

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

MEMORANDUM IN SUPPORT OF MOTION TO SEAL (1) PORTIONS OF DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO PRECLUDE DR. OPHIR FRIEDER FROM TESTIFYING REGARDING UNTIMELY OPINIONS THAT WERE NOT DISCLOSED IN HIS ORIGINAL EXPERT REPORT AND OPINIONS THAT HE NOW CONCEDES ARE INCORRECT; (2) PORTIONS OF DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO EXCLUDE THE TESTIMONY OF STEPHEN L. BECKER; AND (3) PORTIONS OF EXHIBIT I TO THE DECLARATION OF HOWARD CHEN IN SUPPORT OF DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO PRECLUDE DR. OPHIR FRIEDER

In support of their Motion to Seal pursuant to Local Rule 5, and the Protective Order entered in this matter on January 23, 2012 (Dkt. No. 85), Defendants Google Inc., Target Corporation, IAC Search & Media, Inc., Gannett Co., Inc. and AOL Inc. (collectively "Defendants") state the following:

1. Defendants have moved the court for leave to file under seal (1) Portions of Defendants' Reply Brief in Support of Their Motion to Preclude Dr. Ophir Frieder From Testifying Regarding Untimely Opinions That Were Not Disclosed in his Original Expert Report and Opinions that he Now Concedes Are Incorrect ("Reply Brief to Preclude Dr. Frieder"); (2) Portions of Defendants' Reply Brief in Support of Their Motion to Exclude the Testimony of Stephen L. Becker ("Reply Brief to Preclude Dr. Becker"); and (3) Portions of Exhibit I to the

Declaration of Howard Chen in Support of Defendants' Reply Brief in Support of Their Motion to Preclude Dr. Ophir Frieder (“Exhibit I to the Chen Declaration”).

2. Portions of the Reply Brief to Preclude Dr. Frieder, Portions of the Reply Brief to Preclude Dr. Becker, and Portions of Exhibit I to the Chen Declaration contain data that is confidential under the Protective Order.

3. There are three requirements for sealing court findings: (1) public notice with an opportunity to object; (2) consideration of less drastic alternatives; and (3) a statement of specific findings in support of a decision to seal and rejecting alternatives to sealing. *See, e.g., Flexible Benefits Council v. Feldman*, No. 1:08-CV-371, 2008 U.S. Dist. LEXIS 93039 (E.D. Va. Nov. 13, 2008) (citing *Ashcraft v. Conoco, Inc.*, 218 F.3d 282, 288 (4th Cir. 2000)). Defendants contend that Portions of the Reply Brief to Preclude Dr. Frieder, Portions of the Reply Brief to Preclude Dr. Becker, and Portions of Exhibit I to the Chen Declaration contain data that is confidential under the Protective Order. Defendants specifically state as reasons for sealing the requested pleadings that:

(a) The Reply Brief in Support of Their Motion to Preclude Dr. Ophir Frieder From Testifying Regarding Untimely Opinions That Were Not Disclosed in his Original Expert Report and Opinions that he Now Concedes Are Incorrect contains confidential Google technical information that is not generally known, that has economic value, and would cause competitive harm if made public;

(b) The Reply Brief in Support of Their Motion to Exclude the Testimony of Stephen L. Becker contains confidential Google technical information, confidential Google financial information and confidential third-party licensing information that is not generally known, that has economic value and would cause competitive harm if made public; and

(c) Exhibit I to the Declaration of Howard Chen in Support of Defendants' Reply Brief in Support of Their Motion to Preclude Dr. Ophir Frieder contains confidential Google technical information that is not generally known, that has economic value, and would cause competitive harm if made public.

Defendants have made all reasonable efforts to limit their redactions in compliance with the law of this Circuit.

4. *In camera* copies of Portions of the Reply Brief to Preclude Dr. Frieder, Portions of the Reply Brief to Preclude Dr. Becker, and Portions of Exhibit I to the Chen Declaration have been forwarded to the Court. In light of Defendants' concerns and the Protective Order, there appears to be no alternative that appropriately serves Defendants' expressed confidentiality concerns.

5. For the sake of consistency with practices governing the case as a whole, Portions of the Reply Brief to Preclude Dr. Frieder, Portions of the Reply Brief to Preclude Dr. Becker, and Portions of Exhibit I to the Chen Declaration should remain sealed and be treated in accordance with the terms and conditions of the Protective Order.

Accordingly, and in satisfaction of the requirements of Local Rule 5, Defendants respectfully ask the Court to seal Portions of the Reply Brief to Preclude Dr. Frieder, Portions of the Reply Brief to Preclude Dr. Becker, and Portions of Exhibit I to the Chen Declaration.

DATED: October 2, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on October 2, 2012, 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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