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

**INTERNATIONAL SWAPS AND DERIVATIVES
ASSOCIATION, INC.**

Index No.: 09 -cv-8033

Plaintiff,

-against-

SOCRATEK , L.L.C.,

Defendant.

**MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S
MOTION FOR A PRELIMINARY INJUNCTION AND IN SUPPORT OF
DEFENDANT'S MOTION TO DISMISS THE COMPLAINT**

Defendant Socratek LLC (“**Socratek**”) submits this memorandum of law in opposition to the motion by International Swaps and Derivatives Associations, Inc. (the “ISDA” or “**Plaintiff**”) for a preliminary injunction restraining Socratek from selling or reselling certain publicly available corporate agreements which are based upon ISDA’s so-called “Master Agreements” (the “**Documents**”) and in support of its motion, pursuant to Fed. R. Civ. Pro. 12(b)(6), to dismiss the Complaint dated September 18, 2009 (the “**Complaint**”).

I. PRELIMINARY STATEMENT

This Court should deny Plaintiff’s motion for a preliminary injunction and should dismiss the Complaint in its entirety. The acts that form the basis both for the Complaint and the instant

motion are expressly sanctioned by Federal statute (Section 35A of the Securities Act of 1934)¹ and, accordingly, the Complaint fails to state a claim upon which relief may be granted.

There is little dispute about the facts in this case: (1) the parties agree that the “ISDA Master Agreements” (“**Documents**”) that Socratek is providing to its customers are exact copies of the documents freely available from the Security Exchange Commission (“**SEC**”) website called “EDGAR” at www.sec.gov (“**EDGAR**”),² and (2) Plaintiff does not contest that Socratek legally obtained these documents from EDGAR.

The key question before the Court is whether Section 35A of the Securities Act of 1934³, which established the EDGAR system, and general principles of copyright law, permit Socratek to distribute the Documents for commercial purposes on its website www.techagreements.com (the “**TechAgreements Website**”). On this point, the language in Section 35A is clear:

“. . . any information in the EDGAR system that is required to be disseminated by the contractor . . . may be used, *resold*, or *redisseminated* by any person who has lawfully obtained such information *without restriction* and *without payment of additional fees or royalties* . . .” (emphasis added)

From this statutory language, it is unambiguous that the Documents (or any other information on EDGAR) may be “resold” and “redisseminated” by Socratek “without payment of additional fees or royalties.” Plaintiff itself concedes this point in its legal memorandum when it states that Section 35A does “allow someone to access EDGAR and retrieve a document and . . . to sell or transfer that document”.⁴ Further, Section 35A states expressly that the right shall be “without restriction.” The broad language of Section 35A furthers a clearly stated legislative intention to broadly encourage the dissemination of company information filed with the SEC.

Notwithstanding the clear statutory language (i.e., “without restriction”) in Section 35A, Plaintiff asks this Court to read into Section 35A a limitation for documents protected under the Federal Copyright Act. There is, however, no such limitation in Section 35A. Further, Section

¹ U.S.C. 15 § 7811

² For example, the ISDA Document “CPI Aerostructures - Isda 2002 Master Agreement” is available on EDGAR at http://sec.gov/Archives/edgar/data/889348/000088934809000005/ex10_17.htm; the identical document is available from TechAgreements at <http://www.techagreements.com/agreement-preview.aspx?num=652090>.

³ U.S.C. 15 § 7811

⁴ *Legal Memorandum in Support of Motion for Preliminary Injunction (“Plaintiff’s Legal Memorandum”)*, p16.

35A provides a remedy for parties who are potentially aggrieved by the publication on EDGAR and further potential dissemination of their materials. Specifically, Section 35A gives parties the right to seek a “hardship exception”⁵ and to have their documents excluded from the EDGAR filings upon request.

As Plaintiff has a remedy under Section 35A, rather than filing a lawsuit and a preliminary injunction against Socratek for making use of the EDGAR information, Plaintiff could have availed itself of this exception in Section 35A by requesting that the company filing the Documents with the SEC either redact them or have them removed from their public disclosures on EDGAR.

