

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

ROSETTA STONE LTD.

Plaintiff,

v.

GOOGLE INC.

Defendant.

Case No. 1:09cv736 (GBL/TCB)

MEMORANDUM OF LAW IN SUPPORT OF UNOPPOSED MOTION TO SEAL

Google, Inc. (“Google”), by and through undersigned counsel, respectfully submits this Memorandum of Law In Support of its Unopposed Motion to Seal its Memorandum of Law in Support of its Omnibus Motion in Limine. The Unopposed Motion has been noticed on the public docket as a sealing motion. The Sealing Order is appropriate and necessary to protect confidential information produced by Google in the course of this litigation.

1. On December 14, 2009, this Court entered an Agreed Protective Order in the above captioned case. (Docket No. 28.) This Agreed Protective Order permits parties in this case to designate certain documents, testimony and other discovery material as “Confidential,” “Confidential Attorneys’ Eyes Only” and “Restricted Confidential—Source Code.” The Order further provides that any material so designated “shall not be disclosed to any person” not otherwise specifically enumerated in the Order. To that end, Paragraph 3 of the Agreed Protective Order provides that if a receiving party seeks to file protected information with the Court, that party shall give the designating party written notice of its intention to do the same and the designating party shall have five business days in which to file with the Court a motion to

have the proposed filing under seal.

2. In its Memorandum of Law in Support of its Omnibus Motion in Limine, Google identifies and quotes from documents designated by Protected Information in accordance with the Agreed Protective Order. These documents reference business practices that are confidential and propriety. Consequently, Google has designated these documents as “Confidential” or “Confidential Attorneys’ Eyes Only” pursuant to the Agreed Protective Order.

3. Because there is not sufficient time to allow Rosetta Stone to file its own motion to seal in accordance with the procedural provisions set forth in the Agreed Protective Order, Google instead is filing this Unopposed Motion consistent with the spirit of the Agreed Protective Order. Nothing in this Unopposed Motion, however, shall prevent Google from contending that any information or documents designated by Rosetta Stone as Protected Information have been improperly designated.

4. In determining whether to grant a motion to seal, courts begin with the assumption that the documents at issue are judicial records subject to public access. They then engage in a balancing test to determine if the interest in sealing or maintaining the seal on such documents outweighs the public’s interest in access to them. In conducting this balancing test, courts have placed the burden upon the party which seeks to overcome the presumption of public access to show some significant interest that outweighs public access. The courts have applied a three-part test in deciding whether to seal such documents, as follows: (1) provide public notice of the request to seal and allow interested parties a reasonable opportunity to object; (2) consider less drastic alternatives to sealing the documents; and (3) provide specific reasons and factual findings supporting the decision to seal the documents and for rejecting alternatives. *See, e.g., Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 302 (4th Cir. 2000); *Stone v. University of Maryland*

Medical System Corporation, 855 F.2d 178, 182 (4th Cir. 1988); *In re Knight Publishing Company*, 743 F.2d 231, 235-36 (4th Cir. 1984). *See also*, *United States ex rel. Coughlin v. IBM*, 992 F. Supp. 137, 141 (N.D.N.Y. 1998) (balancing “need for and harm risked by the disclosure sought by Relators”); *United States ex rel. O’Keefe v. McDonnell Douglas Corp.*, 902 F. Supp. 189, 191 (E.D. Mo. 1995) (court has discretion to maintain seal on pre-intervention documents after “balancing [the requesting party’s] need for the sealed documents and the harm to the government risked by disclosure”).

5. Google contends that the “Protected” material at issue relates to business practices that are confidential and proprietary, the public disclosure of which would be harmful to its business interests. Reasonable public notice of the sealing of these documents has been given through the filings in this case. No less restrictive method would adequately preserve the confidential and proprietary nature of the information at issue. Google has publicly filed redacted versions of its Memorandum of Law in Support of its Omnibus Motion for Sanction.

6. The Agreed Protective Order addresses the period of time the party seeks to have the matter maintained under seal and how the matter is to be handled upon unsealing: “Outside attorneys of record for the parties are hereby authorized to be the persons who may retrieve confidential exhibits and/or other confidential matters filed with the Court upon termination of this litigation without further order of this Court, and are the person to whom such confidential exhibits or other confidential matters may be returned by the Clerk of the Court, if they are not so retrieved.”

For the foregoing reasons, Google respectfully requests that the Court grant its Motion to Seal and enter the attached Order.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 15, 2012, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Warren Thomas Allen, II, Esquire
SKADDEN ARPS SLATE MEAGHER & FLOM LLP
1440 New York Ave NW
Washington, DC 20005-2111
202-371-7126
Fax: 202-661-9063
Email: wtallen@skadden.com
Counsel for Plaintiff Rosetta Stone Ltd.

_____/s/_____
Jonathan D. Frieden, Esquire (VSB No. 41452)
Stephen A. Cobb, Esquire (VSB No. 75876)
ODIN, FELDMAN & PITTLEMAN, P.C.
9302 Lee Highway, Suite 1100
Fairfax, Virginia 22031
(703) 218-2100
(703) 218-2160 (facsimile)
jonathan.frieden@ofplaw.com
stephen.cobb@ofplaw.com
Counsel for Defendant Google Inc.