UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

I/P ENGINE, INC.,	)	
Plaintiff,	)	
v.	)	No. 2:11-cv-512
AOL, INC., *et al*.,	)	
Defendants.	)	

BRIEF IN OPPOSITION TO
DEFENDANTS' MOTION TO SEAL TRIAL EXHIBITS
AND CLOSE THE TRIAL PROCEEDINGS

Defendants have filed a motion to seal as yet unidentified trial exhibits and to close as yet unspecified portions of the trial. (Doc. 346.) Suffolk Technologies, LLC ("Suffolk"), an interested party, opposes that motion, seeks notice of and an opportunity to be heard at any sealing hearings. Suffolk also seeks access to the trial exhibits when offered and admitted, seeks to be present at trial, and seeks copies of the trial transcripts. Furthermore, Suffolk seeks access to the summary judgment exhibits. Defendants' motion analyzes the sealing issues under the wrong (common law) standard. (*See* Doc. 347 at 2-4.) The standard that applies to summary judgment and trial materials is the "more rigorous" First Amendment standard, which requires that Defendants show a "compelling governmental interest" to justify sealing of judicial records and closure of trial proceedings. No such showing has been made.

Specifically, Defendants seek to seal trial exhibits and close the courtroom during trial whenever the following three topics are presented:

> (1) how AdWords and AdSense for Search determine which advertisements to display to users, (2) Google's confidential patent license agreements and other

> intellectual property agreements, and (3) Defendants' confidential, non-public financial information.

(*See* Doc. 347 at 1.) Defendants make the generalized and conclusory assertion that these categories constitute "extraordinarily sensitive and valuable confidential business information." (*Id*.). The Defendants generalized assertions do not satisfy the First Amendment standard.

To be sure, if a proper showing is made, trade secret information may be protected from public disclosure in trial exhibits and other judicial records, as well as in trial proceedings. The necessary showing is exacting, however, and any sealing, redaction, or closure must be narrowly tailored. Defendants' generalized statement of their interests is not sufficient, and their proposals for sealing and closure are not narrowly tailored. The motion to seal and for closure must be denied at this time.

SUFFOLK'S STATEMENT OF INTEREST

Any member of "the public" has standing to oppose a sealing request. *See In re Knight Pub. Co.*, 743 F.2d 231 (4th Cir. 1984). Here, Suffolk's standing to seek access is underscored by its interest in the particular categories of information that Defendants' now seek to have sealed.

In June 2012, Suffolk commenced a patent infringement action against defendants, AOL Inc. ("AOL") and Google Inc. ("Google"), asserting two patents, one pertaining to generating summaries of information in response to a search, United States Patent No. 6,334,132 ("'132 patent"), and the other pertaining to the operation of an Internet server with respect to the decision as to the particular file, if any, to be transmitted in response to a request, U.S. Patent No. 6,081,835 ("'835 patent"). *Suffolk Tech. LLC v. AOL Inc. and Google Inc.*, No. 1:12cv625 (TSE/IDD) (E.D. Va. filed June 7, 2012) ("*Suffolk Action*"). The accused instrumentalities

include Google's "AdWords" and "AdSense" services, as well as AOL's proprietary "ad serving" technology—the same instrumentalities that are accused in this action.

In the *Suffolk Action*, the parties are litigating, *inter alia*, the manner in which the accused instrumentalities work and the damages that may be awarded to Suffolk for AOL and Google's alleged infringement. Accordingly, Suffolk has an interest in all three categories of information that Defendants seek to seal.

First, Suffolk has an interest in "how AdWords and AdSense for Search determine which advertisements to display to users" because Suffolk has accused the same instrumentalities of infringing its patents.

Second, Suffolk has an interest in "Google's confidential patent license agreements and other intellectual property agreements" because those agreements are considered in the damages analysis. As damages, Suffolk is seeking a reasonable royalty. The commonly used reasonable royalty analysis involves consideration of the 15 factors enumerated in the *Georgia-Pacific* case. *Lucent Techs, Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1324 (Fed. Cir. 2009); *see also i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 853 n.3 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2238 (2011); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970). Factor 2 in the *Georgia-Pacific* analysis examines "The rates paid by the [defendant] for the use of other patents comparable to the patent in suit." Thus, Suffolk has an interest in Google's "patent license agreements and other intellectual property agreements."

