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December 29, 2016

VIA ECF and EMAIL

Hon. Richard J. Sullivan
United States Courthouse
40 Foley Square, Room 2104
New York, NY 10007

Re: Capitol Records, LLC et al. v. ReDigi Inc. et al., 12 cv. 0095 (RJS)

Dear Judge Sullivan:

We represent Plaintiffs in the above-referenced action. We write pursuant to the Court's order of December 20, 2016 (Docket No. 283) in order to provide a more detailed response objecting to the unsealing of the following documents that were previously sealed pursuant to the Court's orders of July 31, 2012 (Docket No. 71) and September 5, 2012 (Docket No. 102): Docket Nos. 57 (Exhibit 6), 74 (Exhibit 3), 76, 78, 90 and 91 (Exhibit 1). We note that per the Court's order, we have provided ReDigi's appellate counsel with unredacted copies of each of the foregoing documents so the sole issue is whether Plaintiffs' privacy interest in such documents continues to outweigh the presumption of public access to judicial documents. For the reasons set forth below, Plaintiffs respectfully submit that it does.

While there is a presumption of public access to judicial documents under the common law and First Amendment, "the court must balance competing considerations" against such presumption. Lugosch v. Pyramid Co. of Onondaga, 435 F.2d 110, 120 (2d Cir. 2006) (quoting United States v. Amodio, 71 F.3d 1044, 1050 (2d Cir. 1995)). Among the "countervailing factors" that may outweigh the public interest in disclosure are "the privacy interests of those resisting disclosure," *id.*, including interests based on the need to protect sensitive commercial information. See Fed. R. Civ. P. 26(c)(1)(G) ("The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, 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 . . ."); Crossman v. Astrue, 714 F. Supp. 2d 284, 287 (D. Conn. 2009) ("there can be (and often are) considerations of personal privacy, public safety, or a business's proprietary information . . . that can trump the right of the public to access court records.") (emphasis added); Encyclopedia Brown Productions, Ltd. v. Deutsch, 26 F. Supp. 606 (S.D.N.Y. 1998) (withholding from disclosure confidential business information that would harm defendants' competitive position).

The above-referenced documents contain excerpts from Plaintiffs' 2003 "Digital Music Download Agreement" with Apple and various later amendments to such agreement (collectively, the "Apple Agreements"), as well as further references to and discussion of such agreement and Capitol's contractual arrangement with Apple. Although this particular agreement is no longer in effect, its terms remain of a highly competitively sensitive nature, are not publicly available and are subject to a strict confidentiality provision which treats the terms of the agreement as confidential and prohibits public disclosure of such terms without the other side's consent or unless required by law. Permitting competitors, who have their own separately negotiated and confidential relationships with Apple, to have access to historically negotiated terms pursuant to which Plaintiffs have structured their key commercial arrangement with Apple would provide useful insights to Plaintiffs' competitors in connection with their own future negotiations and dealings with Apple. The recording industry members do not generally share information concerning the terms of their past or present commercial arrangements, and making such information available to Plaintiffs' competitors would afford them an unwarranted and unfair business advantage.

The harm that Plaintiffs would suffer to their competitive position from the release of such confidential business information outweighs the public's interest in access to such documents. See, e.g., GoSMiLE, Inc. v. Dr. Jonathan Levine, D.M.D., P.C., 769 F. Supp. 2d 630, 649-50 (S.D.N.Y. 2011) (granting defendants' motion to seal when documents contained "highly proprietary material concerning the defendants' marketing strategies, product development, costs and budgeting"); Scott D. Boras Inc. v. Sheffield, 2009 WL 3444937, at *1 (S.D.N.Y. Oct. 26, 2009) (granting motion to seal certain documents where "the proprietary business matters discussed" justified confidential treatment); Encyclopedia Brown Productions, Ltd. v. Deutsch, 26 F. Supp. 606, 612-14 (S.D.N.Y. 1998) (granting motion to seal confidential business information where harm to defendant's competitive position caused by giving competitors a bargaining advantage in negotiating outweighed interest in public access).

Indeed, the information in question had no bearing on the outcome of the case, and shielding those limited portions not revealed in the redacted documents from public disclosure would still permit public access to all the relevant information on which the Court's resolution of the parties' summary judgment motions turned. The Court gave short shrift to ReDigi's argument on summary judgment that Capitol's arrangement with Apple permitting downloading on iTunes had any relevance to ReDigi's fair use defense, and thus never needed to address any aspect of the Apple Agreements:

ReDigi incredibly argues that Capitol is preempted from making a market-based argument because Capitol itself condones downloading of its works on iTunes. (ReDigi Mem. 18.) Of course, Capitol, as copyright owner, does not forfeit its right to claim copyright infringement merely because it permits certain uses of its works. This argument, too, is therefore unavailing.

Docket No. 109 at 11. Given the complete irrelevance of the terms of the Apple Agreements to any issue in the case, and the sensitive nature of the competitive business information contained

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in the Apple Agreements, the balance clearly continues to weigh strongly against disclosure of these documents. Moreover, inasmuch as Defendants' appellate counsel has been given access to the documents at issue pursuant to an appropriate protective order, Defendants suffer no prejudice from the continuing confidential treatment of the information.

Accordingly, for all these reasons, Plaintiffs respectfully request that the Court continue to permit the sealing of the documents described above in accordance with its prior rulings recognizing Plaintiffs' legitimate privacy interest in the business information contained in such documents.

Respectfully,

A handwritten signature in cursive script, appearing to read "R. S. Mandel", written in dark ink.

Richard S. Mandel

cc: All Parties Receiving Notice via ECF