

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK**

BROADSPRING, INC.,

Plaintiff,

13 Civ. 1866 (JMF)

v.

CONGOO, LLC, doing business as ADIANT  
and ADBLADE, ASHRAF NASHED,  
RAFAEL COSENTINO and DOES 1-10,

Defendants.

**PLAINTIFF’S MEMORANDUM OF LAW IN SUPPORT OF  
RE-DESIGNATION OF DEFENDANTS’ DOCUMENTS AND SANCTIONS**

Pursuant to the Court’s Order of October 16, 2013, regarding Defendants’ continued abuse of the “Highly Confidential – Attorneys’ Eyes Only” (“AEO”) designation (ECF No. 60), Plaintiff Broadspring, Inc. (“Broadspring”) respectfully submits this memorandum in support of its application for an Order directing Defendants to:

- (1) re-designate as Confidential the entirety of the documents accompanying this memorandum at Exhibit 1;
- (2) apply the proposed redactions and re-designate as Confidential the documents accompanying this memorandum at Exhibit 2;
- (3) re-designate as Confidential the material redacted as AEO in Exhibit 3; and
- (4) reimburse Broadspring for the costs and attorneys’ fees incurred as a result of Defendants’ flagrant abuse of the AEO designation throughout this litigation.

**I. Introduction**

On October 16, the Court ordered Defendants to “review all of the documents they have produced and designated as [AEO] and re- or de-designate any such documents as appropriate by October 23, 2013.” (ECF No. 60.) The Court also made clear that “[i]f there

is a single line that is properly designated as AEO ... You should redact that portion and designate the unredacted portion confidential.” (ECF No. 67, 11:14-17.) Following that court-ordered review, Defendants re-designated 780 documents, effectively conceding that a remarkable number of their AEO designations were improper. Nevertheless, Defendants failed properly to re-designate many documents that are clearly not AEO. As a result, Broadspring’s depositions of Defendants this past week descended into farce, with Broadspring’s CEO, Jonathan Markiles, who flew in from California to attend, being forced to perform a “jack in the box” routine as he repeatedly popped in and out of the deposition room. This not only prevented him from assisting during the examination, but also posed a health risk to Mr. Markiles, who recently suffered a fractured knee and blood clots.

Accordingly, Broadspring respectfully submits that Defendants should be sanctioned and ordered to re-designate the following documents:

- Exhibit 1: This exhibit comprises documents that remained entirely AEO after Defendants’ re-review, but should be re-designated in their entirety.
- Exhibit 2: These documents also remained entirely AEO, but should be re-designated with limited redactions.
- Exhibit 3: These documents were re-designated with AEO redactions, but the redactions are inappropriate and the documents should be re-designated in their entirety.

All but one document in Exhibit 1 was marked at Defendants’ depositions, as was every document in Exhibit 2. Defendants declined to re-designate these documents at the depositions, even when requested to do so, instead insisting that Mr. Markiles leave the room.

## **II. The Terms of the Protective Order**

On May 17, 2013, the Court so-ordered the parties’ Confidentiality Stipulation and Protective Order (the “Protective Order”). (ECF No. 33.) The Protective Order contemplates

two levels of confidentiality—a “Confidential” designation for documents that can be shared with clients for use only in connection with the litigation, and a “Highly Confidential – Attorneys’ Eyes Only” designation for documents that can be viewed only by the parties’ outside counsel of record in this action (and certain experts and litigation support providers).

Recognizing that an AEO designation imposes a serious burden on counsel’s ability to prepare for trial, the Protective Order has several built-in protections against abuse. First, the AEO designation is strictly limited to “extremely sensitive Confidential Information or Items whose disclosure to another Party or nonparty would create a substantial risk of serious injury that could not be avoided by less restrictive means.” (*Id.* § 2.4.) Second, the Protective Order makes clear that the designating party “must take care to limit any such designation to specific material that qualifies under the appropriate standards,” and “to designate for protection only those parts of ... documents ... that qualify.” (*Id.* § 5.1.) Third, the Protective Order expressly provides that “[d]esignations that are shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), may expose the Designating Party to sanctions.” (*Id.*)

### **III. Documents That Remain Improperly AEO Even After the Court’s Orders**

Despite being twice admonished by the Court, Defendants have failed properly to re-designate many of their documents. Indeed, so many documents remain improperly AEO that we have determined not to burden the Court with an *in camera* review of all of them. Rather, we have selected only those documents that were either marked at the depositions taken by Broadspring, or are likely to be used in connection with future proceedings. Broadspring respectfully submits that none of these challenged materials contains “extremely sensitive Confidential Information or Items whose disclosure to another Party or nonparty would create a substantial risk of serious injury that could not be avoided by less restrictive

means,” as required by the Protective Order. (ECF No. 33, § 2.4.) Further, in evaluating these designations, it should be noted that the “burden of persuasion in any such challenge proceeding shall be on the Designating Party.” (*Id.* § 6.3.)