II. FACTUAL BACKGROUND

A. *Socratek Background*

TechAgreements.com (the “**TechAgreements Website**”) is a website that has been operated by Socratek LLC (“**Socratek**”), a New Jersey Limited Liability Company, since 1999.⁶ For the past 10 years, Socratek has offered the same service on the TechAgreements Website; namely, providing enhanced access to certain publicly-filed documents, such as the documents filed with EDGAR. There are over 500,000 documents available from the TechAgreements Website. The Socratek business made \$24,396 in profit in 2008, on \$149,439 in gross sales⁷.

B. *The Documents on TechAgreements*

The documents referred to in Plaintiff’s Complaint (the “**Complaint**”) were all obtained by Socratek directly from EDGAR. Socratek has not altered the content of the Documents obtained from the SEC in any way: the title of the documents and their contents are exactly as filed with the SEC. In 2008, Socratek sold 3 copies of the agreements with “ISDA” in the title, for a

⁵ 15 U.S.C.A 7811(2) states “. . .except that the Commission may exempt persons or classes of persons, or filings or classes of filings, from such rules or regulations in order to prevent hardships or to avoid imposing unreasonable burdens or as otherwise may be necessary or appropriate”.

⁶ Alan Schwartz Declaration dated November 1, 2009 (“**Schwartz Dec.**”), ¶ 5-6.

⁷ Schwartz Dec., ¶ 8, and as reported by Socratek LLC in its form 1065 Federal Tax filing for 2008.

total of \$105 in revenues, or \$35 each. As of October 2009, Socratek sold 4 copies of agreements with “ISDA” in the title for \$35, with 2 of those being bought by the Plaintiff itself.⁸

As Plaintiff notes, it sells a blank form agreement of its “master agreement” together with explanatory notes and instructions for documenting the terms of various derivatives-based transactions. Importantly for copyright purposes, Socratek is not distributing the blank “form agreements” -- with the complete schedules and instructions -- as sold by the ISDA to its members from the ISDA website. As Plaintiff’s concedes in its Complaint, the Documents on the TechAgreements Website are all documents that have been “bilaterally negotiated and adapted” by the company that filed them with the SEC and, therefore, include “significant changes” as compared with the form agreements offered by the ISDA.⁹

III. ARGUMENT

To obtain a preliminary injunction, the moving party has the burden of showing (a) irreparable harm in the absence of the requested relief and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and (c) a balance of hardships tipping decidedly in its favor.¹⁰ Plaintiff has failed to make the requisite showing with respect to any of the required elements.

A. Likelihood of Success on the Merits

Plaintiff has failed to demonstrate likelihood of success on the merits:

⁸ Schwartz Dec., ¶ 14

⁹ Complaint, ¶ 18; Declaration of Robert Pickel, ¶ 11.

¹⁰ *Faiveley Transp. Malmö AB v. Wabtec Corp.*, 559 F.3d 110 (2nd Cir. 2009); *County of Nassau, NY v. Leavitt*, 524 F.3d 408, 414 (2d Cir. 2008).

1. Socratek's Use of the Documents is clearly authorized by Statute

Socratek's commercial use of the Documents is explicitly validated by Section 35A.¹¹ Section 35A states in unambiguous language that documents filed with EDGAR can be "resold" and "disseminated" without "payment of additional fees or royalties". The legislative intent of Section 35A is also clear that the purpose of EDGAR is to "supply more rapid and timely dissemination of corporate and financial information to investors and to the financial community."¹² Section 35A makes clear that the way Congress intended the SEC to implement this intent was to allow the information in EDGAR to be "resold" and "disseminated" by third parties without "payment of additional fees or royalties".

