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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

GoDaddy.com, LLC,
Plaintiff,
v.
RPost Communications Limited, et al.,
Defendants.

No. CV-14-00126-PHX-JAT
ORDER

Pending before the Court are Plaintiff GoDaddy.com, LLC (“GoDaddy”)’s Motion to Strike RPost’s Rule 56.1 Reply Statement of Facts, (Doc. 322), Defendants’¹ Motion to Strike, or in the Alternative Seal, Exhibit 40 to GoDaddy’s Reply in Support of its Motion for Summary Judgment, (Doc. 324), and two motions to seal filed by RPost, (Docs. 305, 319). The Court now rules on the motions.

I. Motions to Strike

A. GoDaddy’s Motion to Strike

After GoDaddy filed its controverting and supplemental statements of facts (“CSOF”), (Docs. 307, 308), RPost filed a “Rule 56.1 Reply Statement of Facts in Support of its Statement of Material Facts and Controverting Statement of Facts to GoDaddy’s Additional Statement of Statement of Facts” (“RSOF”), (Doc. 316). GoDaddy moves to strike RPost’s RSOF and its attached exhibits as improperly filed in

¹ Defendants are RPost Communications Ltd.; RPost Holdings, Inc.; RPost International Ltd.; and RMail Ltd. Defendants are collectively referred to as “RPost.”

1 violation of the Local Rules of Civil Procedure for the District of Arizona (“Local
2 Rules”). (Doc. 322). GoDaddy does not oppose or object to RPost correcting errors in the
3 record, but insists that RPost must do so by filing a Notice of Errata. (*Id.* at 3).

4 In response, RPost (1) filed a Notice of Errata to correct several errors in the
5 record, (Doc. 330); (2) argued that it should be allowed to provide evidence to rebut two
6 false statements made by GoDaddy in its CSOF, (Doc. 331 at 4–5); (3) contended that it
7 should be permitted to file additional documents to cure evidentiary objections made by
8 GoDaddy to RPost’s original statement of facts (“SOF”), (*id.* at 6–7); and (4) rescinded
9 the remainder of its RSOF, (*id.* at 7).

10 In reply, GoDaddy argued that RPost failed to set forth sufficient reasons to
11 deviate from the Local Rules and should have objected to GoDaddy’s CSOF in the body
12 of RPost’s reply brief and attached the proper documentation to its opening brief.
13 (Doc. 335 at 2–4).

14 **1. Legal Standard**

15 The Local Rules do not permit a party moving for summary judgment to file a
16 separate statement of facts in response to the non-moving party’s statement of facts. *See*
17 *Isom v. JDA Software Inc.*, 2015 WL 3953852, at *1–2 (D. Ariz. June 29, 2015);
18 LRCiv 7.2(m)(2). As the Court has explained,

19 Local Rule of Civil Procedure 56.1(a) requires the party moving for
20 summary judgment to file a separate statement of facts with its motion. The
21 non-moving party must then file a statement, separate from its memo, that
22 specifically responds to each of the moving party’s statements of fact and
23 that sets forth any additional facts that make summary judgment
inappropriate. Local Rule 56.1 does not provide for a reply statement of
facts or a response to the non-moving party’s separate statement of facts.

24 In fact, Local Rule 7.2(m)(2) provides that any objection to the non-
25 moving party’s statement of facts must be made in a reply memorandum,
and cannot be presented in a separate responsive memorandum. . . .

