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

DEFENDANT GOOGLE INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO SEAL AND REDACT PORTIONS OF TRIAL RECORD

Google has consistently sought to protect its highly confidential information during the course of this litigation by sealing various pleadings, by moving to seal the courtroom for the limited purpose of protecting the very information that is the subject of its current motion, and by objecting to its public introduction at trial during conferences with the Court prior to and during trial. (*See, e.g.*, D.N. 347.) Still, Plaintiff argues that Google somehow waived its right to seek such protection and that the Court has already rejected Google's justification for protecting its confidential business information. Plaintiff's arguments are incorrect. The Court has not considered the specific, highly confidential information Google now seeks to redact from the trial transcript. Further, Google's pre-trial efforts to protect this information prevented any waiver because Google attempted to seal documents in advance of or contemporaneously with their use or filing with the Court, as required in *Level 3 Communications, LLC v. Limelight Networks, Inc.*, 611 F. Supp. 2d 572, 583 (E.D. Va. 2009). Because Google has consistently sought protection for the very information at issue in its motion and because there is no way to protect Google's confidential information other than redacting limited portions of the public record, Google asks that the Court redact and seal the portions of the trial record that contain Google's confidential information.

ARGUMENT

I. Google Did Not Waive Its Right to Protect the Information at Issue in Its Motion Because It Has Consistently Sought Protection for that Information.

Plaintiff does not cite any case requiring objections to the presentation of confidential information be made on the record each time the information is presented. This is because it cannot. The very case Plaintiff relies upon for its waiver argument allows a party to object to the introduction of its confidential information either before or contemporaneously with its use in open court. *Level 3 Commc'ns,* 611 F. Supp. 2d at 583. Because Google objected to the presentation of its confidential information in motions and in conferences with the Court before and during trial, Google did not waive any right to seek redress by not repeatedly interrupting the trial each time confidential information was elicited.

Further, Plaintiff's focus on which objections occurred on the record is misplaced. As Plaintiff is well aware, the Court held conferences about the introduction of confidential information in chambers and, thus, off the record. In fact, the trial transcript, including portions Plaintiff cites in its opposition, shows that the discussion about closing the courtroom had occurred off the record. (*See* Trial Tr., 367:10-20, 368:15-19.) Plaintiff has cited no authority holding that the format of the parties' previous discussions of confidentiality should affect Google's right to seek protection of its confidential information at this time. As Google timely objected to the disclosure of its confidential information into the public record, there was no waiver.

II. The Court Has Not Yet Decided The Issue Before It Today – Whether to Protect Google's Highly Confidential Business Information Through Targeted Redaction of the Public Trial Transcript.

Google has sought to protect the information at issue in this motion by sealing various pleadings and by moving to close the courtroom. The Court declined to close the courtroom during testimony about financial matters and closed the courtroom only during testimony

regarding Google's source code. But deciding to close the courtroom for extended periods is different than redacting small portions of the transcript. Even though the Court declined to close the courtroom during testimony about damages and certain technical matters, the Court still may now prevent additional disclosure of Google's confidential financial and technical information by redacting limited portions of the trial transcript. Accordingly, contrary to what Plaintiff argues, the issue has not already been decided, and Google is entitled to seek redress for the further public exposure of its confidential information. *See Woven Elec. Corp. v. Advance Group, Inc.*, 1991 U.S. App. LEXIS 6004, at *17-19 (4th Cir. Apr. 15, 1991) (unpublished, per curiam) (remanding case to district court to determine which portions of public trial transcript should be sealed to protect confidential information discussed in open court during trial).

