

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION**

Verisign, Inc.,

Plaintiff,

v.

XYZ.com, LLC and Daniel Negari,

Defendants.

Case No. 1:14-cv-01749 CMH-MSN

**DEFENDANTS' MOTION TO
REDESIGNATE "ATTORNEY'S EYES ONLY" DOCUMENTS TO PUBLIC**

INTRODUCTION

The public has a basic right to access court documents, particularly those that are key to understanding a court's judgments and decisions. In keeping with that principle, XYZ respectfully requests this Court redesignate limited portions of three deposition transcripts and a dozen documents that will serve as key evidence in XYZ's forthcoming renewed motion for attorney's fees under the Lanham Act's exceptional-case provision.

Verisign designated these documents and depositions as "attorneys eyes only" despite that none of them meet the heightened standard for that designation under this Court's Protective Order. None contain "highly sensitive business and financial information" or similar material. At most, they may be embarrassing. But that's not a basis for confidentiality. Perhaps some of the documents might have been confidential in 2015 shortly after Verisign strategized about how to deal with its new commercial threat of competition. But now long after that threat, the documents can no longer meet the definition of "confidential information" or outweigh the public's fundamental right to know the business of its courts. The Court should allow these documents to be publicly filed.

A. This Court’s Protective Order requires the designating party to justify why the material qualifies as a trade secret or otherwise deserves special treatment.

On May 18, 2015, the Court entered a protective order governing discovery in this matter. (Dkt. No. 57; hereafter “Protective Order”.) The Court allowed two designations, “Confidential Information” and “Attorney’s Eyes Only” defined as:

“Confidential Information” means trade secrets and commercial information whose disclosure would reveal competitively sensitive information; and

“Attorney’s Eyes Only” applies to Confidential Information that contains sensitive information relating to research and development of products or services, highly sensitive business and financial information, pending or abandoned intellectual property applications, or information whose unauthorized disclosure is likely to irreparably injure the producing party.

(Protective Order, ¶ 2.)

The Protective Order requires the party asserting confidentiality to “bear the burden of establishing entitlement to such protection. The producing party’s good faith belief that a document or information is entitled to such a designation, standing alone, is insufficient to warrant protection.” (Protective Order, ¶ 9.)

B. Verisign designated thousands of pages of documents and deposition testimony as “attorneys-eyes only” and XYZ seeks the re-designation of a handful of items that will serve as key evidence in upcoming briefing.

The Court recently ordered post-remand briefing on XYZ’s motion for attorney’s fees. (Dkt. No. 479.) In preparing that briefing, XYZ recognized it would be citing to and relying on several pieces of evidence and testimony currently designated as “Attorneys Eyes Only.” But none of those materials qualify for that designation or even for the lesser “Confidential Information” designation. So, XYZ would like to file these materials publicly when it submits its briefing on September 14.

The following chart summarizes the materials XYZ seeks to re-designate and how they relate to the forthcoming briefing.

Briefing Topic	Deposition Excerpts	Documents
<p>[REDACTED]</p>	<p>Pat Kane Deposition Transcript (“Kane Tr.”)¹ at 211:9–212:11.</p>	<p>Deposition Exhibit 1097, at page 15.²</p> <p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>August 14, 2015 Scott Schnell Deposition (“Schnell August 14 Tr.”)³ at 234:6–236:4.</p>	<p>Deposition Exhibit 1164⁴</p> <p>[REDACTED]</p> <p>Deposition Exhibit 1215⁵</p> <p>[REDACTED]</p>
<p>[REDACTED]</p>	<p>Schnell August 14 Tr. at 149:5-164:16; 235:20–236:4</p> <p>Kane Tr. at 191:5–193:2, 198:4–201:4.</p>	<p>Deposition Exhibits 1082⁶, 1086⁷, 1161⁸, 1163⁹, 1169¹⁰</p> <p>[REDACTED]</p> <p>Deposition Exhibit 1097¹¹</p> <p>[REDACTED]</p>

¹ Sykes Decl., Ex. A.

² *Id.*, Ex. C (note that XYZ is providing the entire document to the Court for context but only seeks to file VRSN0000038803 publicly).

³ *Id.*, Ex. B.

⁴ *Id.*, Ex D.

⁵ *Id.*, Ex E.

⁶ *Id.*, Ex F.

⁷ *Id.*, Ex G.

⁸ *Id.*, Ex H.

⁹ *Id.*, Ex I.

¹⁰ *Id.*, Ex J.

¹¹ *Id.*, Ex C. (note that XYZ is providing the entire document to the Court for context but only seeks to file VRSN0000038802–38803 publicly).