26 The Local Rules do not contemplate attaching additional exhibits to
27 replies in support of summary judgments or filing a separate response to the
28 non-moving party’s statement of facts. This is consistent with the moving
party’s need to show no genuine issue of material facts exists and that there
is no need for a trier of fact to weigh conflicting evidence, assuming the

1 non-moving party's evidence is true.
2 *Kinnally v. Rogers Corp.*, 2008 WL 5272870, at *1–2 (D. Ariz. Dec. 12, 2008) (internal
3 citations and quotations omitted). The Court described the rationale behind Local Rule
4 7.2(m)(2) as follows:

5 Explicating the logical possibilities for a supplemental statement of
6 facts demonstrates why Defendant's argument must fail. Each of Plaintiff's
7 supplemental facts necessarily must fall into one of the following
8 categories: (1) not material to deciding the motion, (2) material to deciding
9 the motion and disputed, or (3) material to deciding the motion and
10 undisputed. A movant is not prejudiced by not responding to facts falling
11 into the first category because a court does not consider immaterial facts in
12 ruling on a motion for summary judgment. Nor is a movant prejudiced by
13 not responding to facts falling into the second category because disputed
14 facts serve to defeat the motion for summary judgment. Defendant in its
15 unauthorized response disputes a number of Plaintiff's supplemental facts;
16 if just one of these facts is material to deciding the motion, then Defendant
17 has necessarily defeated its own motion. Thus, Defendant can gain nothing
18 by disputing these facts. Finally, a movant is not prejudiced by not
19 responding to facts falling into the third category because the movant's
20 agreement that these supplemental facts are undisputed merely further
21 supports the non-movant's position.

22 *Isom v. JDA Software Inc.*, 2015 WL 3953852, at *1 (D. Ariz. June 29, 2015) (internal
23 citations omitted).

24 **2. Analysis**

25 To begin, RPost draws on the Court's prior statement that a moving party may not
26 file a reply statement of facts "assuming the non-moving party's evidence is true."
27 (Doc. 331 at 4) (citing *Kinnally*, 2008 WL 5272870). According to RPost, it should be
28 permitted to supplement the record to provide evidence showing that GoDaddy's CSOF
Nos. 95 and 104 are, in fact, false. *See (id.)* Notwithstanding, the Court will deny RPost's
request for the simple reason that it does not find CSOF Nos. 95 and 104 to be "material"
for deciding RPost's motion for summary judgment. When and to whom RPost disclosed
the California lawsuits during the *Amazon* litigation has no bearing on GoDaddy's
fraudulent misrepresentation claim in this case. As expressed above, "[a] movant is not
prejudiced by not responding to facts falling into the first category because a court does

1 not consider immaterial facts in ruling on a motion for summary judgment.” *Isom*, 2015
2 WL 3953852, at *1 (citing *Quanta*, 2014 WL 1246144, at *3); see *Burch v. Regents of*
3 *the Univ. of Cal.*, 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006). Here, the Court
4 concludes that GoDaddy’s CSOF Nos. 95 and 104 are immaterial to Count I of its FAC.

5 Next, RPost insists that it should be granted leave to “cure” several of GoDaddy’s
6 evidentiary objections to RPost’s SOF by submitting a supplemental declaration by Zafar
7 Khan, RPost’s Chief Executive Officer (“Khan Declaration II”), and supporting
8 documents. (Doc. 331 at 6–7). GoDaddy objected to RPost’s SOF Nos. 2–8, 10–12, and
9 14–19 (the “Disputed SOFs”) based on Federal Rule of Evidence (“FRE”) 1002, which
10 requires a party to prove the contents of a document by producing the original document
11 itself, in addition to authentication and hearsay grounds. (Doc. 307). In the Disputed
12 SOFs, RPost relied solely on previously filed declarations of Mr. Khan (“Khan
13 Declaration I”) and John K. Fitzgerald (“Fitzgerald Declaration”). See (Doc. 285 at 2–4)
14 (citing Docs. 58, 59, & 59-1). Neither of these declarations cite to or attach the
15 documents RPost now affixes to the proposed Khan Declaration II, namely, a purchase
16 and sale agreement, (Doc. 318-1); an assignment of patent rights from Authentix
17 Authentication Technologies, Ltd. (Doc. 318-2); a promissory note, (Doc. 318-3); a
18 termination of exclusive patent licensing agreement, (Doc. 318-4); and two exclusive
19 patent licensing agreements, (Docs. 318-5; 318-6).

