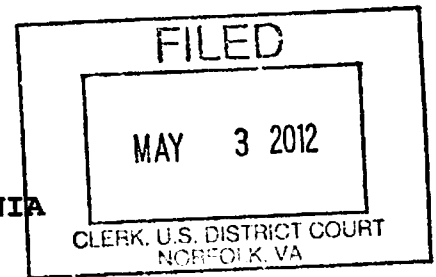


UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division



I/P ENGINE, INC.,

Plaintiff,

v.

Case No.: 2:11cv512

AOL, INC., et al.,

Defendants.

ORDER TO SHOW CAUSE

Before the Court is a Motion to Seal Portions of Defendants' Brief in Support of Their Motion to Compel Plaintiff to Supplement Its Infringement Contentions and Exhibits K, L, M and N to the Declaration of Emily C. O'Brien In Support of Defendants' Brief in Support of Their Motion to Compel Plaintiff to Supplement Its Infringement Contentions (ECF No. 101) ("Motion to Seal"), filed on March 27, 2012, by defendants Google Inc. and IAC Search & Media, Inc. The Motion to Seal is unopposed. In addition to the Motion to Seal and related filings, the Court has reviewed in camera the brief and exhibits submitted for filing under seal. For the reasons stated below, the Court finds the basis for sealing some of the material is unclear. Accordingly, the Court will ORDER the parties to SHOW CAUSE why certain or all of these materials should not be unsealed and filed in the public record.

The defendants have asked to file under seal the Brief in Support of Defendants Google Inc.'s and IAC Search & Media, Inc.'s

Motion to Compel Plaintiff to Supplement Its Infringement Contentions and Exhibits K, L, M, and N to the Declaration of Emily C. O'Brien in support thereof (ECF No. 107). The parties have agreed that certain information contained in these materials should remain confidential, but "[w]hen discovery material is classified as confidential by the parties, their classification is not binding on the court." Chemical Bank v. Affiliated FM Ins. Co., 154 F.R.D. 91, 94 (S.D.N.Y. 1994).

In Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000), the Fourth Circuit set out three requirements for sealing court filings:

[B]efore a district court may seal any court documents, it must (1) give 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 its decision to seal the documents and for rejecting the alternatives.

Id. at 288 (citing Stone v. Univ. of Md. Med. Sys. Corp., 855 F.2d 178, 181 (4th Cir. 1988), and In re Knight Pub. Co., 743 F.2d 231, 235-36 (4th Cir. 1984)). Local Civil Rule 5 provides further guidance to litigants with respect to motions to seal.

The Court notes that, in accordance with Local Civil Rule 5, the Clerk has provided public notice of the Motion to Seal by docketing the motion with a clear description of it as a motion to seal, and by docketing a separate Notice of the defendants' Motion

to Seal (ECF No. 103). No objection has been filed by any interested party.

"Even when no third party challenges a motion to seal, however, the Court must still ensure that the motion is supported by good cause." See Auburn Univ. v. IBM Corp., No. 3:09-cv-694-MEF, 2010 WL 3927737, at \*2 (M.D. Ala. Oct. 4, 2010). The Court's review, in this instance, finds insufficient support to establish good cause to seal the submitted materials.

Based on the Court's in camera review of the materials submitted for filing under seal, the Court FINDS the following:

1. The materials submitted by the defendants for filing under seal include certain materials which, upon close review, do not appear to contain any confidential information. Namely, Exhibits K and L to the O'Brien Declaration are letters from counsel of record for the defendants to counsel of record for the plaintiff, dated February 13, 2012, and January 23, 2012, respectively, in which the author discussed disputed discovery issues in this litigation. Neither document bears a legend designating it "CONFIDENTIAL," as required by Paragraph 1 of the Agreed Protective Order (ECF No. 85) entered in this case on January 23, 2012, and having reviewed both documents in detail, the Court is unable to identify any information that appears to be confidential or otherwise worthy of protection. Indeed, these documents appear to disclose nothing of substance whatsoever.

2. The materials submitted by the defendants for filing under seal include Exhibit M, a copy of Plaintiff I/P Engine, Inc.'s Second Preliminary Disclosure of Asserted Claims and Infringement Contentions as to Google AdWords and Google AdSense for Search, served on February 17, 2012. This disclosure consists of a four-page main document and an attached 28-page claim chart. Both parts bear a legend designating them "CONFIDENTIAL - OUTSIDE COUNSEL ONLY," as required by Paragraph 1 of the Agreed Protective Order (ECF No. 85), and the right-hand column of the claim chart describes certain features of Google AdWords and Google AdSense for Search that allegedly infringe upon the plaintiff's patents, some of which may indeed be "confidential technical . . . or otherwise commercially sensitive information."<sup>1</sup> See Agreed Protective Order ¶ 1(A)(1), ECF No. 85. The left-hand column of the claim chart, however, consists entirely of quoted patent claim language from publicly available United States Patents. See generally ActiveVideo Networks, Inc. v. Verizon Commc'ns Inc., No. 2:10cv248, 2011 WL 3793168, at \*3 (E.D. Va. June 21, 2011) (quoting Acer Am. Corp. v. Tech. Props., No. C08-00877, 2009 WL 1363551, at \*1-\*2 (N.D. Cal. May 14, 2009)) ("As Rumpelstiltskin spun straw into gold, so have defendants attempted to spin these publicly available

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<sup>1</sup> Some or all of this material may be confidential, but it is also possible that none of it is. The parties must furnish the Court with specific facts and reasons to justify sealing this document, in part or in its entirety.

documents into confidential information." ). Moreover, the main document does not appear to disclose any information that is confidential or otherwise worthy of protection. If not unsealed in its entirety, the filing of a redacted version of this Exhibit would appear to be appropriate.

3. The materials submitted by the defendants for filing under seal include Exhibit N, a copy of a letter from counsel of record for the defendants to counsel of record for the plaintiff, dated February 27, 2012, in which the author discussed disputed discovery issues in this litigation. This document does not bear a legend designating it "CONFIDENTIAL," as required by Paragraph 1 of the Agreed Protective Order (ECF No. 85), but it appears to quote passages from the right-hand column of the claim chart in Exhibit M. Otherwise, the letter appears to disclose nothing of substance. To the extent that the quoted material in Exhibit M is indeed confidential, it would follow that the same information is confidential in this Exhibit as well. But, at a minimum, the filing of a redacted version of this Exhibit is appropriate.

4. The materials submitted by the defendants for filing under seal include an unredacted copy of the brief in support of their motion to compel. Two sentences are redacted from the public version of the brief. See Defs.' Br. in Supp. (public version) 10, ECF No. 105. The redacted material appears to quote and reference passages from the right-hand column of the claim chart in Exhibit

M. To the extent that the quoted material in Exhibit M is indeed confidential, it would follow that the same information is confidential in the brief as well. It is not clear whether the second redacted sentence, which merely references Exhibit M, discloses anything confidential or otherwise worthy of protection.

Accordingly, the Court will defer ruling on the Motion to Seal. The parties are ORDERED to show cause why each of the documents referenced above should not be unsealed and filed in the public record. Any party may respond to this Order to Show Cause by filing a written response within seven days of the date of this Order, setting forth any and all reasons why these documents should be filed under seal, whether in whole or in part, rather than in the public record of this case. If no response is filed within seven days of the date of this Order, the Court will issue a further order unsealing these materials and directing the Clerk to file them in the public record. In the interim, the Clerk shall continue to maintain the unredacted version of the defendants' brief and Exhibits K, L, M, and N (ECF No. 107) under seal.

IT IS SO ORDERED.

  
UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

May 3, 2012