UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAUI JIM, INC., an Illinois Corporation, Plaintiff, v. SMARTBUY GURU ENTERPRISES, a Cayman Island Company, MOTION GLOBAL LTD., a Hong Kong Company, SMARTBUYGLASSES SOCIETÁ A RESPONSABILITÁ LIMITATA, an Italian Company, SMARTBUYGLASSES OPTICAL LIMITED, a Hong Kong company, Defendants.	)	No. 1:16 CV 9788 Hon. Marvin E. Aspen

MEMORANDUM IN SUPPORT OF MOTION TO UNSEAL

Professor Rebecca Tushnet has intervened pursuant to Federal Rule of Civil Procedure 24(b) for the limited purpose of unsealing portions of the court record in this case—specifically, the redacted portions of the Court's opinion granting in part and denying in part the parties' cross-motions for summary judgment, and portions of the parties' cross-motions and oppositions and their supporting papers. This motion to unseal asserts a public right of access under the common law and First Amendment to the entire opinion on summary judgment, and to the entire the materials filed in support and opposition to the parties' cross-motions for summary judgment, some of which is currently redacted.

BACKGROUND

This was an action in which Maui Jim, a maker of fancy sunglasses, sued Smart Buy, a company that sells designer sunglasses with lenses created by its own opticians, for reselling Maui

Jim frames with third-party prescription lenses. Maui Jim alleged both copyright and trademark infringement as well as the state-law tort of interference with contract; Smart Buy counterclaimed alleging various state-law theories. After extensive discovery, exchanged under the terms of an agreed protective order, DN 51, the parties filed cross-motions for summary judgment, as well as *Daubert* briefing about plaintiff's expert evidence. The supporting and opposing briefs, the parties' Rule 56 statements about whether there were genuine issues of fact material to the legal issues that had to be resolved on summary judgment, and defendants' motion seeking to exclude the report of the plaintiff's expert from consideration on summary judgment, were riddled with sometimes-extensive redactions. Because the parties had agreed to a protective order covering their discovery, and submitted joint or unopposed motions to allow each other to file documents under seal rather than contesting confidentiality, DN 144, 413, the Court allowed the filing of these redacted papers, DN 153, DN 429, without the benefit of any adversary briefing about whether there was genuine need for confidentiality and whether the interests in confidentiality outweighed the public right of access to judicial records. As a result, there are substantial redactions in DN 430, DN 431, DN 432, DN 433, DN 434, DN 435, DN 436, DN 438, DN 437, DN 500, DN 501. Indeed, it appears from the docket sheet that, after the initial round of briefing, the parties filed all of the summary judgment papers under seal without submitted **any** unredacted public versions. DN 441, DN 446, DN 452, DN 458, DN 459, DN 460, DN 461, DN 462, DN 463, DN 464, DN 465, DN466, DN 468, DN 469, DN 483, DN 484, DN 488, DN 489, DN 490.

In some places, only a single word, such as a name or a number, has been redacted. However, in other places entire sentences and paragraphs are redacted; in a number of instances, entire pages have been redacted. *E.g.*, Plaintiffs' Memorandum in Support of Summary Judgment

on Copyright, DN 432, pages 5-7; Defendants' Statement of Material Facts, DN 438, pages 5-7, 9, 11-12, 29, 31-32, 34-35, 37-39, 40-41; Plaintiff's Statement of Material Facts on Lanham Act and Related Claims, DN 433, pages 6-7, 8-9; Plaintiff's Statement of Material Facts on Copyright, DN 435, pages 4, 5-6; Plaintiff's Memorandum in Support of Trademark Summary Judgment, DN 430, pages 11-12. 15-17, 23-24, 29-32; Defendants' Memorandum in Support of Summary Judgment, DN 4636, pages 4-6, 7-8, 13-14, 17-19, 30. The entire reply brief filed in support of defendants' motion to exclude the expert report of Brian Sowers, DN 452, remains under seal, as do a significant number of papers between DN 441 and DN 490.

The Court granted the cross-motions for summary judgment in minor part, but largely denied the cross-motions for summary judgment on the grounds that material facts, as well as the amount of damages on plaintiff's copyright infringement claim, would have to be resolved at trial. The Court discussed some of the arguments and evidence that the parties had redacted in their briefs; deprived of any adversary briefing on whether those redactions were justified, the Court similarly redacted these portions of its opinion. Individual words in the opinion such as names and numbers are redacted, but so are blocks of lines including all or most of entire sentences on pages 6 and 32 of the opinion.