20 GoDaddy makes two primary contentions as to why the Court should deny
21 RPost’s request to file these documents. First, GoDaddy argues that RPost “should have”
22 affixed the documents to its opening brief. (Doc. 335 at 4). Second, GoDaddy contends
23 that the attached documents “are not the versions produced in this case as they either do
24 not bear a Bates Label at all or are labeled from a different matter.” (*Id.*) Initially, the
25 Court agrees that RPost “should have” attached these documents to its original motion for
26 summary judgment. Nonetheless, the Court will grant RPost’s request for leave to file the
27 Khan Declaration II and the attached documentation. To avert any possible prejudice to
28 GoDaddy, the Court will afford GoDaddy the opportunity to respond to the documents.

1 *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996) (“Where new evidence is
2 presented in a reply to a motion for summary judgment, the district court should not
3 consider the new evidence without giving the [non-]movant an opportunity to respond.”
4 (quotation omitted)).

5 As to the remainder of RPost’s RSOF, RPost elected to “withdraw” those facts,
6 “[w]ithout conceding the merits of GoDaddy’s arguments.” (Doc. 331 at 7). Thus, the
7 Court will not consider the remainder of RPost’s RSOF when ruling on RPost’s motion
8 for summary judgment.

9 **3. Conclusion**

10 For efficiency purposes, the Court will deny GoDaddy’s motion to strike but will
11 not consider the portions of RPost’s RSOF that (1) RPost withdrew, (2) serve to “correct”
12 the record, or (3) rebut GoDaddy’s CSOF Nos. 95 and 104. The Court will grant RPost’s
13 request for leave to file documents to “cure” the evidentiary objections made by
14 GoDaddy. Because RPost already filed the relevant documents, GoDaddy shall have
15 three days from the date of this Order to file its own controverting statement of facts to
16 RPost’s RSOF Nos. 2–8, 10–12, and 14–19 only.

17 **B. RPost’s Motion to Strike**

18 RPost moves the Court to strike or alternatively seal Exhibit 40 to GoDaddy’s
19 reply in support of its motion for summary judgment. (Doc. 324). After RPost filed this
20 motion, the parties acknowledged to the Court that RPost’s motion to strike could be
21 granted due to the Court’s ruling on GoDaddy’s *Daubert* motion. Specifically, GoDaddy
22 stated that Exhibit 40 has no relevance to the currently pending motions for summary
23 judgment, and thus, can be stricken from the record. Consequently, the Court will grant
24 the motion to the extent it seeks to strike Exhibit 40 from the record, without prejudice.

25 **II. Motions to Seal**

26 RPost moves the Court to seal two documents containing the following
27 information which purportedly contain “trade secrets”: (1) GoDaddy’s computer code for
28 its e-mail servers, *see* (Doc. 305 at 3), and (2) RPost’s “suppliers,” *see* (Doc. 319 at 3).

1 GoDaddy does not oppose either motion.

2 **A. Legal Standard**

3 It has long been recognized that the public has a general right of access “to inspect
4 and copy . . . judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435
5 U.S. 589, 597 (1978). This right of access extends to all judicial records except those that
6 have “traditionally been kept secret for important policy reasons,” namely grand jury
7 transcripts and certain warrant materials. *Kamakana v. City & Cnty. of Honolulu*, 447
8 F.3d 1172, 1178 (9th Cir. 2006). Nevertheless, “the common-law right of inspection has
9 bowed before the power of a court to insure that its records” do not “serve as . . . sources
10 of business information that might harm the litigant’s competitive standing.” *Nixon*, 435
11 U.S. at 598.