Third, Suffolk has an interest in AOL and Google's "confidential, non-public financial information" because, for example, Factors 8 and 13 in the *Georgia-Pacific* analysis examine "profitability of the product made under the patent; its commercial success; and its current popularity," and the "portion of the realizable profit that should be credited to the invention as

distinguished from non-patented elements, the manufacturing process, business risks, or significant features or improvements added by the infringer." *Georgia-Pacific*, 318 F. Supp. at 1120. Suffolk, therefore, has an interest in detailed financial information from each accused infringer.

ARGUMENT

Sealing must be sought and justified on a document-by-document basis; the substantive test for sealing must be met; the procedural requirements for sealing must be satisfied; and the sealing or redaction must be as narrow as possible. None of the necessary predicates for sealing has been satisfied by Defendants' motion. Moreover, Defendants have analyzed sealing under the wrong standard. Defendants' sealing and closure motion must be denied at this time.

I. GOVERNING PRINCIPLES OF LAW

Choice of Law: In patent infringement litigation, the Federal Circuit has ruled that procedural matters that do not implicate issues unique to patent law are governed by regional circuit and local district law. *Biodex Corp. v. Loredan Biomedical, Inc.*, 946 F.2d 850, 857 (Fed. Cir. 1991) (regional circuit and local rules govern procedural matters). Under this rule, the Court should apply "the law of the United States Court of Appeals for the Fourth Circuit in analyzing [a] motion to seal, which clearly is procedural and does not implicate any issues unique to patent law." *Level 3 Comm., LLC v. Limelight Networks, Inc*., 611 F. Supp. 2d 572, 575 (E.D. Va. 2009). Thus, Fourth Circuit law and Eastern District of Virginia local rules are applied herein.

The Right of Access to Judicial Records: Under the common law, judicial records are presumptively public: "It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." *See Nixon v. Warner Comm., Inc.*, 435 U.S. 589, 597 (1978). Moreover, under the First Amendment,

the press and public alike have a right of access to attend trials—both criminal and civil. *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 603 (1982) (criminal); *Craig v. Harney*, 331 U.S. 367, 374 (1947) (a civil trial is "a public event").[1] The First Amendment right also has been extended to certain pretrial hearings, depending upon the historical tradition of openness and the value of public scrutiny of that proceeding. *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501 (1984) ("*Press-Enterprise I*"); *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) ("*Press-Enterprise II*"). Where a First Amendment right of access attaches to the pretrial proceeding or hearing, the same right of access applies to papers and documents filed in association with that proceeding or hearing, in both criminal and civil cases. *See In re Washington Post Co.*, 807 F.2d 383, 389-90 (4th Cir. 1986) (access to records of plea and sentencing proceedings); *Rushford v. The New Yorker Magazine, Inc.*, 846 F.2d 249, 252-54 (4th Cir. 1988) (access to summary judgment record). Thus, there are ***two*** sources of a right of access to judicial records, not just the common law right of access cited in Defendants' moving papers.[2]

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[1]/ Much of the case law concerning open hearings and access to judicial records has been developed in criminal cases—and often reveals the tension between having public criminal proceedings and preserving the defendant's right to a fair trial before an impartial jury. *See Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 547-51 (1976). The same principles of openness—open judicial records and open trials—apply to civil cases. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 & n.9, 580 n.17 (1980).

[2]/ Although known as the "First Amendment right of access," this right is not reserved for the press. "It has generally been held that the First Amendment does not guarantee the press a constitutional right of special access to information not available to the public generally … ." *Branzburg v. Hayes*, 408 U.S. 665, 684-85 (1972). "The First and Fourteenth Amendments bar government from interfering in any way with a free press. The Constitution does not, however, require the government to accord the press special access to information not shared by members of the public generally." *Pell v. Procunier*, 417 U.S. 817, 833-34 (1974). The First Amendment protects a freedom of the press, of course, but it also secures for every citizen freedom of speech, as well as the rights to peaceably assemble and to petition the government, which together give rise to the First Amendment right of access to judicial proceedings and records. *See Richmond Newspapers, Inc. v. Virginia*, 448 U.S. at 575.