**A. Documents at Exhibit 1**

As noted, Exhibit 1 comprises AEO documents that clearly should not have been designated as such. They should be re-designated in their entirety. Included among these documents are:

- C00010997: This is an e-mail that Defendant Nashed sent to himself within hours of receiving Broadspring’s cease-and-desist letter on March 12. It contains no text except a link to an archived version of Broadspring’s web site.
- C00007393-7394: This is an e-mail to one of Broadspring’s publisher clients containing false and misleading statements about Broadspring. Nothing in it remotely meets the standard for AEO. Indeed, the only pricing information that is disclosed is the amount Broadspring pays, not Defendants.
- C00014005-08: This is an e-mail sent to a publisher after the commencement of this lawsuit, evidencing continued dissemination of the defamatory statements in the Squidoo Lens. There is nothing remotely AEO here.
- C00013303-05, C00013436 and C00013447-48: These are e-mail strings between Congoo and “Congoo Client” Reader’s Digest, discussing the latter’s dissatisfaction with Congoo’s CPM. The monetary figure mentioned refers to the CPM paid by Broadspring, not Congoo, and accordingly is not AEO.
- C00014365-66: This is a draft e-mail from defendant Cosentino to defendant Nashed plotting continued dissemination of false and misleading statements about Broadspring. There is no discussion of trade secrets or any other information that could possibly justify an AEO designation.

- C00014377-79: This contains nothing more than a breach notice prepared by defendant Nashed for defendant Cosentino to send to Reader's Digest.
- C00007207-08 and C000014396-99: These e-mails contain only banter about Defendants' desire to suppress negative online information about Congoo.
- C00014781-82: These e-mails discuss Defendants' press release concerning this lawsuit. It contains only cursory mentions of well-known search engine optimization practices that are not proprietary to Congoo.
- C00007052-54: These e-mails reveal Defendants' concern that their publishers are "dropping like flies," precipitating their decision to begin a false advertising campaign against their BroadSpring. The generic observation that Congoo's publishers were "dropping like flies" is not AEO; nor are the identifies of Congoo's publishers, since a web site displaying Congoo advertising is information available to anyone with access to the internet.

**B. Documents at Exhibit 2**

Exhibit 2 contains AEO documents that Defendants should be ordered to re-designate with limited redactions:

- C00002131-2143: This e-mail string, in which Defendant Cosentino sends a link to the Squidoo Lens to a publisher, should be re-designated with only the CPM and performance reference redacted.
- C00006889-6891: This is an e-mail Cosentino sent to a publisher containing false and misleading statements about BroadSpring. Only the CPM information should be redacted as AEO.
- C000011149-54: This e-mail string contains a passing mention of CPM that can be redacted as AEO, but the remainder should be re-designated.

**C. Documents at Exhibit 3**

Exhibit 3 contains documents that have been improperly redacted by Defendants. The following redacted material is not AEO, and the should be re-designated (Redacted and unredacted versions of each document are included in the exhibit.)

- C00008156 to C00008157: Defendants improperly redacted Defendant Nashed's request to two of his employees to "[p]lease compare these articles" to see why Broadspring is outperforming Congoo. These four words are plainly not AEO.
- C00008758: This document displays two images in a side-by-side comparison. The first image is a screenshot obtained from Congoo's SmarterLifestyles website and the second image is a screenshot obtained from Broadspring's HowLifeWorks website. While the content of both images is self-explanatory, Defendants nonetheless redacted the text beneath the images, which simply notes that the first image shows "text only links in upper right," while the second image "uses News Bullet style links." This is absurd.
- C00008680: Defendants redacted Mr. Nashed's directive to an employee to contact what he believed to be a Broadspring publisher, and the employee's response of "I do not think we want to be there."
- C0000383: Defendants redacted as AEO the words "Where are we with them[?]" for no apparent reason.
- C00011121: Defendants redacted a line of text that notes that Broadspring is "taking over all" of Cosentino's partners (*i.e.*, publishers).