Plaintiff itself concedes that "Section 35A does "allow someone to access EDGAR and retrieve a document and . . . to sell or transfer that document".¹³ Plaintiff's then argues, however, that "commercial reproduction for profit is prohibited".¹⁴ The Court need only look at the plain text of the Section 35 to conclude that the documents may be "resold . . . without restriction"¹⁵ to reject Plaintiff's contention. It is hard to imagine any interpretation of the word "resold" that does not involve commercial dissemination.¹⁶

2. Section 35A can be reconciled with the Copyright Act

In what Plaintiff calls the "nail in the coffin" of Socratek's defense, Plaintiff claims that Socratek's reading of Section 35A creates an irreconcilable conflict with the federal

11 U.S.C. TITLE 15 § 78ll, states:"The Commission, by rule or regulation . . .(1) shall provide that any information in the EDGAR system that is required to be disseminated by the contractor . . . (B) may be obtained by a purchaser by direct interconnection with the EDGAR system (D) may be used, resold, or redisseminated by any person who has lawfully obtained such information without restriction and without payment of additional fees or royalties . . ."

¹² S. Rep. No. 100-105.

¹³ Plaintiff's *Legal Memorandum*, p16.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ In the face of this clear language in Section 35A permitting "resale" and "transfer", Plaintiff's then proceeds to make up out of whole cloth the notion that Section 35 "at most entitles a user such as Socratek to resell a copyrighted document downloaded from Edgar once, but not to resell it numbers times . . ." *Plaintiff's Legal Memorandum* at 16. Unfortunately for Plaintiff's, this "one copy only" language is nowhere to be found in the statute itself and is also contrary to how the SEC makes documents available on EDGAR and how the financial information industry uses EDGAR to provide information to its customers.

Copyright Act. Using an analogy, Plaintiff suggests that Socratek's reading of Section 35A would eviscerate the copyright in the lyrics of a tune such as "When You Wish Upon a Star" by its mere inclusion in EDGAR and therefore the Copyright Act must be read to limit the rights of Socratek under Section 35A to resell and disseminate the Documents. Plaintiff's analogy is inapplicable for two reasons.

FIRST, the lyrics of a song would not be a "material definitive agreement"¹⁷ as required to be filed with the SEC on EDGAR. We do not know of any cases where an original work of authorship such as lyrics to a song has been filed with the SEC as a "material agreement" in the last 10 years we have been receiving documents from the EDGAR. Plaintiff, in its complaint and legal memorandum, also cannot point to any such examples in the more than 500,000 documents currently on the TechAgreements Website.

SECOND, Plaintiff's "Wish Upon a Star" analogy is further undercut by the "hardship exception" which Congress wrote into Section 35A and in SEC Rules, which allow documents to be redacted from EDGAR upon request to the SEC.¹⁸ To prevent confidential or other information from becoming part of the public filing, it is common practice among companies to request that information be redacted before it is filed with the SEC.¹⁹ In the rare case that such a document would need to be filed in EDGAR, the owner of the copyright in "Wish Upon a Star" would simply ask that the company filing with EDGAR redact the text from its public filing. In the instant case, however, Plaintiff has failed to avail itself of this "hardship exception" to prevent disclosure of its copyrighted materials from inclusion in EDGAR. Plaintiff presents no evidence in its Complaint that (1) the ISDA contractually limits the buyers of the Documents from including them in their public filings, or (2) the ISDA has requested the SEC or the company filing the agreements to remove them from EDGAR under the "hardship exception."

¹⁷ See the instructions for filing Form 8-K, Item 1.01, for an explanation of the requirements for filing a "Material Definitive Agreement".

¹⁸ 15 U.S.C.A 7811(2) states "...except that the Commission may exempt persons or classes of persons, or filings or classes of filings, from such rules or regulations in order to prevent hardships or to avoid imposing unreasonable burdens or as otherwise may be necessary or appropriate".

¹⁹ See SEC Rule, Release No. 33-6977 for a description of the "redaction process".

Instead, Plaintiff fails to even mention the “hardship exception” of Section 35A in its *Legal Memorandum*. Plaintiff should certainly be required to seek that remedy before asking a court to enjoin Socratek for its lawful use of the Documents under Section 35A. Given this “hardship exception”, there is no need for the court to try to reconcile the alleged conflict between the Copyright Act and Section 35A, as this plain language of Section 35A expressly permits the Documents to be “resold” and “disseminated” by Socratek and the “hardship exception” provides a mechanisms to avoid any potential conflicts with the Copyright Act.²⁰

For the foregoing reasons, Plaintiff has failed to demonstrate that it is likely to succeed on the merits of its claim. To the contrary, the fact that the conduct that forms the very basis of the Complaint is expressly sanctioned by Federal statute renders the Complaint fatally flawed and subject to dismissal as a matter of law.

