

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
CAPITOL RECORDS, LLC, CAPITOL
CHRISTIAN MUSIC GROUP, INC., and VIRGIN
RECORDS IR HOLDINGS, INC.

Case No.: 12CV00095
(RJS) Doc. 215

Plaintiffs,

v.

REDIGI INC., JOHN OSSENMACHER and
LARRY RUDOLPH a/k/a LAWRENCE S.
ROGEL,

Defendants.
-----X

MEMORANDUM OF LAW IN SUPPORT OF REDIGI INC'S
MOTION FOR SEALING

ADELMAN MATZ P.C.
1173A Second Avenue
New York, New York 10065
Telephone: (646) 650-2207
Attorneys for ReDigi Inc.

Gary Adelman, Esq.

TABLE OF CONTENTS

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

FACTUAL BACKGROUND..... 1

APPLICABLE LAW 2

ARGUMENT..... 2

CONCLUSION..... 6

TABLE OF AUTHORITIES

Cases

<i>Bernstein v Bernstein Litowitz Berger & Grossmann LLP</i> , 814 F.3d 132 (2d Cir. 2016).....	5
<i>D 'Ammour v. Ohrenstein & Brown, LLP</i> , No. 06 -601418,17 Misc. 3d 1130(A), 851 N.Y.S.2d 68 (Aug. 13, 2007 Sup. Ct.)	3
<i>Dawson v. White & Case</i> , 584 N.Y.S.2d 814 (App. Div. 1992)	3
<i>Gelb v. Am. Tel. & Tel. Co.</i> , 813 F. Supp. 1022 (S.D.N.Y. 1993).....	3, 4
<i>In re: Gen. Motors LLC Ignition Switch Litig.</i> , 14-MC-2543 (JMF), 2016 WL 1317975 (S.D.N.Y. Mar. 2, 2016)	4
<i>Lugosch v. Pyramid Co. of Onondaga</i> , 435 F.3d 110 (2d Cir. 2006).....	2, 4
<i>Matter of New York Times Co.</i> , 828 F.2d 110 (2d Cir. 1987).....	2
<i>Sherwin-Williams Co. v. Spitzer</i> , No. 04-185, 2005 WL 2128938 (N.D.N.Y. Aug. 24, 2005)	3
<i>United States v. Amodeo</i> , 44 F.3d 141 (2d Cir. 1995).....	2
<i>United States v. Amodeo</i> , 71 F.3d 1044 (2d Cir. 1995).....	3

Rules

F.R.C.P. 26(c)	1, 2
----------------------	------

PRELIMINARY STATEMENT

Defendant ReDigi Inc. (“ReDigi”) submits this memorandum of law in support of its motion for a protective order, pursuant to F.R.C.P. 26(c), to seal certain information contained in the transcript of the conference that the parties appeared at before the Court, dated April 4, 2016 (the “Transcript”).

Courts frequently recognize that not all information made part of the record should be subject to public disclosure. This is particularly true in connection with confidential, private, and sensitive information that, is not generally available to the public, and where disclosure could cause competitive injury, including private details of the terms of the agreement between the parties while ReDigi is still involved with negotiations related and necessary to effectuate said agreement. For the reasons set forth below, ReDigi respectfully requests that certain portions of the Transcript that include the particulars of the agreement between the parties as set forth in Exhibits 1 and 2 to the Adelman Declaration, namely the negotiated dollar amounts and certain constraints surrounding the agreement, be placed under seal. *See* Adelman Decl. Ex. 1 (an unredacted copy of the April 4, 2016 transcript which the parties are requesting be filed under seal) and Ex. 2 (a copy of the April 4, 2016 transcript with proposed redactions showing the portions that the parties seek to restrict access to).

FACTUAL BACKGROUND

On April 4, 2016, counsel for all parties appeared before the Court. During the conference, the parties discussed some of the terms of the agreement concerning damages and entry of final judgment between the parties (the “Agreement”), including the dollar amounts and the contingency discussed. This information should be sealed and/or redacted to prevent

competitive and commercial harm to ReDigi, and to maintain the confidentiality of this information.

APPLICABLE LAW

The presumption of public access to judicial documents is subject to multiple, well-recognized exceptions designed to protect the type of information at issue in this matter. *See Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-120 (2d Cir. 2006). Under the common law, the Court was instructed to weigh the presumption of access against factors that outweigh disclosure. *See United States v. Amodeo*, 44 F.3d 141, 146 (2d Cir. 1995); *Matter of New York Times Co.*, 828 F.2d 110, 116 (2d Cir. 1987).

The court may, for good cause shown, issue an order to protect any party including “requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way.” Fed. R. Civ. P. 26(c)(1)(G). The presumption of public access, which arises out of the First Amendment, may be overcome “to preserve higher values” provided “the sealing order is narrowly tailored to achieve that aim.” *Lugosch*, 435 F.3d at 124.

ARGUMENT

Well-recognized exceptions to the presumption of public access, including the privacy interests of parties, justify the sealing and/or redacting of the parts of the Transcript that could cause ReDigi a competitive disadvantage by impacting its ability to raise funds that are necessary to effectuate the Agreement. *See Adelman Decl.*, Ex. 2. Sealing and/or redacting the only parts of the Transcript containing this information is a narrowly-tailored means of protecting harm to ReDigi due to disclosure of the information at issue.

Information concerning the dollar amount and contingency contained in the parties' Agreement is private and the disclosure of this information could leave ReDigi at a competitive disadvantage when negotiating with third parties for the purpose of raising funds to effectuate the Agreement.