**IV. Plaintiff Should be Awarded its Costs and Attorneys' Fees**

Here, the totality of Defendants' abuse of the AEO designation cries out for sanctions. This Court not only has the inherent power to do so, it also has the power to award costs and fees under both Rule 37 and the Protective Order. As for the Protective Order, the parties

expressly stipulated that “designations shown to be clearly unjustified, or that have been made for an improper purpose (e.g., to unnecessarily encumber or retard the case development process, or to impose unnecessary expenses and burdens on other parties), may expose the Designating Party to sanctions.” (ECF No. 33, § 5.1.) And even if the parties had not so stipulated, Rule 37 empowers the Court to impose sanctions whenever a party fails to obey a discovery order, including a protective order. Fed. R. Civ. P. 37(b)(2)(A). Courts have consistently held that improper designations justify sanctions. *See, e.g., Del Campo v. Am. Corrective Counseling Servs., Inc.*, 2007 U.S. Dist. LEXIS 87150, \*11-12 (N.D. Cal. Nov. 5, 2007) (“The failure to obey a protective order’s prohibition against indiscriminate designations is covered by Rule 37”); *In re ULLICO Inc. Litig.*, 237 F.R.D. 314, 317-18 (D.D.C. 2006) (awarding attorneys’ fees incurred as a result of improper designations).

The Court is already familiar with the history of the parties’ dispute over Defendants’ AEO designations. For a more complete recitation, the Court is respectfully referred to Broadspring’s letters of July 19 (ECF No. 42), October 7 (ECF No. 53) and October 11 (ECF No. 55), which describe how Defendants’ conduct has severely delayed discovery and impeded counsel’s ability to prosecute this action. As explained in those letters, Defendants have consistently violated the Protective Order by affixing the AEO designation to thousands of documents that no reasonable person could believe to contain “extremely sensitive Confidential Information or Items whose disclosure to another Party or nonparty would create a substantial risk of serious injury that could not be avoided by less restrictive means.” (ECF No. 33, § 2.4.)

Indeed, when Broadspring submitted a small set of examples, the Court described them as “mystifying” and advised Defendants’ counsel that “to the extent that is an example, you may have a problem here.” (ECF No. 67, 6:12-19.) In response, counsel argued that those documents “were perhaps not reviewed with the same care as has been spent with the

vast bulk of the documents that have been produced here,” and were not “reflective of the work that’s been done here.” (*Id.* 8:3-13.) But those documents were all too reflective of Defendants’ abuse of the AEO designation. To better illustrate the extent of the overdesignation, accompanying this memorandum are additional examples from each significant production of ESI made by Defendants. All of the following documents were originally designated AEO by Defendants, and the designations were only removed after months and months of needless litigation , “meet and confers,” and two court orders:

- Exhibit 4—Clearly unjustified AEO designations from Defendants’ production of June 3, 2013.
- Exhibit 5—Clearly unjustified AEO designations from Defendants’ production of August 21, 2013. (Defendants produced no ESI between June 3 and August 21.)
- Exhibit 6—Clearly unjustified AEO designations from Defendants’ production of August 29, 2013.
- Exhibit 7—Clearly unjustified AEO designations from Defendants’ production of September 17, 2013
- Exhibit 8—Clearly unjustified AEO designations from Defendants’ production of September 26, 2013.

As one Court explained in a passage that could have been written for this case:

[Defendant’s] massive overdesignation of documents warrants sanctions. [Defendant’s] belated recognition that the confidential designation of over 1,500 documents could not be supported does not render its behavior substantially justified and does nothing to undermine the justification for sanctions. [Defendant’s] actions in indiscriminately designating documents had the result of improperly shifting the cost of review of confidentiality to Plaintiffs. Sanctions are necessary to correct this unfair burden.

*Del Campo*, 2007 U.S. Dist. LEXIS 87150, \*12-13.

Just so here. Despite being warned by the Court on July 26 (ECF No. 41), Defendants continued to violate the Protective Order by repeatedly making designations that were clearly

unjustified (*see, e.g.*, Exs. 5-8). And they have now violated the Court's Order of October 16 by failing properly to remediate their past misconduct (*see, e.g.*, Exs. 1-3). As this Court warned on October 16:

You have to go through everything you have designated AEO and decide if you're willing to stand by that designation, understanding it may well be submitted to me. And if I disagree with it, there will be consequences. And those consequences may well include whatever fees they have incurred in order to address the issue, including whatever motion practice is necessary in connection with this.

(ECF No. 67, 9:2-8.) Defendants have created a tremendous amount of unnecessary work for Broadspring's counsel, obstructed counsel's relationship with their client, and violated multiple court orders. Respectfully, the time has come for the imposition of significant sanctions.

**V. Conclusion**

Broadspring respectfully requests that the Court enter an Order directing Defendants to (1) re-designate as Confidential the entirety of the documents annexed as Exhibit 1; (2) apply the proposed redactions and re-designate as Confidential the documents annexed as Exhibit 2; (3) re-designate as Confidential the material redacted as AEO in Exhibit 3; and (4) reimburse Broadspring for the costs and attorneys' fees (which exceed \$50,000) it incurred as a result of Defendants' flagrant abuse of the AEO designation.

Dated: New York, New York  
November 1, 2013

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