Plaintiff's attempt to distinguish *Woven Electronics* is unavailing. The basis of the holding in *Woven Electronics* was not, as Plaintiff argues, that confidential information was "mistakenly discussed in open court." (D.N. 812, 5 n.3.) Rather, in *Woven Electronics*, the plaintiff moved to seal the courtroom to prevent exposure of its trade secrets, and the court denied the motion without explanation or a review of the confidential information at issue. *Woven Elec.*, 1991 U.S. App. LEXIS 6004 at *18. Because the jury found that the plaintiff's trade secrets had been misappropriated, the Fourth Circuit noted that trade secrets were indeed involved in the case. *Id.* But the Fourth Circuit nowhere suggested that a jury finding establishing that information is confidential must precede the redaction of a trial transcript containing highly confidential business information. *Id.*

Plaintiff further claims that *Woven Electronics* "does not factually apply to this situation" (D.N. 812, 5 n.3), when, in fact, the circumstances are equivalent. In *Woven Electronics*, like in this case, a party actively sought protection for its confidential information prior to the trial, was denied that protection, and, after the trial, sought to redact the confidential information from the

public record. *See Woven Elec.*, 1991 U.S. App. LEXIS 6004 at *17-19; *see also* D.N. 803. In both cases, "nothing [could] be done to remedy the situation at trial," i.e., the presentation of confidential information in public court. But in this case, as in *Woven Electronics*, the trial transcript can be sealed after the fact to prevent further harm to Google. *Id.* at *18.

III. Plaintiff's Counsel Elicited Testimony About Google's Technical Trade Secrets In Open Court, But Now Seeks to Prevent Google From Protecting That Information.

Plaintiff attempts to downplay the sensitivity of technical information it elicited on the fly when there was not an opportunity to close the courtroom by now claiming that testimony from Google's technical witness simply "refer[s] to Google's accused systems," but does "not discuss the details of specific, highly confidential aspects of Google's source code that were discussed in a closed courtroom." (D.N. 812, 3.) The fact that the testimony did not include a discussion about source code is not dispositive. The testimony included highly confidential details about the operation of Google's systems, and this information is also entitled to protection from public disclosure. In fact, Google's counsel interrupted the cross examination of Google's technical witness, Bartholomew Furrow, to alert the Court that Plaintiff's counsel was eliciting proprietary testimony in open court. (Trial Tr., 1122:20-1123:1.) The Court responded that "we don't intend to do that because we are not closing the courtroom this afternoon." (*Id.*, 1123:2-3.) Although Plaintiff's counsel stated that he would "try and speak in generalities," he continued to elicit proprietary testimony from Mr. Furrow during the open court session. (*Id.*, 1123:6-12.) As the Court made clear that the courtroom would not be closed again that day and Plaintiff's counsel continued eliciting highly confidential information in open court, Google's counsel was left with no option but to seek redress through this motion. It is unreasonable for Plaintiff to now oppose the protection of the information Plaintiff's counsel elicited in open court over Google's objection.

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

Plaintiff never addresses the fundamental fairness issue at play in this motion. Google is a defendant in this action. It did not choose to expose its highly confidential materials for its own gains. Google was entitled to fully defend itself and identify the deficiencies in Plaintiff's case at trial without jeopardizing the business it has built on confidential information. Plaintiff's decision to bring suit against Google should not subject Google to the ongoing exposure of its confidential information in public trial transcripts. The limited redactions Google has requested would balance the public right to access judicial records with Google's right to protect its confidential business information. Plaintiff has not provided a justification for continuing to allow Google's confidential information to remain in the public transcripts. As *Woven Electronics* held, the mere fact that the information appeared in the public transcript does not justify allowing it to remain there when the information is confidential.[1]

CONCLUSION

For the foregoing reasons and those presented in Defendant Google Inc.'s Memorandum in Support of Motion to Seal and Redact Portions of Trial Record, the Motion should be granted.

[1] Plaintiff's assertion that Google is seeking to force trial spectators to "unremember" the confidential information is a red herring. (*See* D.N. 812, 1.) Google is seeking to prevent additional exposure of its confidential information and the additional harm Google's business will suffer as a result of even more parties having access to its confidential business information.

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CERTIFICATE OF SERVICE

I hereby certify that on December 13, 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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