12 “Unless a particular court record is one traditionally kept secret, a strong
13 presumption in favor of access is the starting point.” *Kamakana*, 447 F.3d at 1178
14 (quotation omitted). A party seeking to seal a judicial record bears the burden of
15 overcoming this presumption by either meeting the “compelling reasons” standard if the
16 record is a dispositive pleading, or the “good cause” standard if the record is a non-
17 dispositive pleading. *Id.* at 1180.²

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19 ² In a recent opinion, a panel of the Ninth Circuit shifted from the dispositive/non-
20 dispositive analysis to a review of the relationship between the underlying motion and the
21 merits of the case. *See Ctr. for Auto Safety v. Chrysler Grp, LLC*, No. 15-55084, 2016
22 WL 142440, at *6 (9th Cir. Jan. 11, 2016) (“*Auto Safety*”). Specifically, *Auto Safety* held
23 that public access to records attached to a motion that is “more than tangentially related
24 to the merits of a case” will be reviewed under the “compelling interest” standard, while
25 documents attached to a motion that does not have a “tangential” relationship to the
26 merits of a case may be sealed if “good cause” is shown. *Id.* However, because *Auto
27 Safety* was only a panel decision and not *en banc*, prior Ninth Circuit precedent
28 centralizing the inquiry on whether the record is dispositive or non-dispositive was not
overruled. *See Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (*en banc*). Circuit
Judge Sandra S. Ikuta stated as much in her Dissent:

According to the majority, the district court here erred because it “relied on
language in our cases which provides that when a party is attempting to
keep records attached to a ‘non-dispositive’ motion under seal, it need only

1 What constitutes a “compelling reason” is “best left to the sound discretion of the
2 trial court.” *Nixon*, 435 U.S. at 599. The Court must “balance the competing interests of
3 the public and the party who seeks to keep certain judicial records secret.” *Kamakana*,
4 447 F.3d at 1179. If the Court decides to seal certain judicial records after considering
5 these interests, “it must base its decision on a compelling reason and articulate the factual
6 basis for its ruling, without relying on hypothesis or conjecture.” *Id.* Generally,
7 “compelling reasons sufficient to outweigh the public’s interest in disclosure and justify
8 sealing court records exist when such court files might have become a vehicle for
9 improper purposes, such as the use of records to gratify private spite, promote public
10 scandal, circulate libelous statements, or release trade secrets.” *Id.* (quotation omitted).

11 In the business context, a “trade secret may consist of any formula, pattern, device
12 or compilation of information which is used in one’s business, and which gives him an
13 opportunity to obtain an advantage over competitors who do not know or use it.” *In re*
14 *Elec. Arts, Inc.*, 298 F. App’x 568, 569–70 (9th Cir. 2008) (quotation omitted). As this
15 Court has observed in the past, “because confidentiality alone does not transform
16 business information into a trade secret, a party alleging trade secret protection as a basis
17 for sealing court records must show that the business information is in fact a trade
18 secret.” *PCT Int’l Inc. v. Holland Elecs. LLC*, 2014 WL 4722326, at *2 (D. Ariz. Sept.
19 23, 2014) (quotation omitted). In other words, “[s]imply mentioning a general category of
20 privilege, without any further elaboration or any specific linkage with the documents,
21 does not satisfy the burden.” *Kamakana*, 447 F.3d at 1184.

23 show ‘good cause.’” Maj. op. at 5. This comes as a surprise, because the
24 “language in our cases” constitutes binding precedent. But no matter, the
25 majority invents a new rule, namely that a party cannot keep records under
26 seal if they are attached to any motion that is “more than tangentially
27 related to the merits of a case,” Maj. op. at 17, unless the party can meet the
28 “stringent standard” of showing that compelling reasons support secrecy,
Maj. op. at 8. Because this decision overrules circuit precedent and vitiates
Rule 26(c) of the Federal Rules of Civil Procedure, I strongly dissent.

Auto Safety, 2016 WL 142440, at *9.