Each right of access applies to a different set of judicial records. The common law right of access applies to "all judicial records and documents," while the First Amendment right of access applies "only to particular judicial records and documents," such as exhibits filed in connection with plea hearings and sentencing hearings in criminal cases, and trial proceedings and dispositive motions in civil cases. *Stone v. University of Maryland Medical Sys. Corp.*, 855 F.2d 178, 180-81 (4th Cir. 1988). Thus, when a civil action is commenced, the ***common law*** right of access attaches to all the "judicial records and documents" in the case file. Then, when the merits are presented to the Court, the ***First Amendment*** right of access attaches to dispositive motions and the trial.

The right of access—whether common law or First Amendment—also determines the showing that must be made to keep judicial records under seal. The Supreme Court has recognized that "the [common law] right to inspect and copy judicial records is not absolute. Every court has supervisory power over its own records and files, and access has been denied where the court files might have become a vehicle for improper purposes," such as promoting spite, libel, and public scandal, invading privacy, or injuring a litigant's "competitive standing." *Nixon v. Warner Communications*, 435 U.S. at 598. Exercising that supervisory power is committed to the "sound discretion" of the district court, which is to be "exercised in light of the relevant facts and circumstances of the particular case." *Id.* at 598-99. Thus, both compelling private and public concerns may overcome the common law right of access and justify sealing a judicial record.

On the other hand, if the First Amendment right of access applies to the judicial records, then access can be denied only if—and only to the extent—necessary to advance "a compelling governmental interest." *Press-Enterprises I*, 464 U.S. at 510. The same rule applies in civil

cases. *Rushford*, 846 F.2d at 253 (proponent must show that sealing serves an "important governmental interest"). As is shown below, for each of the judicial records now at issue, as well as the trial proceedings, the First Amendment right of access applies.

Mandatory Procedures for Sealing: Under Fourth Circuit law, the Court must do the following prior to sealing any judicial records:

> (1) give public notice of the request to seal and allow interested parties a reasonable opportunity to object, (2) consider less drastic alternatives to sealing the documents, and (3) provide specific reasons and factual findings supporting its decision to seal the documents and for rejecting the alternatives.

Ashcraft v. Conoco, Inc., 218 F.3d 282, 288 (4th Cir. 2000). To satisfy the first requirement, the Court must provide notice of a request for sealing in the court record and provide interested persons with "an opportunity to object." *In re Knight Pub. Co.*, 743 F.2d 231, 235 (4th Cir. 1984). Individual notice is not required, and the Court may give adequate notice either by "notifying the persons present in the courtroom of the request to seal" at the time of the hearing, or by "docketing [the sealing request] in advance of deciding the issue." *Id.* To meet the second requirement, the Court must consider using redactions or limited sealing (either scope or duration) in lieu of permanent blanket sealing. And to meet the third requirement, the Court must make specific findings, supported by the record, that justify sealing under the applicable standard—either the First Amendment or common law. Any sealing order that fails to satisfy these three requirements is "invalid." *Ashcraft*, 218 F.2d at 288. The *Ashcraft* procedures must be strictly followed by the Court.

II. THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES TO SUMMARY JUDGMENT MOTIONS AND TRIAL IN CIVIL CASES

Defendants have analyzed the sealing request under the common law right of access, which is the wrong standard. In civil cases, the First Amendment right of access applies to trials, trial exhibits, and trial transcripts, as well as to the materials submitted in support of, and in

opposition to a motion for summary judgment. The "more rigorous" First Amendment standard requires that a sealing-proponent prove that sealing judicial records, hearings, and trials serves a "compelling governmental interest," demonstrate that there is no less drastic alternative means available to protect those interests, ***and*** propose narrowly tailored sealing.

