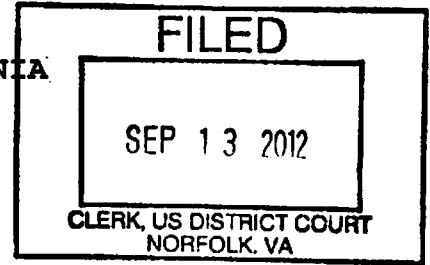


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



I/P ENGINE, INC.,
Plaintiff,

v.

Case No.: 2:11cv512

AOL, INC., et al.,
Defendants.

ORDER TO SHOW CAUSE

Before the Court is the Motion to Seal Portions of the Memorandum in Support of Defendants' Motion for Summary Judgment, Exhibits 4-9, 21-22, and 25-31 to the Declaration of Howard Chen in Support of Defendants' Motion for Summary Judgment, and the Declaration of Bartholomew Furrow in Support of Defendants' Motion for Summary Judgment (ECF No. 234), filed on September 12, 2012, by defendants Google Inc., Target Corporation, IAC Search & Media, Inc., Gannet Co., Inc., and AOL Inc.

For the reasons stated below, the Court finds the stated basis for sealing these materials to be manifestly insufficient to justify filing of these materials under seal. Accordingly, the Court will ORDER the parties to SHOW CAUSE why the specified materials should not be unsealed and filed in the public record.

The defendants have asked to file under seal portions of their Memorandum in Support of Defendants' Motion for Summary Judgment, portions of the Declaration of Bartholomew Furrow, and Exhibits 4,

5, 6, 7, 8, 9, 21, 22, 25, 26, 27, 28, 29, 30, and 31 to the Declaration of Howard Chen.¹ The parties have agreed that certain information contained in these materials should remain confidential, but “[w]hen discovery material is classified 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).

“When presented with a motion to seal judicial records or documents, a district court must comply with certain substantive and procedural requirements.” Va. Dep’t of State Police v. Wash. Post, 386 F.3d 567, 576 (4th Cir. 2004). In Ashcraft v. Conoco, Inc., 218 F.3d 282 (4th Cir. 2000), the Fourth Circuit set out the procedural requirements for sealing court filings. 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 procedural guidance to litigants with respect to motions to seal filed in this district.

But it is the substantive requirements that are at issue in this case. “The right of public access to documents or materials filed in a district court derives from two independent sources: the common law and the First Amendment.” Wash. Post, 386 F.3d at 575.

¹ Unredacted versions of these papers submitted for filing under seal have not yet been docketed. The public, redacted versions of these papers have been docketed as ECF Nos. 238-41.

This distinction is significant because "[t]he common law does not afford as much substantive protection to the interests of the press and the public as does the First Amendment." Rushford v. New Yorker Magazine, Inc., 846 F.2d 249, 253 (4th Cir. 1988). "When the First Amendment provides a right of access, a district court may restrict access 'only on the basis of a compelling governmental interest, and only if the denial is narrowly tailored to serve that interest.'" Wash. Post, 386 F.3d 575 (quoting Stone, 855 F.2d at 180).² Moreover, "[t]he burden to overcome a First Amendment right of access rests on the party seeking to restrict access, and that party must present specific reasons in support of its position." Id. (citing Press-Enter. Co. v. Superior Court, 478 U.S. 1, 15 (1986)).

Noting that "summary judgment adjudicates substantive rights and serves as a substitute for a trial," the Fourth Circuit has held that "the more rigorous First Amendment standard should also apply to documents filed in connection with a summary judgment motion in a civil case." Rushford, 846 F.2d at 252, 253. The defendants have requested to file portions of the memorandum in support of their motion for summary judgment, together with

² As this Court has previously noted, "several courts have also recognized that, in limited circumstances, certain . . . private interests might also implicate higher values sufficient to override . . . the First Amendment presumption of public access." Level 3 Commc'ns, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572, 580 (E.D. Va. 2009). See generally id. at 580-83 (discussing various private interests that have been recognized).

portions of a declaration and certain exhibits in support of that motion, under seal.

In support of the motion, the defendants merely characterize these materials, in conclusory fashion, as "data that is and should be kept confidential." Neither they nor the plaintiff has "present[ed] specific reasons in support of [their] position[s]." See Wash. Post, 386 F.3d at 575. "The First Amendment right of access cannot be overcome by [a] conclusory assertion." See Press-Enter., 478 U.S. at 15.

Nonetheless, the Court is sensitive to the potential damage that might be done should any actual confidential information be disclosed to the public prematurely. Accordingly, the Court ORDERS the parties to SHOW CAUSE why the unredacted version of the Memorandum in Support of Defendants' Motion for Summary Judgment, the unredacted version of the Declaration of Bartholomew Furrow, and Exhibits 4, 5, 6, 7, 8, 9, 21, 22, 25, 26, 27, 28, 29, 30, and 31 to the Declaration of Howard Chen should not be unsealed and filed in the public record.

The parties are DIRECTED to appear before the Court on September 18, 2012, at 12:00 noon to identify, on the record, any and all reasons why these materials should be filed under seal rather than in the public record of this case.³ The parties should

³ The Court notes that a hearing on certain discovery motions in this case is already scheduled for that date and time.

provide specific reasons why sealing these materials serves a compelling interest, governmental or private, and why there is no less restrictive way to serve that compelling interest.

In the interim, the Clerk shall continue to maintain the materials under seal.

IT IS SO ORDERED.


UNITED STATES MAGISTRATE JUDGE

Norfolk, Virginia

September 13, 2012