

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.

Plaintiff,

v.

AOL, INC., *et al.*,

Defendants.

Civil Action No. 2:11-cv-512

**DECLARATION OF JOSHUA L. SOHN IN SUPPORT OF DEFENDANTS’
OPPOSITION TO PLAINTIFF’S MOTION FOR LEAVE TO FILE SUPPLEMENTAL
MEMORANDUM REGARDING MOTION TO SHOW CAUSE AND MOTION TO
STRIKE PLAINTIFF’S SUPPLEMENTAL MEMORANDUM**

I, Joshua L. Sohn, declare as follows:

1. I am an attorney in the law firm of Quinn Emanuel Urquhart & Sullivan, LLP and am counsel for Defendants in the above-captioned case. I provide this declaration upon personal knowledge and, if called upon as a witness, would testify competently as to the matters recited herein.

2. During the pre-trial discovery phase, the parties agreed that they had no obligation to retain, collect, or produce custodial documents created after the filing date of the Complaint in this lawsuit. This agreement included post-Complaint emails, and throughout pre-trial discovery, the parties consistently operated under the principle that post-Complaint emails were exempt from discovery. This agreement was reconfirmed in correspondence sent from Defendants’

counsel Jennifer Ghaussy to Plaintiff's counsel Charles Monterio, dated April 27, 2012, a true and correct copy of which is attached hereto as Exhibit 3.

3. In addition to discussion of post-Complaint custodial documents, the parties also discussed discovery of instant messages and voice mails as part of their discussion of procedures for electronic discovery. They prepared a draft Stipulation Regarding the Format of Document Productions detailing the parties' positions on such procedures, then negotiated over the limited areas of disagreement.

4. On December 15, 2011, during the parties' negotiation about the stipulation, Plaintiff's counsel proposed including a limitation reading, "No party has an obligation to preserve corporate voicemails or corporate instant messages created after September 17, 2011." Defendants' counsel agreed to the inclusion of this language in an email that same day, December 15, 2011. A true and correct copy of this email from Defendants' counsel David Perlson to Plaintiff's counsel Kenneth Brothers is attached hereto as Exhibit 15.

5. During a meet and confer conference on March 1, 2012, Plaintiff's counsel stated that he believed that the parties had not reached an agreement concerning instant messages. In correspondence on March 7, 2012, Defendants' counsel pointed to the parties' December 15, 2011 agreement that the parties have no obligation to preserve corporate instant messages created after September 17, 2011. Attached hereto as Exhibit 1 is a true and correct copy of this correspondence from Defendants' counsel Margaret Kammerud to Plaintiff's counsel Kenneth Brothers.

6. Then, on March 29, 2012, Defendants' counsel circulated the Proposed Stipulation Regarding the Format of Document Productions, which included the previously agreed language concerning instant messages: "No party has an obligation to preserve corporate voicemails or

corporate instant messages created after September 17, 2011.” Attached hereto as Exhibit 2 is a true and correct copy of the email from Defendants’ counsel Emily O’Brien to Plaintiff’s counsel Charles Monterio attaching this stipulation. While the parties continued to negotiate concerning other, unrelated aspects of the stipulation during April 2012, Defendants’ counsel noted that the date after which voicemails and instant messages need not be preserved should coincide with the filing of the litigation, September 15, 2011. Attached hereto as Exhibit 3 is a true and correct copy of the correspondence sent from Defendants’ counsel Jennifer Ghaussy to Plaintiff’s counsel Charles Monterio, dated April 27, 2012, in which the September 15, 2011 date was proposed. Plaintiff agreed to this proposal on May 7, 2012 in a letter from Plaintiff’s counsel Charles Monterio to Defendants’ counsel Jennifer Ghaussy, attached hereto as Exhibit 13. As of that date, the only remaining dispute about the Proposed Stipulation Regarding the Format of Document Productions concerned unsent draft emails. Defendants agreed to Plaintiff’s demands about the issue of draft emails to reach full resolution as to the stipulation on May 8, 2012. This agreement is memorialized in a letter from Defendants’ counsel Jennifer Ghaussy to Plaintiff’s counsel Charles Monterio, a true and correct copy of which is attached hereto as Exhibit 14.

7. Attached hereto as Exhibit 4 is a true and correct copy of an email from Plaintiff’s counsel Charles Monterio to Defendants’ counsel, dated September 23, 2013.

8. Attached hereto as Exhibit 5 is a true and correct copy of an email from Defendants’ counsel Margaret Kammerud to Plaintiff’s counsel, dated September 25, 2013.

9. Plaintiff filed its Motion for Leave to file a supplemental memorandum (Dkts. 993 & 994) and the supplemental memorandum itself (Dkt. 998) on October 7, 2013. Plaintiff never requested any meet-and-confer before filing these documents.

10. After Google's September 25 production of a Launch Cal document and textual notes on its source code changes, Plaintiff never requested any extension of its expert report deadline in order to adequately digest these documents.
11. Attached hereto as Exhibit 6 is a true and correct copy of the expert report of Plaintiff's technical expert, Dr. Frieder, served on September 25, 2013.
12. Attached hereto as Exhibit 7 is a true and correct copy of the expert report of Defendants' technical expert, Dr. Ungar, served on October 15, 2013.
13. Attached hereto as Exhibit 8 is a true and correct copy of excerpts from the deposition of Google engineer Bartholomew Furrow, dated September 20, 2013.
14. Attached hereto as Exhibit 9 is a true and correct copy of a "Launch Cal" document, bearing Bates Number G-IPE-0901993, that Google produced to Plaintiff just after midnight on September 25, 2013.
15. Attached hereto as Exhibit 10 is another Launch Cal document, bearing Bates Number G-IPE0892429, that Google produced to Plaintiff just after midnight on August 26, 2013.
16. Attached hereto as Exhibit 11 is a true and correct copy of an email string between Plaintiff's counsel and Defendants' counsel, dated September 10-12, 2013.
17. Attached hereto as Exhibit 12 is a proposed Agreed Order that Plaintiff sent to Defendants on September 10, 2013, laying out the terms under which Plaintiff would agree to withdraw its Motion to Show Cause. Defendants did not agree to these terms.
18. Attached hereto as Exhibit 13 is a true and correct copy of a letter from Plaintiff's counsel Charles Monterio to Defendants' counsel Jennifer Ghaussy, dated May 7, 2012.

I declare under penalty of perjury of the laws of the United States that the foregoing is true and correct.

Dated: October 21, 2013

A handwritten signature in blue ink, appearing to read "Joshua L. Sohn", positioned above a horizontal line.

Joshua L. Sohn

DATED: October 21, 2013

/s/ Stephen E. Noona

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2013, I will electronically file the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following:

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