Briefing Topic	Deposition Excerpts	Documents
		level domains.
<div style="background-color: black; width: 100%; height: 100%;"></div>	Schnell August 14 Tr. at 134:20–136:9; 214:13–216:8 August 7, 2015 Scott Schnell Deposition Transcript at 18:21–22:3	Deposition Exhibit 1143 ¹² <div style="background-color: black; width: 100%; height: 100%;"></div> Deposition Exhibit 1183 ¹³ <div style="background-color: black; width: 100%; height: 100%;"></div>

C. There is heightened public interest in this case, particularly within the domain-name industry.

This case has already drawn significant media attention within the domain-name industry. Several blogs and media outlets reported on the case when Verisign filed it. The media has tracked the ups and downs of the parties’ motions practice, XYZ’s successful motion for summary judgment, Verisign’s failed appeal of the same, and the subsequent litigation over attorneys fees. (Sykes Decl. ¶ 14; *see also* Dkt. 384-1, 384-2 (media report on XYZ’s trial exhibit list and media coverage of court documents filed by Verisign). These media reports serve as a strong indicator of public interest in this matter.

ARGUMENT

A. Verisign cannot overcome the strong presumption that these documents should be filed publicly.

Both the common law and the First Amendment presume a public right of access to court documents. *See Nixon v. Warner Comms., Inc.*, 435 U.S. 589, 602 (1978); *Stone v. Univ. of Md. Med. Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988). This Court has noted that this “presumptive right to access” is not easily overridden. *See U.S. ex. rel. Permison v. Superlative Technologies, Inc.*,

¹² *Id.*, Ex K (note that XYZ is providing the entire document to the Court for context but only seeks to file VRSN0000002222–2223 publicly).

¹³ *Id.*, Ex L.

492 F.Supp.2d 561, 564. Rather, “sealing of court records is not warranted absent the presence of a factor sufficient to outweigh the strong interest in public access, such as national security considerations, trade secrets, personal privacy interests, and personal safety concerns.” *Id.* The presumption in favor of public access to court filings is especially strong where, as here, the filings involve matters of particular concern to the public. *Id.*

Verisign bears the burden to prove that the materials at issue be filed under seal. (*Accord* Protective Order at ¶ 9.) Since no plausible matters of national security, personal safety, or personal privacy are raised by the materials, *Verisign*’s only basis for keeping them confidential is to claim they are trade secrets. But *Verisign* cannot meet the Fourth Circuit’s definition of a trade secret, e.g. “[I]nformation ... that (i) derives independent economic value ... from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.” *Hoechst Diafoil Co. v. Nan Ya Plastics Corp.*, 174 F.3rd 411, 417 (4th Cir. 1999).

The materials speak for themselves—many of them refer to or incorporate public documents, data, and practices. None of them disclose sensitive financial information or internal metrics. All of them are from 2015 or earlier. It is difficult to see how *Verisign* could justify designating these materials as “attorneys eyes only” in the first place. None contain “highly sensitive business and financial information, pending or abandoned intellectual property applications, or information whose unauthorized disclosure is likely to irreparably injure the producing party.” And three years later—long after *Verisign* discussed its tactics to deal with the new competitive threat that XYZ posted—none could qualify as “confidential” given the requirement that such information be “trade secrets” or “competitively sensitive information.”

Finally, filing materials under seal is burdensome. The parties must file a separate motion to seal, spend hours redacting, and risk violating the proactive order by missing a sentence that may be subject to the protective order. The Court should relieve the parties of that burden.

CONCLUSION

Absent extraordinary circumstances, the public has a right to know the business of its courts. No extraordinary circumstances exist in this case. XYZ simply seeks to publicly file documents that will provide substantial context and understanding for its pending motion for attorney's fees. None of these documents contain commercial- sensitive financial information. And any reason to keep circa-2015 discussions about new competitive threats under wraps has become moot.

XYZ respectfully requests that this Court order the material redesignated so that it can be filed publicly, and so the public can fully understand the basis for XYZ's motion for fees and the Court's ultimate decision.

Dated August 31, 2018.

Respectfully Submitted,

/s/

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 37(E)

Undersigned counsel hereby certifies that they have consulted with opposing counsel and have made a good faith effort to resolve the discovery matters at issue. Unfortunately, the parties have been unable to reach agreement on the requested re-designation of documents pertaining to this motion. Should the parties reach agreement on any other matters, XYZ will promptly bring such agreement to the Court's attention.

Dated August 31, 2018.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that on August 31, 2018, I electronically filed 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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