The protection of ReDigi's ability to fairly negotiate with third parties justifies sealing parts of the Transcript, even when disclosure is not certain to have an adverse impact. *See Gelb v. Am. Tel. & Tel. Co.*, 813 F. Supp. 1022, 1035 (S.D.N.Y. 1993) (granting motion to seal documents based upon the "assertion that its competitors who do not now have this information could use it to do [the party] competitive injury ..."); *Dawson v. White & Case*, 584 N.Y.S.2d 814 (App. Div. 1992) (sealing law "financial information concerning [its] partners and clients" because it does not "facilitate public discussion of policy issues" or serve "any legitimate public concern, as opposed to mere curiosity ... to counter-balance the interest of [its] partners and clients in keeping their financial arrangements private") (internal citations omitted); *United States v. Amodeo*, 71 F.3d 1044, 1051 (2d Cir. 1995)("[f]inancial records of a wholly owned business ... and similar matters will weigh more heavily against access than conduct affecting a substantial portion of the public."); *Sherwin-Williams Co. v. Spitzer*, No. 04-185, 2005 WL 2128938 (N.D.N.Y. Aug. 24, 2005) (ordering the sealing of documents ... regarding confidential information such as trade secrets, and commercial and proprietary interests).

In *D 'Ammour v. Ohrenstein & Brown, LLP*, the Court found good cause for sealing numerous documents containing a law firm's confidential, non-public information. *See D 'Ammour v. Ohrenstein & Brown, LLP*, No. 06 -601418, 17 Misc. 3d 1130(A), 851 N.Y.S.2d 68, at 2007 WL 4126386 at *21 (Aug. 13, 2007 Sup. Ct.). The court explained that the firm's interest in maintaining the privacy of these documents, which included, among other things, the firm's

agreements and memoranda, outweighed the right of public access to such documents. The firm “ought not to be required to make their private financial information public, merely because they have been named as defendants in a lawsuit, where no substantial public interest would be furthered by public access to that information.” *Id.*

Parts of the Transcript, specifically any references to the particulars terms of the dollar amount and contingency set forth in the parties’ private Agreement, include confidential information that could put ReDigi at an unfair competitive disadvantage while engaged in negotiations that relate to raising funds necessary to effectuate the Agreement between the parties.

The protection of the parties’ confidential and private terms of the Agreement justifies the sealing and redaction of part of the Transcript containing such information. Here, the disclosure of the contingency in the Agreement may place ReDigi at a severe disadvantage in the negotiation and as a result may impact ReDigi’s ability to raise funds necessary to effectuate the Agreement. As such sealing is warranted. *See Gelb*, 813 F. Supp. at 1035. Moreover, here, all of the parties prefer that the terms of their private Agreement set forth in the Transcript be sealed and/or redacted. While, by itself, this is generally insufficient to overcome the presumption of open proceedings a court may consider this fact while making a determination. *See Gelb*, 813 F. Supp. at 1035.

Moreover, even when the interest in disclosure is very high, a Court may grant a protective order sealing and/or redacting potentially harmful information. *See Lugosch*, 435 F.3d at 122. Here the First Amendment and common law concerns are minimal. Because the portions of the Transcript that are sought to be sealed concern the terms of a confidential agreement, which is a corollary issue to the main litigation, their availability is not necessary to allow the

public to follow the case or provide the public with the capacity to attend the relevant proceedings. *See In re: Gen. Motors LLC Ignition Switch Litig.*, 14-MC-2543 (JMF), 2016 WL 1317975, at *1 (S.D.N.Y. Mar. 2, 2016) (*citing Bernstein v Bernstein Litowitz Berger & Grossmann LLP*, 814 F3d 132, 141 (2d Cir. 2016)). Moreover the material at issue is not important to the exercise of Article III judicial power nor is it relevant to those monitoring the courts. The parties' private agreement is independent from the litigation, and having access to the information at issue is not important. This is especially true where, as here, the parties have agreed that the ultimate stipulated final judgment to be filed in this action pursuant to the parties' Agreement will be publicly filed.

Here, the material that ReDigi seeks to seal through this motion consists of the terms of a private Agreement between the parties, information that is generally not publicly filed or disclosed thereafter. Thus, like in *Dawson*, disclosure will not result in any public discussion of policy issues as the issues will not result in a ruling on the merits. Only the ultimate final stipulated judgment, which will be filed, is important to parties interested in the final adjudication on the merits.

This Court should therefore allow the parties to take appropriate measures to protect ReDigi's confidential and private information, including, without limitation, by sealing and/or redacting the Transcript as proposed. *See Adelman Decl.*, Exs 1 and 2. Furthermore, ReDigi believes that the instant request is narrowly tailored so as not to unduly prevent public access to judicial documents and that in this instance any interest the public may have in these documents is far outweighed by the competitive injury that ReDigi would suffer as a result of their disclosure.

CONCLUSION

For all of the foregoing reasons, ReDigi respectfully submits that the Court should order the sealing and/or redaction of parts of the Transcript and as proposed.

Dated: New York, New York
April 11, 2016

Respectfully submitted,
ADELMAN MATZ P.C.

A handwritten signature in black ink, appearing to read 'G. Adelman', written over a horizontal line.

Gary Adelman, Esq.
1173A Second Avenue, Suite 153
New York, New York 10065
Telephone: (646) 650-2207
E-mail: g@adelmanmatz.com
Attorneys for ReDigi Inc.