Summary Judgment: The case is now at the adjudication phase, and sealing is disfavored. It is settled that civil discovery proceedings are "not a public components of a civil trial," and, in general, civil discovery is "conducted in private as a matter of modern practice;" therefore, the "raw fruits" of civil discovery are not judicial records and a protective order may be entered limiting public disclosure to discovery materials. *See Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 33-35 (1984). When discovery materials are filed with the district court, however, a tension arises between the parties' interests in keeping civil discovery confidential and the public's common law or First Amendment right of access to judicial records. *See Rushford*, 846 F.2d at 251-52. Generally, confidential discovery materials filed in connection with a summary judgment motion give rise to a First Amendment right of access because "summary judgment adjudicates substantive rights and serves as a substitute for a [public civil] trial." *Id.* at 252. Once discovery materials "are made part of a dispositive motion, such as a summary judgment motion, they lose their status of being raw fruits of discovery," and become "judicial documents." *Id.* (citation and internal quotations omitted). Similarly, in *Seattle Times*, the Supreme Court distinguished between information and materials that had been "discovered" (to which there is no right of access) and those that have been "admitted" into evidence for an adjudication on the merits (to which there is a right of access). *Seattle Times*, 467 U.S. at 33. Thus, the First Amendment right of access applies to the briefs and exhibits submitted in support of, and in opposition to, a motion for summary judgment.

To be sure, "there may be instances in which discovery materials should be kept under seal even after they are made part of a dispositive motion," but the entry of a blanket protective order during discovery proves nothing. *Rushford*, 846 F.2d at 253. "The reasons for granting a protective order to facilitate pre-trial discovery may or may not be sufficient to justify proscribing the First Amendment right of access to judicial documents." *Id.* at 254. Thus, where, as here, a blanket protective order has been entered that allows the parties to designate discovery materials as "confidential," the Court still must review the materials when filed in connection with summary judgment and independently determine whether those materials should be sealed. *See In re Time, Inc.*, 182 F.3d 270, 271-72 (4th Cir. 1999). At this stage, a party may not merely rest on its own confidentiality designations or those of its opponent. The Court must consider the summary judgment exhibits one-by-one to determine whether sealing is appropriate.

Suffolk respectfully submits that the necessary procedures for sealing summary judgment exhibits have not been followed, nor has the necessary showing been made. The Fourth Circuit has held that "the more rigorous First Amendment standard should … apply to documents filed in connection with a summary judgment motion in a civil case." *Rushford*, 846 F.2d at 253. To justify sealing under this standard, the sealing-proponent must show that sealing "serves an important governmental interest and that there is no less restrictive way to serve that governmental interest." *Id.* The procedures pursuant to which the sealing determinations are made, moreover, must meet the criteria set forth in *Knight*. *Id.* Those were not followed here.

During summary judgment briefing, the parties utilized Local Civil Rule 5(D) and filed sealing motions together with the proposed sealed filings. (*E.g.*, Doc. 235 & 425.) By rule, those proposed sealed filings remained under seal pending a decision by the Court. E.D.VA.CIV.R. 5(D). The Court issued an *Order to Show Cause* regarding those sealing requests

and held a hearing on September 18, 2012. (Doc. 244 & 274.) At that hearing, the Court "inquired as to the pending motions to seal in the case. The parties were directed to submit to chambers an agreed order regarding the sealing of documents in the case by Monday, September 24, 2012 at noon." (Doc. 274). An agreed order was submitted and entered on September 28, 2012, unsealing some exhibits but maintaining the seal as to others. (Doc. 469 ("*Agreed Sealing Order*").) The parties' mere agreement to seal exhibits does not satisfy the First Amendment standard. *R&G Mortgage Corp. v. Federal Home Loan Mtg. Corp*., 584 F.3d 1, 12 (1st Cir. 2009) ("Sealing orders are not … available upon request or as a mere accommodation."); *accord* E.D.VA.CIV.R. 5(A) ("no document may be filed under seal without an order entered by the Court"). Respectfully, the *Agreed Sealing Order* does not make specific findings, supported by the record, that justify sealing under the applicable First Amendment standard, or consider less restrictive sealing, and therefore is "invalid." *Ashcraft*, 218 F.2d at 288. Thus, the entry of the *Agreed Sealing Order* does not bar further inquiry based on Suffolk's objection.