1 **B. Analysis**

2 In this case, RPost seeks to seal two documents that relate to the parties’ cross-
3 motions for summary judgment. Thus, RPost must present “compelling reasons” that the
4 documents are entitled to sealing treatment. *See Kamakana*, 447 F.3d at 1180.³

5 As to the document disclosing GoDaddy’s computer code, the Court finds that
6 compelling reasons exist for sealing the document as source code falls squarely within
7 the realm of a trade secret. *See, e.g., Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 2012 WL
8 6115623, at *2 (N.D. Cal. Dec. 10, 2012) (sealing declaration that “consist[ed] entirely of
9 Samsung’s source code” because it “clearly meets the definition of a trade secret” and
10 sealing portions of another declaration that “reproduce[d] or discuss[ed] in any detail
11 Samsung’s confidential source code”); *Microsoft Corp. v. Motorola, Inc.*, 2012 WL
12 5476846, at *2–4 (W.D. Wash. Nov. 12, 2012) (sealing “confidential source code”);
13 *Network Appliance, Inc. v. Sun Microsystems Inc.*, 2010 WL 841274, at *2–5 (N.D. Cal.
14 Mar. 10, 2010) (sealing exhibits that disclosed source code); *see also Agency*
15 *Solutions.Com, LLC v. TriZetto Grp., Inc.*, 819 F. Supp. 2d 1001, 1017 (E.D. Cal. 2011)
16 (noting that “source code is undoubtedly [sic] a trade secret”).

17 Regarding RPost’s “supplier” information, the Court finds that this information is
18 merely tangentially related to the merits of RPost’s motion for summary judgment. Under
19 such circumstances, the public’s interest in the information is at its nadir. On the other
20 hand, RPost explains that it would suffer “grievous harm” from public disclosure of this
21 “sensitive proprietary information” because only it has access to the information and uses
22 it to “obtain an advantage” over its competitors. (Doc. 319 at 3). On balance, because
23 sealing RPost’s “supplier” information will have no impact on the public’s need to
24 understand court proceedings and RPost’s competitive standing would be harmed by
25 public disclosure, the Court will permit RPost to file this information under seal. *See*

26
27 ³ Under the *Auto Safety* test, the “compelling reasons” standard would still apply
28 as a motion for summary judgment is undoubtedly “more than tangentially related to the
merits of the case.” *See Auto Safety*, 2016 WL 142440, at *6.

1 *Nixon*, 435 U.S. at 598 (“[T]he common-law right of inspection has bowed before the
2 power of a court to insure that its records [do not] serve as . . . sources of business
3 information that might harm the litigant’s competitive standing.”); *In re Elec. Arts*, 298 F.
4 App’x at 569–70 (noting that in the business context, a “trade secret may consist of any . .
5 . compilation of information which is used in one’s business, and which gives him an
6 opportunity to obtain an advantage over competitors who do not know or use it”).

7 **III. Conclusion**

8 For the reasons set forth above,

9 **IT IS ORDERED** that GoDaddy’s Motion to Strike RPost’s Rule 56.1 Reply
10 Statement of Facts, (Doc. 322), is **DENIED**. The Court will only consider RPost’s RSOF
11 Nos. 2–8, 10–12, and 14–19 which attempt to cure GoDaddy’s evidentiary objections.
12 Within three days from the date of this Order, GoDaddy may file its own controverting
13 statement of facts in response to these designated RSOF only.

14 **IT IS FURTHER ORDERED** that RPost’s Motion to Strike or in the Alternative
15 Seal, Exhibit 40 to GoDaddy’s Reply in Support of its Motion for Summary Judgment,
16 (Doc. 324), is **GRANTED** to the extent it seeks to strike the document. The Clerk of
17 Court shall strike Docket No. 314-1 from the record. The Alternative request to seal the
18 document is **DENIED**.

19 **IT IS FURTHER ORDERED** that RPost’s Motion to Seal (Doc. 305) is
20 **GRANTED**. The Clerk of Court shall file under seal the document currently lodged at
21 Docket No. 306.

22 **IT IS FINALLY ORDERED** that RPost’s Motion to Seal (Doc. 319) is
23 **GRANTED**. The Clerk of Court shall file under seal the document currently lodged at
24 Docket No. 320.

25 Dated this 1st day of June, 2016.

