democratic system. Wi-LAN cannot point to any specific or substantiated evidence that can overcome this strong presumption, nor can it support its bald assertion that failing to seal these exhibits "will no doubt" harm its patent licensing business. Alcatel-Lucent and HTC therefore request that the Court deny in part the motion to seal.[1]

II. LEGAL STANDARDS

Courts have "recognize[d] a general right to inspect and copy . . . judicial records and documents." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 597 (1978). "Public access [to 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." *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849

[1] More specifically, Alcatel-Lucent and HTC oppose the sealing of admitted trial exhibits PX-157, PX-159, PX-162, PX-163, PX-166, PX-167, PX-168, PX-169, PX-170, DX-403, DX-14, PX-187, PX-122R, DX-55, DX-60, DX-62, DX-63, and PX-200. Alcatel-Lucent and HTC do not oppose the sealing of other exhibits—including those from Wi-LAN, Ericsson, Sony Mobile, or third-parties—because they were either not discussed in Court or are subject to separate third-party confidentiality obligations.

(5th Cir. 1993); *IP Innovation L.L.C. v. Red Hat, Inc.*, No. 2:07-cv-447-RRR, Dkt. No. 271 at 1–2 (E.D. Tex. Sept. 21, 2010) (Rader, J., by designation) (Ex. 1.)

While the right is not absolute, "[t]he 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); *see also United States v. Holy Land Found. for Relief & Dev.*, 624 F.3d 685, 690 (5th Cir. 2010) ("the power to seal court records must be used sparingly in light of the public's right to access"). Before ordering documents be sealed, a district court "must balance the public's common law right of access against the interests favoring nondisclosure." *Van Waeyenberghe*, 990 F.2d at 848; *IP Innovation L.L.C.*, No. 2:07-cv-447-RRR, Dkt. No. 271 at 2 (Ex. 1.)

III. ARGUMENT

A. WI-LAN CANNOT OVERCOME THE PRESUMPTION AGAINST SEALING PUBLIC RECORDS

Wi-LAN's desire for the secrecy of its admitted exhibits does not overcome the strong presumption in favor of disclosure. Significantly, not once during the week-long trial did Wi-LAN request to seal the courtroom when these exhibits were discussed. By failing to take any appropriate precautions at trial to preserve any confidential information within these exhibits, Wi-LAN cannot now argue that public disclosure of these exhibits will present significant harm. And Wi-LAN's post-hoc attempts to downplay the extent to which these exhibits were discussed at trial cannot alter the actual reality of the trial.[2] For instance, the "Houston Memo"[3] not only was the foundation of Wi-LAN's damages theory, it was also discussed extensively throughout

[2] Wi-LAN's discussion of DX-309 and PX-165 is misplaced as Alcatel-Lucent and HTC do not oppose sealing those exhibits, precisely because those exhibits were not discussed extensively at trial.

[3] The Houston Memo was admitted at trial as PX-200, DX-55, DX-60, and DX-63.

trial. *See, e.g.*, Trial Testimony 53:2–54:12, 67:20–69:9, 79:23–80:11, 126:5–132:24, 134:8–14, 175:20–176:5 (July 10, 2013 Morning Session) (Ex. 2); Trial Testimony 62:16–66:11, 119:22–120:16, 128:18–22, 130:16–20, 131:5–23, 144:16–145:8 (July 11, 2013 Afternoon Session) (Ex. 3.) Similarly, DX-14 was analyzed at length by the Defendants' damages expert. *Id*. at 90:14–94:18 (Ex. 3.)[4] In all these instances, limiting public disclosure to the trial transcript does not give the public a meaningful opportunity to assess the proceedings in this case. Wi-LAN's own brief reveals it could not determine the extent to which DX-62 and DX-403 were discussed during trial based solely on the transcript. (D.I. 485 at 9.)

Wi-LAN does not have evidence—let alone a specified showing—that the records it seeks to seal will be used as a "vehicle for improper purposes" to overcome the presumption in favor of disclosure. Indeed, disclosure of the license agreements and business analyses that underpinned the parties' damages methodologies at trial will be beneficial to the public. *See IP Innovation L.L.C.*, No. 2:07-cv-447-RRR, Dkt. No. 271 at 2–3 (denying motion to redact portions of the trial transcript and admitted trial exhibits that contained information relating to third-party license agreements because public access would provide "a more complete understanding of the damages methodology in this patent infringement case" and because such information may be "relevant to future litigants in preparing their damages cases.") (Ex. 1.) Similarly, Wi-LAN has not described the substance of the exhibits that would give the Court an adequate basis to support the seal order. *Van Waeyenberghe*, 990 F.2d 845, 849 (overturning an order sealing judicial records because the district court did not "articulate any reasons that would support sealing the final order.") Its conclusory statement that access to the exhibits "will no

[4] DX-14 is the same as PX-187, and PX-122R contains the same email chain that was discussed at trial.

doubt" harm its business is insufficient to overcome the strong presumption in favor of disclosure. (D.I. 485 at 10.)

The cases cited by Wi-LAN are distinguishable. The *Ironclad* case involved business competitors, which, unlike here, presents a potential risk that information could be used for an illegitimate or malicious purpose. *Ironclad, L.P. v. Poly-Am., Inc.*, No. 3:98-cv-2600, 2000 WL 1400762, at *1 (N.D. Tex. July 28, 2000) (Ex. 4.) The motions to seal in *Fractus* were unopposed. *See Fractus, S.A. v. Samsung Elecs. Co.*, No. 6:09-cv-203-LED-JDL, Dkt. No. 1155 at 9 (E.D. Tex. Dec. 7, 2012) (Samsung's Mot. to Seal Certain Trial Exs.) (Ex. 5.) The movants in *Fractus* further demonstrated to this Court, in nearly eight pages of briefing, that the exhibits at issue would place it at a competitive disadvantage. *See e.g., id.* (Ex. 5.) No such showing has been made by Wi-LAN.

IV. CONCLUSION

For the reasons discussed above, Alcatel-Lucent and HTC respectfully request that the Court deny in part Wi-LAN, Ericsson, and Sony Mobile's Joint Motion to Seal Certain Trial Exhibits.

Dated: September 9, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on September 9, 2013. Any other counsel of record will be served by first class U.S. mail on this same date.

/s/ Akshay S. Deoras
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