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

DEFENDANTS' REPLY BRIEF IN SUPPORT OF THEIR MOTION TO SEAL DOCUMENTS AND CLOSE THE COURTROOM DURING PRESENTATION OF CONFIDENTIAL MATERIAL AT TRIAL

There is good reason to close the Courtroom for specific, highly confidential information, the disclosure of which will not only harm Google but consumers in general. Realizing this, Plaintiff does not oppose the actual relief Google is seeking. Plaintiff acknowledges that it "likely will not oppose a brief closure of the courtroom upon a showing that it is the only way of preserving legitimate, highly confidential information that previously has not been publicly disclosed." (D.N. 516, 1.) This is precisely the type of protection for confidential materials Defendants are seeking through their Motion. Defendants seek to protect highly confidential engineering, licensing, and financial materials through the limited closing of the courtroom and the sealing or redaction of documents.[1] Defendants do not intend to create a revolving door whereby the courtroom is repeatedly open and shut, and they will work with the Court and opposing counsel to minimize any closure. They do not seek wholesale sealing of documents. They simply request protection for a limited set of highly confidential materials that may be presented during trial. As a result, this Court should grant the relief requested.

[1] Although Defendants' Motion asks that confidential documents be sealed, Defendants will redact and present for the public record any documents that can be redacted rather than fully sealed.

Dockets.Justia.com

I. Defendants Will Specify Exactly What Information They Seek to Protect.

Plaintiff's chief complaint is that Defendants' Motion "lacks specificity." (D.N. 516, 2.) But as Defendants made clear in their Motion, and Plaintiff ignores, the parties have identified hundreds of exhibits and many hours of deposition testimony for use during trial. Rather than list every possible piece of evidence, Defendants have identified a narrow scope of items for which they seek this Court's protection. Because the parties are only just beginning to meet and confer about the introduction of evidence during the trial, Defendants cannot yet know "what the full scope of evidence will be at trial or what Plaintiff intends to introduce." (D.N. 347, 5.) Further, much of the evidence for which Defendants may seek protection is the subject of pretrial motions to exclude, so it may or not may be at issue in the case at all.[2] (*See, e.g.,* D.N. 303.)

Once the parties' cases have been narrowed through the meet and confer process and the Court's rulings, Defendants will be better able to present a very limited list of confidential material, consistent with the narrow scope identified, for which they seek protection during trial. Plaintiff ignores that Defendants already have agreed to meet and confer in good faith about this issue and that Defendants "anticipate supplementing this motion with a specific and narrowly tailored list of evidence that should not be heard in open court, along with tailored evidence and testimony justifying the request after such meet and confer takes place." (D.N. 347, 10.)

II. Plaintiff Does Not Address Defendants' Justifications for Protecting Confidential Information.

Plaintiff does not take issue with the reasons proffered for closure. Indeed, Plaintiff never addresses or refutes the detailed justifications Defendants provided concerning the narrow categories of information set forth in their Motion are confidential and deserve protection from the Court. (*See* D.N. 347, 6-10; *see also* D.N. 351, D.N. 351, D.N. 414.) For example,

---

[2] Defendants will not engage Plaintiff's attempts to disparage their actions in this case or

Defendants seek protection for source code—the veritable "keys to the kingdom" and the very material protected by the court in *Viacom Int'l, Inc. v. Youtube Inc.*, 253 F.R.D. 256 (S.D.N.Y. 2008), one of the many supporting cases cited in Defendants' brief that Plaintiff ignores. Defendants provide explanation for the protection of this confidential material in their Motion, (D.N. 347, 6-8; *see also* D.N. 414.) Plaintiff disregards this information.

Plaintiff further does not take issue with the profound harm that the disclosure of Google's confidential intellectual property agreements or information would work on Google's competitive standing or upon the consumer at large. (D.N. 346, 8.) Plaintiff further ignores the fact that third party signors to these agreements would be harmed if their confidential information was disclosed to the public. (*Id.*; D.N. 351 ¶ 4.) And while Plaintiff states, "Defendants have failed to identify anything that distinguishes their financial information from the financial information that is ordinarily considered in other patent trials." (D.N. 516, 5-6), Plaintiff fails to acknowledge Defendants' proffered justifications for protecting highly confidential, non-public financial data.[3] (*See* D.N. 347, 9-10; D.N. 350.)