Although summary judgment has been denied (Doc. 572), Suffolk respectfully requests the opportunity to be heard regarding the numerous sealed filings made by the parties, so it may seek access to the remaining sealed summary judgment exhibits.

Closing Trial: By rule, "Every trial on the merits must be conducted in open court … ." FED.R.CIV.P. 77(b). A civil trial is a "public event," and "[w]hat transpires in the court room is public property." *Craig v. Harney*, 331 U.S. at 374. Thus, the trial should be held in open court unless Defendants make a proper showing for closure, which they have not.

The standard and procedures for closing a courtroom during trial or for motions are very strict under Fourth Circuit law:

> There is a strong presumption in favor of openness: Closed proceedings ... must be rare and only for cause shown that outweighs the value of openness. ... The

> presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.… Even with findings adequate to support closure, the trial court must consider alternatives before the courtroom can be closed constitutionally.
>
> To facilitate a trial court's case-by-case determination of closure, representatives of the press and general public must be given an opportunity to be heard on the question of their exclusion. When a closure motion is made in open court, persons present must be given notice and an opportunity to object before the public can be excluded.

In Re Knight, 743 F.2d at 234 (citations and internal quotation marks omitted). No such showing has been made nor have the necessary procedures been followed.

One of the "rare" instances in which a trial may be sealed for "cause shown" would be to protect trade secrets. Where a civil litigant's "trade secrets" are contained in the judicial record, the value of which property rights would be destroyed by public disclosure in a trial or hearing, a sufficient "compelling governmental interest" exists to warrant sealing of the courtroom and the pertinent judicial documents. *See In re Iowa Freedom of Information Council*, 724 F.2d 658 (8th Cir. 1983); *accord Woven Elec. Corp. v. The Advance Group Inc.*, 19 U.S.P.Q.2d 1439, 1443, 1991 U.S. App. LEXIS 14345, *16-19 (4th Cir. 1991) (citing and following *Iowa Freedom of Information Council*) (district court may close civil trial and seal trial record as necessary to protect litigant's "trade secrets"). The Fourth Circuit, however, made it clear in *Woven* that it was "not announcing a blanket rule that the presence of trade secrets will in every case and at all events justify the closure of a hearing or trial." *Level 3*, 611 F. Supp. 2d at 582 (quoting *Woven*). Yet that is what Defendants want—closure "whenever" any testimony or exhibits are offered at trial pertaining to the three broadly stated categories they have identified.

Closure of trial is a very unusual and rarely granted protection. The sealing-proponent must make a detailed showing that the information really is a trade secret. Generalities and conclusory assertions are not sufficient. *Cf. Presley v. Georgia*, 130 S. Ct. 721, 725 (2010) ("If broad concerns of this sort were sufficient… a court could exclude the public… almost as a matter of course."). Defendants' motion to seal the trial fails to make a particularized showing necessary to justify closing the courtroom during trial.

Similarly, any closure order must be narrowly tailored. The Defendants' open-ended and undefined proposal for closure fails in this regard, as well.

Suffolk respectfully submits that the Court should not enter any order generally closing the trial or identifying in advance particular topics that will warrant closure. Instead, if and when trade secret information is proffered, notice must be given, and the sealing-proponent must show that a "compelling governmental interest" justifies closure of the courtroom.

Trial Exhibits: Under the local rules, trial exhibits, "including documents previously filed under seal," cannot be "filed under seal except upon a showing of necessity demonstrated to the trial judge." E.D.VA.CIV.R. 5(H). Under local practice the parties must identify their trial proposed exhibits in their respective Rule 26(a)(3) disclosures, but they do not file their proposed trial exhibits until one day before trial. *See* E.D.VA.CIV.R. 79(A). Until exhibits are offered and admitted, they are not necessarily judicial records. *See Seattle Times*, 467 U.S. at 33. The proper time to consider sealing of trial exhibits, therefore, will be at trial when they are offered.

