Seeking Transparency in Waco

Judge Alan Albright's court in the Western District of Texas is rapidly becoming the latest hot spot for patent litigation. While only a total of two patent cases were filed in 2016 and 2017 in Judge Albright's Waco federal courthouse, the number of patent filings rose to seven hundred and ninety-three (793) in 2020. *See* J. Jonas Anderson & Paul R. Gugliuzza, *Federal Judge Seeks Patent Cases*, (forthcoming Duke L. J 2021). Professors Anderson and Gugliuzza provide a thorough explanation (and critique) of this sudden ascent. I have a smaller, but nonetheless important, point to make. If the Western District of Texas is going to hear some of patent law's most important cases, it should not do so in secret. Unfortunately, that appears to have just what happened in one the highest dollar value patent trials in recent history.

The patent world has been abuzz about the $2.18 billion verdict that the Waco jury handed down on March 2, 2021 in *VLSI Technology v. Intel*. The public debate in patent law has often focused on whether courts and juries are getting patent damages right. Looking at relevant filings on damages provides critical information for this important discussion. In high stakes cases, parties typically file summary judgment motions on damages and *Daubert* motions attempting to exclude certain theories. These motions often attach expert reports and deposition testimony as exhibits. Together these documents illustrate how patent doctrine shapes damage awards. For example, filings often explain how the parties seek to apportion damages between the value of the infringing features and the product as a whole. This is not an easy task and parties have taken many approaches to apportionment with varying levels of success.

However, these documents cannot be retrieved from the *VLSI Technology v. Intel* docket. To be clear, sealing is appropriate in some instances. Companies should be able to keep their confidential technical and financial information under wraps. But at least as of March 15, 2021, the following docket entries were wholly unavailable (*i.e*. not even redacted copies were available).

Docket No.	Date	Title (some abbreviated)
252	10/8/2020	DEFENDANT INTEL CORPORATIONS SEALED MOTION FOR SUMMARY JUDGMENT OF NO PRE-SUIT INDIRECT INFRINGEMENT OR WILLFULNESS AND OF NO POSTSUITWILLFULNESS OR ENHANCED DAMAGES
258	10/08/2020	DEFENDANT INTEL CORPORATION'S SEALED MOTION FOR SUMMARY JUDGMENT OF NO PRE-COMPLAINT DAMAGES UNDER 35 U.S.C. § 287.
260	10/08/2020	DEFENDANT INTEL CORPORATION'S SEALED MOTION FOR SUMMARY JUDGMENT OF NO INFRINGEMENT AND/OR NO DAMAGES FOR CLAIMS 1, 2, 4, 17, 19, AND 20 OF U.S. PATENT NO. 7,793,025.
276	10/08/2020	VLSI'S DAUBERT SEALED MOTIONS TO EXCLUDE DAMAGES-RELATED TESTIMONY OF DEFENDANT INTEL'S EXPERTS

431	2/18/2021	Sealed Document filed: Defendant's Response to Plaintiff's Daubert Motions to EXCLUDE DAMAGES-RELATED TESTIMONY OF INTELS EXPERTS
443	2/18/2021	Sealed Document filed: VLSI'S OPPOSITION TO INTEL'S MOTION FOR SUMMARY JUDGMENT OF NO PRE-COMPLAINT DAMAGES UNDER 35 U.S.C. §§ 287 258
445	2/18/2021	Sealed Document filed: VLSI'S OPPOSITION TO INTEL'S MOTION FOR SUMMARY JUDGMENT OF NO INFRINGEMENT AND/OR NO DAMAGES FOR CLAIMS 1, 2, 4, 17, 19, AND 20 OF U.S. PATENT NO. 7,793,025 260
446	2/18/2021	Sealed Document filed: VLSI'S OPPOSITION TO INTEL'S MOTION FOR SUMMARY JUDGMENT OF NO PRE-SUIT INDIRECT INFRINGEMENT OR WILLFULNESS AND OF NO POST-SUIT WILLFULNESS OR ENHANCED DAMAGES 252

Two short orders granted motions to seal these filings. However, the sealed filings appear to go far beyond damages. The first order (dated October 8, 2020) granted roughly thirty motions (Docket Entries 214-244) and the second order (dated February 18, 2021) granted even more (Docket Entries 287-89, 293-319, 321-345, 374-381, 398, 404, 405, 410, 416. 418, 420, 424, 425). Many of the sealed motions are motions *in limine* that do not have a descriptive title. They are simply numbered (*e.g.* Motion In Limine #3). So, there is no way to even know what subjects they cover.

