UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

---------- X

CAPITOL RECORDS, LLC, :

Plaintiff, : 12 Civ. 0095 (RJS)

-against- :

REDIGI INC., :

Defendant. :

---------- x

MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFF'S MOTION TO SEAL

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiff Capitol Records, LLC
1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200

PRELIMINARY STATEMENT

Plaintiff Capitol Records, LLC ("Capitol") respectfully submits this Memorandum of Law in support of its motion to permit the continued sealing of the following documents conditionally filed under seal by Defendant ReDigi Inc. ("ReDigi"), pursuant to the Court's July 12, 2012 endorsed letter order, in connection with ReDigi's motion for summary judgment: (1) Memorandum of Law in Support of ReDigi Inc.'s Motion for Summary Judgment ("ReDigi Brief"); (2) Defendant's Statement of Undisputed Facts Pursuant to Local Rule 56.1 ("ReDigi 56.1 Statement"); and (3) Exhibit 6 to the Declaration of Gary Adelman in Support of Defendants' (sic) Motion for Summary Judgment ("Adelman Declaration").

As set forth in the accompanying Declaration of Mark Piibe ("Piibe Decl."), ReDigi's summary judgment papers include confidential business information of EMI Music and its related entities (collectively, "EMI"), including Capitol, that is competitively sensitive and should be shielded from public disclosure. In particular, Capitol seeks to prevent the public filing of one exhibit to the Adelman Declaration, Exhibit 6,[1] as well as limited references to the content of such exhibit in the ReDigi 56.1 Statement (at paragraphs 64, 65 and 68) and ReDigi Brief (at page 17, lines 3-5).[2]

Exhibit 6 to the Adelman Declaration contains copies of excerpts of EMI's 2003 "Digital Music Download Agreement" with Apple and a 2011 amendment to such agreement

[1]Capitol also designated Exhibit 8 to the Adelman Declaration as confidential during discovery. Accordingly, that exhibit and references to it at page 25, footnote 7 of the ReDigi Brief and paragraph 75 of the ReDigi 56.1 Statement, have also been redacted by ReDigi in its public filing. However, Capitol agrees as part of this motion that Exhibit 8 and the foregoing references to it can be included in publicly available versions of ReDigi's summary judgment papers without the need for redaction.

[2] ReDigi has electronically filed publicly available versions of the ReDigi 56.1 Statement and ReDigi Brief which redact the above-referenced portions of those documents, as well as numerous other portions containing what ReDigi claims is its own confidential business information (and which presumably will be separately addressed by ReDigi in its own motion).

(collectively, the "EMI-Apple Agreement"). Piibe Decl. ¶ 3. The EMI-Apple Agreement governs a complex commercial relationship between EMI and Apple with respect to the sale of downloads of Capitol's sound recordings, music videos, and ringtones through Apple's iTunes Store, and various services offered by Apple to iTunes Store end users with respect to EMI content. The terms of the EMI-Apple Agreement are of a highly competitively sensitive nature, are not publicly available, 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. Id. ¶ ¶ 4-7.

The EMI-Apple Agreement constitutes a classic example of the kind of confidential business information that courts will prevent from public disclosure in order to prevent harm to a litigant. It would give competitors, who have their own separately negotiated and confidential relationships with Apple, an unfair business advantage if they were able to ascertain specifically negotiated terms, definitions, pricing arrangements and restrictions pursuant to which EMI has structured its key commercial arrangement with Apple. Piibe Decl. ¶ 6. Accordingly, and in view of the limited nature of the redactions made to the publicly available documents in order to protect Capitol's confidential information, Capitol submits that sealing is appropriate and necessary in this case.

ARGUMENT

CAPITOL'S SEALING MOTION SHOULD BE GRANTED

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 a presumption of access. Lugosch v. Pyramid Co. of Onondaga, 435 F.3d 110, 120 (2d Cir. 2006) (quoting U.S. v. Amodeo, 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. Home Box Office, Inc., 26 F. Supp. 2d 606, 612-613 (S.D.N.Y. 1998) (withholding from disclosure confidential business information that would harm defendants' competitive position).

In the present case, Capitol has made the requisite showing justifying the sealing of the documents at issue in order to preserve the confidentiality of its competitively sensitive commercial information. See Lugosch, 435 F.3d at 120 (sealing of documents is appropriate based on specific findings "demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest") (quoting In re New York Times Co., 828 F.2d 110, 116 (2d Cir. 1987)). The harm that Capitol would suffer to its competitive position from the release of such confidential business information (Piibe Decl. ¶ 6) 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, 26 F. Supp. 2d at 614 (granting motion to seal confidential business information where harm to defendant's competitive position outweighed interest in public access).

Exhibit 6 to the Adelman Declaration contains significant excerpts from the original EMI-Apple Agreement, including references to key contractual definitions, the scope of Apple's authorization to distribute EMI's content, specific pricing and accounting terms, and Apple's obligations regarding end user restrictions. Piibe Decl. ¶ 5. The exhibit also contains excerpts from the 2011 amendment to such agreement disclosing additional authorizations for Apple to exploit EMI content as part of certain new iTunes services, additional payment/pricing terms, and further obligations imposed upon Apple regarding restrictions to be imposed upon end users. Id. Providing such terms to EMI's competitors, who have their own separately negotiated deals with Apple, would cause serious harm to EMI's competitive position in the marketplace and afford an unwarranted and unfair advantage to EMI's competitors. Id. ¶ 6.

In a situation similar to the one at hand, the defendants in Encyclopedia Brown Productions sought to seal confidential business information, including detailed operations information and information related to business and decision making strategies. 26 F. Supp. 2d at 607-10. Defendants argued that, if unsealed, the information would unfairly benefit defendants' competitors, giving them a bargaining advantage in negotiating, and would irreparably harm defendants' competitive position. Id. at 609, 612-14. The Court found that, while there was a presumption of public access to the information, the potential harm to defendants' competitive position that would result from disclosure outweighed that interest, and

therefore granted, in large part, defendants' motion to seal. Id. at 612-15. In so deciding, the Court recognized the need to protect legitimate confidential business information from disclosure, and weighed heavily the potential damage that release of this information would cause to defendants' business interests. Id.

The same result should follow here. The limited sealing sought by Capitol is necessary to preserve its competitive position, and has been narrowly tailored so as also to protect the public's right to access judicial documents. Indeed, Capitol only seeks to prevent public disclosure of one exhibit, along with accompanying references to such exhibits in three paragraphs of ReDigi's 80 paragraph 56.1 Statement and three lines in ReDigi's 25 page brief. The information in question is tangential at best to the key issues in the case, and shielding these limited portions of ReDigi's motion from public disclosure would still permit public access to essentially all the important information on which determination of the motion is likely to turn without causing any competitive harm to EMI. Accordingly, the Court should appropriately balance the relevant interests at stake by permitting the sealing requested by Capitol.

CONCLUSION

For all of the foregoing reasons, Capitol's motion to seal should be granted.

Dated: New York, New York
July 27, 2012

Respectfully submitted,

COWAN, LIEBOWITZ & LATMAN, P.C.
Attorneys for Plaintiff Capitol Records, LLC

By: _____
Richard S. Mandel
Jonathan Z. King
Bridget A. Crawford

1133 Avenue of the Americas
New York, New York 10036-6799
(212) 790-9200