Once offered and admitted, the First Amendment right of access applies to trial exhibits. *Level 3*, 611 F. Supp. 2d at 579. Similarly, demonstrative exhibits used in open court are subject to the First Amendment right of access. *Rambus, Inc. v. Infineon Tech. AG*, No. 3:00cv524, 2005 U.S. Dist. LEXIS 8621, *6-11 (E.D. Va. May 6, 2005). As is necessary to protect trade

secrets or other compelling interests, trial exhibits may be redacted or sealed. *See Woven*, *supra*; *Level 3*, 611 F. Supp. 2d at 581-83. But that exacting showing will require more than the generalities thus far offered by Defendants.

Suffolk respectfully submits that when exhibits are offered, admitted, or used at trial, the sealing-proponent will need to follow the proper procedures—notice, motion, and factual support—and the Court will need to make appropriate findings and narrowly tailor the closure order. The Court should not now shadow-box with broadly defined categories of information that may warrant sealing, but should instead address closure on a proper showing when the issue is squarely presented at trial.

Trial Transcripts: A civil trial transcript also is public. *See* 28 U.S.C. § 753(b). Under the local rules, the trial transcript cannot be sealed "except upon a showing of necessity demonstrated to the trial judge." E.D.VA.CIV.R. 5(H). The First Amendment right of access applies to the transcript, and so does the First Amendment analysis for sealing or redacting it. *See In re The Washington Post Co.*, 807 F.2d 383 (4th Cir. 1986) (recognizing First Amendment right of access to hearings, evidence, and transcripts). Thus, the sealing-proponent must show that a "compelling governmental interest" justifies sealing some or all of a transcript ***and*** that the sealing or redaction is narrowly tailored. No such showing can be made in advance based upon Defendants' general assertions. A particularized showing must be made when the testimony is offered.

Suffolk respectfully submits that the Court should not enter any order generally indicating when sealing the trial transcript may be warranted. As with closure of the trial proceedings, sealing a transcript must be done on a proper showing made following proper procedures.

III. SUFFOLK SHOULD BE GIVEN ACCESS UNDER THE *SUFFOLK ACTION* PROTECTIVE ORDER

If the Court were inclined to grant the sealing and closures requested by Defendants—either now or at the trial—narrowly tailored relief would not require exclusion of Suffolk from the trial or denial of Suffolk's access to sealed judicial records. Suffolk, AOL, and Google have stipulated to a comprehensive and reticulated protective order in the *Suffolk Action*, which has been approved and entered by the Court. *Suffolk Tech. LLC v. AOL Inc. and Google Inc.*, No. 1:12cv625 (TSE/IDD) (E.D. Va. entered Sept. 18, 2012) (ECF # 122). Therein, the parties have specified the terms and provisions for their exchange, use, and handling of "CONFIDENTIAL OUTSIDE COUNSEL ONLY" information. If Suffolk is permitted to have access to sealed judicial records, to attend closed sessions of the trial, and to obtain un-redacted trial transcripts in this action, Suffolk would agree to treat that information and those materials as "CONFIDENTIAL OUTSIDE COUNSEL ONLY," as defined in the stipulated protective order entered in the *Suffolk Action*.

Similarly, Suffolk would consider agreeing to be bound to the protective order entered in this action. (Doc. 85.) In that protective order, there also is a classification for "CONFIDENTIAL OUTSIDE COUNSEL ONLY," which provides adequate protections to Defendants.

CONCLUSION

Sealing must be sought and justified on a document-by-document basis; the substantive test for sealing (First Amendment or common law) must be met; the three *Ashcraft* procedural requirements must be satisfied; and the sealing or redaction must be as narrow as possible. Similarly, closed proceedings "must be rare and only for cause shown that outweighs the value of openness," must follow the procedures set forth in *Knight*, and must be narrowly tailored. Defendants' motion to seal fails in all respects to satisfy the rigorous First Amendment standard for sealing and closure. The motion to seal and for closure must be denied at this time.

Suffolk should be permitted to have access to sealed judicial records, to attend closed sessions of the trial, and to obtain un-redacted trial transcripts in this action, on the condition that that information and those materials will be treated as "CONFIDENTIAL OUTSIDE COUNSEL ONLY," as defined in the stipulated protective order entered in the *Suffolk Action* or in this action.

Dated: October 4, 2012

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, I filed the foregoing pleading or paper through the Court's CM/ECF system which sent a notice of electronic filing to the following:

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