Google is a defendant in this action. It has not chosen to expose its highly confidential materials for its own gains. Google should be able to fully defend itself and expose the clear deficiencies in Plaintiff's case at trial without jeopardizing the business it has built on this confidential information.

---

their trial strategy.

[3] The cases Plaintiff cites in support of its assertion that damages evidence in civil cases should not be sealed are not on point as they address the closing of criminal trials. *See* D.N. 516, 6 (citing *Presley v. Georgia*, 130 S. Ct. 721, 725 (2010); *Globe Newspaper Co. v. Superior Court for Norfolk County*, 457 U.S. 596 (1982).)

III. Defendants Will Not Seek to Close the Courtroom in Relation to Publicly Available Materials.

Plaintiff asserts – without basis – that Defendants are seeking to conceal public documents concerning the technology at issue in this case. (D.N. 516, 4-5.) Defendants have not and will not seek to close the courtroom during testimony related to public marketing documents or any documents that are publicly available.[4] Defendants made clear in their Motion that they are seeking protection only for <u>confidential</u> evidence related to the design and technology underlying Defendants' advertising products. (D.N. 347, 6.) Under the law of this Circuit, only such confidential information would qualify for the protection that Defendants seek, and Defendants have narrowly crafted their request to meet this law.

CONCLUSION

For the foregoing reasons and those presented in Defendants' Motion to Seal Documents and Close the Courtroom During Presentation of Confidential Material at Trial should be granted.

---

[4] Google would object to reference to material improperly made publicly available through a violation of the Protective Order or a confidentiality agreement.

DATED: October 4, 2012

/s/ Stephen E. Noona
Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624-3000
Facsimile: (757) 624-3169
senoona@kaufcan.com

David Bilsker
David A. Perlson
QUINN EMANUEL URQUHART & SULLIVAN, LLP
50 California Street, 22nd Floor
San Francisco, California 94111
Telephone: (415) 875-6600
Facsimile: (415) 875-6700
davidbilsker@quinnemanuel.com
davidperlson@quinnemanuel.com

Counsel for Google Inc., Target Corporation, IAC Search & Media, Inc., and Gannett Co., Inc.

/s/ Stephen E. Noona
Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 W. Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624-3000
Facsimile: (757) 624-3169

Robert L. Burns
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
Telephone: (571) 203-2700
Facsimile: (202) 408-4400

Cortney S. Alexander
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
3500 SunTrust Plaza
303 Peachtree Street, NE

Atlanta, GA 94111
Telephone: (404) 653-6400
Facsimile: (415) 653-6444

Counsel for Defendant AOL Inc.

CERTIFICATE OF SERVICE

I hereby certify that on October 4, 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:

Jeffrey K. Sherwood
Kenneth W. Brothers
DICKSTEIN SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006
Telephone: (202) 420-2200
Facsimile: (202) 420-2201
sherwoodj@dicksteinshapiro.com
brothersk@dicksteinshapiro.com

Donald C. Schultz
W. Ryan Snow
Steven Stancliff
CRENSHAW, WARE & MARTIN, P.L.C.
150 West Main Street, Suite 1500
Norfolk, VA 23510
Telephone: (757) 623-3000
Facsimile: (757) 623-5735
dschultz@cwm-law.cm
wrsnow@cwm-law.com
sstancliff@cwm-law.com

Counsel for Plaintiff, I/P Engine, Inc.

/s/ Stephen E. Noona
Stephen E. Noona
Virginia State Bar No. 25367
KAUFMAN & CANOLES, P.C.
150 West Main Street, Suite 2100
Norfolk, VA 23510
Telephone: (757) 624-3000
Facsimile: (757) 624-3169
senoona@kaufcan.com

11961473v1