B. Plaintiff has Failed to Demonstrate Irreparable Harm

A showing of irreparable harm is "the single most important prerequisite for the issuance of a preliminary injunction."²¹ To satisfy the irreparable harm requirement, [P]laintiff must demonstrate that absent a preliminary injunction it will suffer an injury that is “neither remote nor speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.”²² Any presumption of “irreparable harm” in this case is rebutted by several undisputed facts:

FIRST, the exact same Documents available on the TechAgreements Website are also available legally, and for free, on EDGAR. Even if Socratek were to be enjoined from offering the Documents, the Documents would still continue to be freely available on the Internet on the

²⁰ Even if the court were to somehow determine that Socratek’s use of the ISDA Agreements from the EDGAR is not expressly permitted under Section 35A, the prevailing case law does not support plaintiff’s position of “likelihood of success on the merits”. Plaintiff argues “the law has long recognized that the mere appearance of copyrighted documents in a public does not ipso facto place the author’s intellectual property in the public domain”. However, in Plaintiff’s Legal Memorandum, Plaintiff fails to site the latest case law from the 5th Circuit in *Veeck v. Southern Building Code Congress International, Inc.*, 293 F.3d 791, 796 (5th Cir. 2002) (Treatise cited) , cert. denied, 539 U.S. 969, 123 S. Ct. 2636, 156 L. Ed. 2d 674 (2003), which held that “as law, model codes enter the public domain and are not subject to the copyright holder’s exclusive prerogatives.”

²¹ *Faiveley Transp. Malmo AB*, 559 F.3d at 110 (2nd Cir. 2009) citing *Rodriguez v. DeBuono*, 175 F.3d 227, 234 (2d Cir. 1999) (internal quotation marks omitted); *Citibank, N.A. v. Citytrust Inc.*, 756 F.2d 273 (2nd Cir. 1985)

²² *Faiveley Transp.*, 559 F.3d at 118.

EDGAR site as well as from other legal formation providers such as WESTLAW and LEXIS. An injunction should not “impose unnecessary burdens on lawful activity” where the products in question “are produced by other companies and are readily available on the market.”²³ There is no dispute that the Documents are “readily available on the market” from EDGAR and other providers. As such, a preliminary injunction is not appropriate as the harm to the ISDA will not be materially aggravated in the interim.

SECOND, the ISDA either knew, or should have known, about the availability of the Documents on EDGAR, and with other information providers such as Socratek since at least 2001, when they were first made available on EDGAR.²⁴ Socratek has been providing these documents to the public in the exact same manner and for the same price since 2001. This fact “undercuts the sense of urgency that ordinarily accompanies a motion for preliminary relief and suggests that there is, in fact, no irreparable injury.”²⁵

THIRD, in 2008, Socratek sold 3 copies of the Documents for a total of \$105 in revenues. Socratek keeps precise records of all its orders of the agreements and therefore it will not be difficult, in the event of a final judgment against Socratek, for Plaintiff to prove damages through the loss of sales due to any proven infringement. As the Documents are already available for free on EDGAR, there is no added danger of “massive, repeated, near instantaneous, and worldwide infringement via the Internet” as plaintiff alleges because the Documents are already available legally on the Internet. This will continue to be the case after the issuance of any injunction. Therefore, if Plaintiff were ultimately successful at trial, “the only possible injury that [the] plaintiff may suffer is loss of sales. . . [which] should be fully compensable by money damages.”²⁶ Plaintiff has not introduced any evidence in the record -- either of an impact on its sales of the Documents or otherwise -- to support the conclusion that ISDA would suffer irreparable harm unless Socratek is enjoined. In the absence of any evidentiary support of irreparable harm, there is no basis for a preliminary injunction against Socratek.²⁷

²³ *Faiveley Transp.*, 559 F.3d at 118; *Waldman Pub. Corp. v. Landoll, Inc.*, 43 F.3d 775, 785 (2d Cir. 1994).