Judge Albright did give a small nod to transparency in his February 18, 2021 order which required "[t]he filing party shall file a publicly available, redacted version of any motion or pleading filed under seal within seven days." Unfortunately, the redacted versions do not appear to have been filed. A few days earlier, Judge Albright also issued a February 12, 2021, standing order that requires parties to do the same in all cases pending in his court.

But these orders are inadequate in several ways. First, they explicitly permit parties to file purportedly confidential information under seal without a motion. But the parties have no incentive to be transparent. It is the court's job to protect the public interest, and this order abdicates that duty. Second, there also appears to be no safeguard for parties that redact too much information in their filings, a problem we have seen before. *See In re Violation of Rule 28(D)* (Fed Cir. 2011)(sanctions for redacting information that was not confidential including case citations). Third, the order does not require parties to redact exhibits. But some of the most critical information like deposition testimony and expert reports are exhibits. Finally, the order is not retroactive allowing most of the *VLSI v. Intel* case to remain in the dark.

This is not the first time that patent litigation has suffered from transparency problems. Other district courts have allowed too many documents to be sealed in previous high stakes cases like *Broadcom v. Qualcomm* (S.D. CA) and *Monsanto v. Dupont* (E.D. MO). *See*, Bernard Chao, *Not so Confidential: A Call for Restraint in Sealing Court Records*, 2011 Patently-O Patent L.J. 6 &

Bernard Chao & Derigan Silver, *A Case Study in Patent Litigation* Transparency, 2014 Journal of Dispute Resolution 83.

While these stories appear to paint a bleak picture for transparency in patent litigation, some courts are making an effort to keep their dockets accessible to the public. There have been notable decisions to ensure that filings are accessible. For example, in 2016 the Electronic Fronter Foundation successfully intervened and obtained an order from the E.D. of Texas to unseal records in a patent case, *Blue Spike LLC, v Audible Magic Corp*. Earlier this month, the Federal Circuit, affirmed a lower decision rejecting attempts to seal specific filings in another patent dispute. *See* *DePuy Synthes Products Inc. v. Veterinary Orthopedic Implants* (Fed. Cir. Mar. 12 2021).

Moreover, individual court rules are now requiring greater transparency. The Federal Circuit's latest rules clearly seek to maximize public disclosure. In each filing, Rule 25.1(d) only allows parties to mark "up to fifteen (15) unique words (including numbers)" as confidential. A party seeking to exceed that limit must file a motion. As Silicon Valley's home venue, the Northern District of California entertains numerous patent cases. The court's local rules say that material may only be sealed when a request "establishes that the the document, or portions thereof, are privileged, protectable as a trade secret or otherwise entitled to protection under the law." Moreover, the request must "must be narrowly tailored to seek sealing only of sealable material." Ironically, even Texas state courts, which obviously do not hear patent cases, treat requests to seal far more seriously than the W.D. of Texas. Specifically, Texas Rule of Civil Procedure 76a states that court records are "presumed to be open to the general public", and only allows records to be sealed upon a showing that "a specific, serious and substantial interest which clearly outweighs" various interests in openness.

In short, the Western District of Texas should join these other courts and take its duty to ensure transparency seriously. As the Fifth Circuit recently put it , "[w]hen it comes to protecting the right of access, the judge is the public interest's principal champion." *Binh Hoa Le v. Exeter Finance Corp.* (5th Cir. Mar. 5, 2021). Accordingly, we make a few basic recommendations. First, parties should not be able to file material under seal without judicial scrutiny. They should be required to file motions and justify their requests. Of course, a court also cannot rubber stamp these requests. If resources are a problem, the court can appoint a special master in larger cases. Second, parties should have to redact exhibits too. There can be valuable non-confidential information in those exhibits. Finally, a quick aside, even though judges bear the primary responsibility for making their dockets transparent, that does not mean the parties should not show more restraint. To the extent that either side is a repeat player, and thinks the patent system needs reform, they should be careful not to over seal. Their filings might end up being important contributions to the public debate.

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