

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

**JOINT RESPONSE TO THE ORDERS TO SHOW CAUSE**

Plaintiff I/P Engine, Inc. ("I/P Engine") and Defendants Google Inc. ("Google"), IAC Search & Media, Inc., Target, Corp., and Gannett Co., Inc., ("Defendants"), collectively, "the Parties"), by counsel, respond to this Court's two Orders to Show Cause dated September 13, 2012 (ECF Nos. 244 & 245) and respectfully move the Court for entry of the attached Order permitting the Parties to unseal, redact, or retain sealing for the documents at issue.

The information sought to be sealed contains confidential information relating to I/P Engine and/or Google. The documents relating to Google contain extraordinarily sensitive and valuable information regarding Google's products and the public disclosure of such information would hurt Google's customers by increasing the rankings of lower quality advertisements. A lack of Court protection of the aforementioned information would cause Google severe economic harm because the information could be used by Google's competitors to attempt to mimic Google's unique, successful, and, thus far, confidential details of its advertising system. (*See* Declaration of Michael Hochberg In Support of Plaintiff's and Defendants' Motions to Seal, filed in connection with Defendants' Motion to Seal Documents and Close the Courtroom During Presentation of Confidential Materials at Trial ¶¶ 17 & 18 ("Hochberg Dec.")) The documents

relating to I/P Engine contain confidential information regarding I/P Engine's business, including future potential business opportunities, as well as personal financial information pertaining to third party Donald Kosak.

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 (4<sup>th</sup> Cir. 2000)). The Parties are sensitive to the Circuit's law restricting the sealing of materials and, therefore, have attempted to seek protection of only those portions that are absolutely necessary. The Parties contend that the documents sought to be redacted or retained under seal *contain confidential material that should be sealed*.

## **I. DOCUMENTS THE PARTIES SEEK TO MAINTAIN UNDER SEAL**

The Parties contend that Exhibits 14, 18 and 21 to the Plaintiff's Motion to Seal (ECF No. 125) and Exhibits 9 and 25 to the Declaration of Howard Chen (ECF No. 238-41.) contain exclusively confidential data and should be kept under seal. In particular, these Exhibits should be sealed for the following reasons:

### **A. ECF No. 125:**

1. Exhibits 14 and 18 are internal Google documents designated "Confidential Outside Counsel Only." They contain highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic

value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)

2. Exhibit 21 is a stipulation describing confidential agreements and terms of agreement between Google and its co-defendants in this case. This exhibit contains highly confidential partnership and economic information regarding Google's relationship with the co-defendants that is not generally known to the public. Google competitors could derive economic value from the disclosure of this information, causing Google severe competitive harm.

**B. ECF Nos. 234-41:**

1. Exhibits 9 and 25 are internal Google documents designated "Confidential Outside Counsel Only." They contain highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)

In light of Google's concerns and the Protective Order, there appears to be no alternative that appropriately serves Google's expressed confidentiality concerns other than to maintain these Exhibits completely under seal. The Parties therefore respectfully requested that the Court enter the Proposed Agreed Order attached as **Exhibit 1** sealing the aforementioned exhibits, and the Court entered a revised version at ECF No. 469. The Clerk will maintain these pleadings under seal per a revised version of Exhibit 1, which the Court has already entered at ECF No. 469.

## II. DOCUMENTS THE PARTIES SEEK TO FILE WITH REDUCED REDACTIONS

A number of the documents previously filed under seal contain confidential information. However, the Parties have revised the redactions to these documents and seek the narrow sealing of only the most confidential portions, as follows:

1. **ECF No. 115:** Exhibits 15, 16, 17, and 21 are correspondence between the Parties that contain highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)
2. **ECF No. 125:** Exhibits 11, 12, 15, and 22, I/P Engine's Brief in Opposition to Google, and IAC's Motion to Compel are pleadings and correspondence that contain highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)
3. **ECF No. 136:** Exhibits AA and BB are a pleading and a letter, respectively, that contains highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic value from the

disclosure of this information, causing Google severe competitive harm.

(See Hochberg Dec. ¶¶ 9-18)

4. **ECF No. 181:** Exhibit P is a letter between the Parties' counsel describing confidential, internal Google processes for document retention.
5. **ECF No. 206:**
  - (a) Exhibits A, B, and C are excerpts of depositions of I/P Engine's officers. These deposition excerpts have limited redactions containing confidential information regarding the future business of I/P Engine or its affiliates or shareholders, including future potential business opportunities and private stock offerings.
  - (b) Exhibit J is a Stock Subscription Agreement with third party Donald Kosak, and Exhibit K are excerpts from Mr. Kosak's deposition. These exhibits have been redacted with reference to personal financial information pertaining to third party Donald Kosak. The Brief in Support of Defendants Motion to Compel has been redacted to remove references to the foregoing confidential information. The redacted materials contain confidential and proprietary information regarding I/P Engine, its affiliates, and shareholders, that is not generally known to the public and that, if disclosed, could cause competitive harm.
6. **ECF No. 214:** Exhibits M and N are pleadings that contains highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could

derive economic value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)

7. **ECF Nos. 234-41:** Exhibits 4, 5, 6, 7, 8, 9, 21, 22, 26, 27, 28, 29, and 30, the Declaration of Bartholomew Furrow in Support of Defendants' Motion for Summary Judgment, and the Memorandum in Support of Defendants' Motion for Summary Judgment all contain highly confidential technical information regarding Google's accused products that is not generally known to the public. Google competitors could derive economic value from the disclosure of this information, causing Google severe competitive harm. (*See* Hochberg Dec. ¶¶ 9-18)

Although the Parties originally requested that the entirety of these Exhibits be filed under seal, the Parties now ask that the Court redact only the highly confidential information from these exhibits. *In camera* copies of these Exhibits were provided to the Court, and proposed redacted versions of the Exhibits are attached hereto. In light of the Parties' concerns and the Protective Order, there appears to be no alternative that appropriately serves the Parties' expressed confidentiality concerns other than to redact these exhibits as proposed by the Parties. The Parties therefore respectfully requested that the Court enter the Proposed Agreed Order attached as **Exhibit 1** sealing portions of the aforementioned exhibits which the Court entered at ECF No. 469. Lesser redacted copies of these documents will be filed as per the revised version of Exhibit 1 that the Court has already entered at ECF No. 469.

**III. DOCUMENTS THE PARTIES AGREE TO UNSEAL IN FULL**

The Parties agree to completely unseal the following documents:

- A. **ECF No. 115:** Exhibit 18 to Plaintiff's Motion to Seal.
- B. **ECF No. 206:** Exhibits H, I, L, M, N, P, Q, R, S, T, and U.
- C. **ECF No. 226:** The Reply Brief in Support of the Motion to Compel.
- D. **ECF No. 234-31:** Exhibit 31 to the Declaration of Howard Chen in Support of Defendants' Motion for Summary Judgment.

Unredacted copies of these Exhibits will be filed publicly with the Court as per a revised version of Exhibit 1 which the Court has already entered at ECF No. 469.

DATED: October 3, 2012

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### **CERTIFICATE OF SERVICE**

I hereby certify that on October 3, 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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