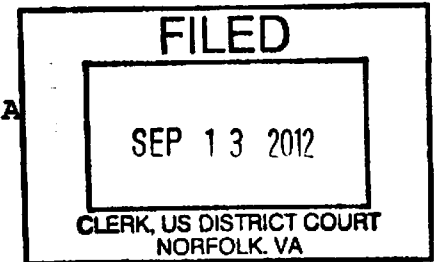


UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division



I/P ENGINE, INC.,

Plaintiff,

v.

Case No.: 2:11cv512

AOL, INC., et al.,

Defendants.

ORDER TO SHOW CAUSE

Before the Court are several motions by both sides seeking leave to file briefs and exhibits in support of various pretrial motions under seal. ECF Nos. 115, 125, 136, 181, 206, 214, 226. Each of these motions to seal is unopposed. In addition to the several motions to seal and related filings in the public record, the Court has reviewed in camera the unredacted briefs and exhibits submitted for filing under seal. For the reasons stated below, the Court finds the basis for sealing these materials unclear, at best, based upon both the motion papers and the Court's in camera review. 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 parties have each asked to file under seal various pretrial motion papers and exhibits in support thereof. They 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.

In Rushford v. New Yorker Magazine, 846 F.2d 249 (4th Cir. 1988), the Fourth Circuit outlined the substantive requirements for sealing pretrial court filings:

Under common law, there is a presumption of access accorded to judicial records. This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access. The trial court may weigh 'the interests advanced by the parties in light of the public interests and the duty of the courts.' The party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.

Id. at 253 (quoting Nixon v. Warner Commc'ns, Inc., 435 U.S. 589,

597 (1978)); see also Level 3 Commc'ns, LLC v. Limelight Networks, Inc., 611 F. Supp. 2d 572, 576-77 (E.D. Va. 2009).

In support of their several motions to seal, the parties merely characterize these materials, in conclusory fashion, as "proprietary and confidential information" and as "data that is and should be kept confidential." Neither side has provided any specific information to suggest that the parties' interests in maintaining the confidentiality of these materials "heavily outweigh the public interests in access." See Rushford, 846 F.2d at 253. Absent any specific information to establish a significant interest that outweighs the presumption of access, the Court cannot grant the motion to file these materials under seal.

Moreover, the Court's in camera review of these same materials suggest that the materials submitted for filing under seal contain little, if any, confidential information at all. In particular, the Court notes the following:

A. Plaintiff's Motion to Seal, ECF No. 115: Exhibits 15, 16, 17, 18, and 21 are all routine meet-and-confer correspondence between counsel in which search criteria for electronically stored information ("ESI") is discussed. Although the requested search criteria includes a number of technical terms which are referenced throughout the letters, the search criteria appears to be drawn from public information available on the internet, including printouts of several publicly accessible web pages that are

appended to the first letter identified as Exhibit 15.

B. Plaintiff's Motion to Seal, ECF No. 125: Exhibit 11 is a copy of plaintiff I/P Engine's second preliminary disclosure of infringement contentions with respect to Google AdWords and Google AdSense for Search, submitted for filing under seal to protect "Google's proprietary and confidential information." ECF No. 126. This document does not bear a legend designating it "CONFIDENTIAL," "CONFIDENTIAL OUTSIDE COUNSEL ONLY," or "RESTRICTED CONFIDENTIAL - SOURCE CODE," as required by Paragraph 1 of the Agreed Protective Order (ECF No. 85) entered in this case on January 23, 2012. Moreover, a substantively identical document was subsequently filed in the public record, without redaction, by defendant Google on September 12, 2012. See ECF No. 241 attach. 4. Exhibit 12 is a substantively identical disclosure of I/P Engine's infringement contentions with respect to defendant IAC Search & Media's use of Google AdWords and Google AdSense for Search. The redacted portions of the opposition brief consist primarily of quoted language from Exhibit 11, and the remainder does not appear to convey any confidential information at all. Finally, the Court notes that copies of Exhibits 14, 15, 18, 21, and 22, which are referenced in the motion to seal and the underlying motion to compel, do not appear to have been submitted to the Court for filing.