Following the Court's ruling on the cross-motions for summary judgment, the parties settled the case, and the action was dismissed pursuant to a stipulation on August 25, 2020. Professor Tushnet published an article on her blog about the Court's summary judgment ruling. *sunglasses reseller liable for (c) infringement, maybe TM/false advertising/tortious interference*, https://tushnet.com/2020/09/10/sunglasses-reseller-liable-for-c-infringement-maybe-tm-false-advertising-tortious-interference/. At several points in her analysis, she expressed frustration about

redactions from the Court's opinion that made it hard both to assess the reasoning for the Court's various rulings, and to ascertain the precedent that the ruling would set for future litigation of similar issues. Through counsel, Professor Tushnet wrote to counsel for both plaintiff and defendants, asking them to consent to a motion to intervene and a motion to unseal; counsel for plaintiff responded that his client would not consent; counsel for defendants never responded.

ARGUMENT

The Supreme Court and the United States Court of Appeals for the Seventh Circuit have repeatedly upheld the public right of access to judicial records. *E.g.*, *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984); *Nixon v. Warner Communications*, 435 U.S. 589, 598 (1978); *Jessup v. Luther*, 277 F.3d 926 (7th Cir. 2002); *Union Oil Co. v. Leavell*, 220 F.3d 562 (7th Cir. 2000); *Grove Fresh Distributors v. Everfresh Juice Co.*, 24 F.3d 893 (7th Cir.1994); *In re Continental Illinois Securities Litigation*, 732 F.2d 1302 (7th Cir.1984).

> The general rule is that the record of a judicial proceeding is public . . .. Not only do such records often concern issues in which the public has an interest . . . but also the public cannot monitor judicial performance adequately if the records of judicial proceedings are secret.
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> *Jessup*, 277 F.3d at 927.

Only if the party wishing the document to remain private can show a "compelling interest in secrecy" will the court seal portions or the entirety of court records. *Id.* at 928.

Courts have recognized a public right of access to judicial records under both the First Amendment and common law.

> The First Amendment presumes that there is a right of access to proceedings and documents which have "historically been open to the public" and where the disclosure of which would serve a significant role in the functioning of the process in question. . . . The difficulties inherent in quantifying the First Amendment interests

> . . . require that we be firmly convinced that disclosure is inappropriate before arriving at a decision limiting access. Any doubts must be resolved in favor of disclosure.
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> *Grove Fresh*, 24 F.3d at 897.

The common law right of access extends to "those records of a proceeding that are filed in court or that, while not filed, are relied upon by a judicial officer in making a ruling or decision." *Smith v. U.S. District Court Officers*, 203 F.3d 440,442 (7th Cir. 2000), *citing Grove Fresh*, 24 F.3d at 897. "[W]hether or not a document or record is subject to the right of access turns on whether that item is considered to be a 'judicial record.' The status of a document as a 'judicial record,' in turn, depends on whether a document has been filed with the court or otherwise somehow incorporated or integrated into a district court's adjudicatory proceedings." *In re Cendant Corp.*, 260 F.3d 183, 192 (3d Cir. 2001). Here, the documents at issue were all filed with the Court, and were considered in connection with the cross-motions for summary judgment. Consequently, all of them documents are judicial records subject to both the common-law and the First Amendment right of access.

Because summary judgment "serves as a substitute for a trial," *Company Doe v. Public Citizen*, 749 F.3d 246, 267 (4th Cir. 2014) (citation and internal quotation marks omitted); *accord Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 122 (2d Cir. 2006), our nation's long history of open access to trials demonstrates that summary judgment opinions and records must be available to the public. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 n.17 (1980) ("[H]istorically both civil and criminal trials have been presumptively open[.]"); *see also Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1067-1070 (3d Cir. 1984) (describing history of public access to civil trials and citing the view of Wigmore, Blackstone, and Justice Holmes in support). Furthermore, public access to judicial opinions and summary judgment records is critical to the functioning of the legal

system as a whole. Dissemination of judicial opinions is necessary for the public to understand what the law is. See *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994) ("[J]udicial precedents are . . . valuable to the legal community as a whole. They are not merely the property of private litigants."); *Lowenschuss v. West Publ'g Co.*, 542 F.2d 180, 185 (3d Cir. 1976) ("As ours is a common-law system based on the 'directive force' of precedents, its effective and efficient functioning demands wide dissemination of judicial decisions.").

Public access to judicial opinions and the moving papers that gave rise to them enables the public to "understand[] disputes that are presented to a public forum for resolution" and to see "that the courts are fairly run." *Crystal Grower's Corp. v. Dobbins*, 616 F.2d 458, 461 (10th Cir. 1980); see also *Union Oil Co. v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000) ("What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.").