²⁴ Schwartz Dec, ¶

²⁵ *Citibank, N.A. v. Citytrust Inc.*, 756 F.2d 273, 277 (2nd Cir. 1985); *Accord Le Sportsac, Inc. v. Dockside Research, Inc.*, 478 F. Supp. 602, 609 (S.D.N.Y. 1979).

²⁶ *Faiveley Transp.*, 559 F.3d at 119; *Geritrex Corp. v. Dermarite Indus., LLC*, 910 F. Supp. 955, 966 (S.D.N.Y. 1996)

²⁷ *Faiveley Transp.*, 559 F.3d at 120 (denying motion for a preliminary injunction for trade secret violation as Plaintiff failed to show any evidence of irreparable harm).

FOURTH, Plaintiff claims that Socratek’s use of Documents “risks substantial damage to its reputation because of the strong likelihood of confusion by customers of Socratek who believe they are purchasing original ISDA Master Agreement”.²⁸ However, as Plaintiff concedes, Socratek is not providing the original ISDA Master Agreements as sold by the ISDA as a blank form, with the complete schedules of instructions and with commentary. Rather, in Plaintiff’s own words, the Documents on TechAgreements are “individually negotiated Master Agreements” that “contain substantive, bilaterally negotiated amendments made by the parties to those particular transactions”.²⁹ Each of the Documents on TechAgreements have been available for years and, as filed with EDGAR, is clearly marked to associate it with the company that filed them, not with the ISDA itself.³⁰ Also, Socratek makes clear in its Terms of Service that it is not endorsing any agreement on its website.³¹

C. The Balance of Hardships Tips Against the Requested Injunction

The first of the ISDA documents in question was first freely available on the SEC EDGAR website over 8 years ago, yet the ISDA has not objected during that time to the SEC’s dissemination of the Documents from its website or via bulk transfer to third parties such as TechAgreements, LEXIS or WESTLAW. To our knowledge, Plaintiff also has not sought the “hardship exception” with the SEC to have the Documents removed from EDGAR.

In contrast to the minor impact on Plaintiff, the potential impact on Socratek’s business as well as the potential chilling effect on EDGAR users in general is disproportionately adverse. As a matter of public policy, if the Court were to grant Plaintiff’s motion for preliminary injunction, it would undermine the entire system by which the public gains access to public

²⁸ See Plaintiff’s Legal Memorandum at p10.

²⁹ See Plaintiff’s Legal Memorandum at p7. For this reason we do not concede that Plaintiff’s owns the copyright in the documents on EDGAR, even if they validly own the ISDA Master Agreements on ISDA website.

³⁰ For evidence of this, see the receipts provided to Plaintiff’s own purchases of documents from Socratek. Walsh Declaration, at Group 1 Exhibit

³¹ The terms of service at www.techagreements.com provide: “TechAgreements provides access to agreements and information in the public domain that TechAgreements has compiled, indexed and formatted for easy access and use. . . .TECHAGREEMENTS DOES NOT PROVIDE LEGAL ADVICE AND NEITHER TECHAGREEMENTS, NOR ANY OTHER PARTY, ENDORSES OR OTHERWISE WARANTS THE CONTENTS OR DISTRIBUTION OF ANY AGREEMENT OFFERED BY TECHAGREEMENTS.”

company disclosures. An injunction such as has been requested would upset the clearly stated Congressional intention in Section 35A to encourage broad dissemination of publicly filed information on the EDGAR filing system.

IV. CONCLUSION

Given the unambiguous language in Section 35A permitting resale of EDGAR documents, Defendant respectfully requests that the Court deny Plaintiff's request for a Preliminary Injunction, grant Defendant's motion to dismiss the Complaint in its entirety pursuant to Fed. R. Civ. Pro. 12(b)(6) and grant Defendant such other and further relief as the Court may deem just and proper.

Dated: Lexington, MA

November 1, 2009

Socratek LLC

By:_____

Alan Schwartz