C. Defendants' Motion to Seal, ECF No. 136: Exhibit BB is

the very same routine meet-and-confer correspondence addressed above as Exhibit 21 under plaintiff's Motion to Seal, ECF No. 115, which does not appear to contain any confidential information. Exhibit AA is defendant Google's objections and answer to interrogatories with respect to its non-infringement contentions, which does not itself appear clearly to disclose any confidential information—it contains bates number references to various documents, some of which may themselves contain confidential information, but the narrative answers do not appear to reference any technical information that is not otherwise publicly available. The redacted portions of the reply brief include quoted language from Exhibit AA that conveys Google's litigation position rather than any confidential technical information, and references to the plaintiff's opposition brief addressed above under plaintiff's Motion to Seal, ECF No. 125, which do not appear to convey any confidential information at all.

D. Defendants' Motion to Seal, ECF No. 181: Exhibit P is routine meet-and-confer correspondence between counsel, addressing certain issues with respect to production of ESI, documents concerning a merger involving I/P Engine's parent company, the scope of certain Rule 30(b)(6) deposition topics, and the scheduling of certain depositions. None of this information appears to be even remotely confidential.

E. Defendants' Motion to Seal, ECF No. 206: Exhibits A, B,

C, and P are transcripts of deposition testimony by certain corporate officers of the plaintiff in which they discussed the organizational structure and business operations of the plaintiff and its parent companies, certain communications with potential investors in the plaintiff's parent company, and circumstances surrounding the plaintiff's acquisition of the patents-in-suit, none of which appear to be even remotely confidential. Exhibits H, I, L, M, and U are routine meet-and-confer correspondence between counsel regarding various discovery issues, none of which appears to involve the disclosure of any substantive information, much less anything confidential. Exhibit J is a stock subscription agreement between the plaintiff or its parent company and Donald Kosak, one of two named inventors of the patents-in-suit and a fact witness for the plaintiff, and Exhibit K is a transcript of deposition testimony by Mr. Kosak regarding a consulting agreement he entered into with counsel of record for the defendants, neither of which appears to contain any confidential information at all. Exhibits N, Q, S, and T are privilege logs containing little more than boilerplate language and disclosing nothing of substance, much less confidential information. Exhibit R is a transcript of deposition testimony by a corporate representative of the previous owner of the patents-in-suit, discussing his company's efforts to sell the patents-in-suit and the involvement of plaintiff's litigation counsel in those efforts; the transcript does not bear a legend

designating it "CONFIDENTIAL," as required by Paragraph 1 of the Agreed Protective Order (ECF No. 85), a portion of the transcript was subsequently filed in the public record by the plaintiff (ECF No. 223 attach. 1), and none of the content appears to be confidential. The redacted portions of the brief in support reference this same information, and they likewise do not appear to be confidential.

F. Defendants' Motion to Seal, ECF No. 214: Exhibit M is the very same second preliminary disclosure of infringement contentions addressed above as Exhibit 11 under plaintiff's Motion to Seal, ECF No. 125, substantively identical to a document subsequently filed in the public record, without redaction. See ECF No. 241 attach. 4. Exhibit N is plaintiff I/P Engine's third preliminary disclosure of infringement contentions, substantively identical to Exhibit M. The redacted portions of the opposition brief contain references to and language quoted from Exhibits M and N; despite their reliance on technical jargon, these passages do not themselves appear to convey any confidential information.

G. Defendants' Motion to Seal, ECF No. 226: The reply brief references the same brief and deposition testimony addressed above under the defendants' Motion to Seal, ECF No. 206.

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 materials described above 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.¹

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

¹ The Court notes that a hearing on certain discovery motions in this case is already scheduled for that date and time.