Accordingly, public access to summary judgment materials is protected by the First Amendment. *See Lugosch*, 435 F.3d at 121; *Company Doe*, 749 F.3d at 267; see also *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (holding, albeit without invoking the First Amendment, that "'compelling reasons' must be shown to seal judicial records attached to a dispositive motion"). The Fourth Circuit has applied this same reasoning to a First Amendment right to a court's summary judgment opinion. *Company Doe*, 749 F.3d at 267-68 ("it would be anomalous" for the First Amendment to apply to summary judgment records "but not the court's

opinion itself"); see also *Union Oil*, 220 F.3d at 568 ("[I]t should go without saying that the judge's opinions and orders belong in the public domain."); *United States v. Mentzos*, 462 F.3d 830, 843 n.4 (8th Cir. 2006) (denying motion to file opinion under seal "because the decisions of the court are a matter of public record"). The degree of protection afforded the right of access to summary judgment motions and opinions does not depend on whether the motion is ultimately granted or denied. *See Lugosch*, 435 F.3d at 121-22; *Republic of the Philippines v. Westinghouse Electric Corp.*, 949 F.2d 653, 660-61 (3d Cir. 1991).

In this case, the redaction of extended parts of the briefs supporting and opposing summary judgment, and of parts of the Court's ruling on summary judgment, impedes the ability of the public to assess the Court's ruling on the parties' controversy and to predict how similar cases would be decided. Tushnet Affidavit ¶ 4. Because trademark cases are highly fact-sensitive, without knowing how the Court applied the rules to the particular facts, it is impossible to truly understand the outcome. Both the multi-factor test for likelihood of confusion, and defenses arising outside the multifactor test, depend on details that the parties have concealed from public scrutiny by their redactions from the briefs, and by the Court's corresponding redactions from its summary judgment ruling. *Id.* ¶¶ 4-6.

Given that the opinion and briefs in question are judicial records subject to the First Amendment right of access, a party seeking to justify each redaction bears the burden of overcoming the presumption of public access to that redacted material, even if a court has previously ordered sealing. *Pickard*, 733 F.3d at 1302. To satisfy the First Amendment, the sealing of judicial records must be narrowly tailored to further a compelling interest. *Globe Newspaper,* 457 U.S. at 607; accord *McVeigh*, 119 F.3d at 814. Yet the Court has made no "'specific, on the record findings,'" *McVeigh*,

119 F.3d at 814 (quoting *Press-Enterprise*, 478 U.S. at 13), of a compelling interest that could justify sealing the opinion or summary judgment records here. *See also United States v. Peters*, 754 F.2d 753, 763 (7th Cir. 1985) (absent specific findings of fact and conclusions of law, reporter could not be denied access to exhibits); *In re Associated Press*, 162 F.3d 503, 510 (7th Cir. 1998) (saying "district courts should articulate on the record their reasons [for sealing]," and quoting *Washington Post v. Robinson*, 935 F.2d 282, 289 (D.C. Cir. 1991), as requiring specific findings before a denial of public access can be found justified).

Here, assuming that the parties may seek to justify sealing based on the "proprietary nature" of the information, that argument would fail. First of all, some of the matter that has apparently been redacted, such as the content of web pages that were public when they were saved, and hence would likely still be found in the Internet Archive, and the names of competitors in a general consumer goods category, can hardly be considered confidential. Moreover, businesses have no generalized right to keep business information secret, even when its release may lead to adverse consequences. *Company Doe*, 749 F.3d at 269 ("Adjudicating claims that carry the potential for embarrassing or injurious revelations about a corporation's image . . . are part of the day-to-day operations of federal courts."). "Many a litigant would prefer that the subject of the case—how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on—be kept from the curious (including its business rivals and customers), but . . . [w]hen [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Union Oil*, 220 F.3d at 567-68. Absent a specific showing adequate to overcome the presumption of public access, the redacted material in the records at issue should be unsealed.

CONCLUSION

For the foregoing reasons, the Court should grant Tushnet's motion to unseal portions of the summary judgment opinion, of the briefs and statements of material facts pertaining to the cross-motions for summary judgment, and of the memoranda supporting defendants' motion to exclude plaintiff's expert evidence,.

Respectfully submitted,

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March 8, 2021

CERTIFICATE OF SERVICE

I hereby certify that on this date, I am providing service to counsel for plaintiffs and defendants, as follows, by filing this motion and accompanying papers by ECF, which will effect service on all parties.

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