UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
--X
CAPITOL RECORDS, LLC,

                           Plaintiff,

        v.

REDIGI INC.,

                           Defendant.

--X

Civil Action No.: 12CIV0095
(RJS)

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

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PRELIMINARY STATEMENT

Defendant ReDigi Inc. ("ReDigi") submits this memorandum of law in support of its

motion for the continued sealing of certain information contained in documents filed with the

Court as listed on Exhibit "A" of the Declaration of Larry Rudolph a/k/a Lawrence S. Rogel

dated July 27, 2012 ("Rogel Decl.") and incorporates by reference those documents contained on

Exhibit "A," that were redacted for the parties' filings on ECF.[1]

Courts frequently recognize that not all information filed in court should be subject to

public disclosure. This is particularly true in connection with documents and information filed

with motions of this nature, which contain highly confidential and sensitive information that is

not generally available to the public, including details concerning the ReDigi's proprietary

software, the internal operations of its service, raising of finances, structure, information

gathered by ReDigi's service and ReDigi's private interactions with potential partners. *See*

Rogel Decl., ¶4-5. ReDigi makes significant efforts to protect the confidentiality of its sensitive

and proprietary information. See Rogel Decl., ¶4-6. For the reasons set forth below, ReDigi

respectfully requests that the portions of ReDigi's confidential information submitted in support

of the parties' motions for summary judgment which were filed under seal remain under seal.

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[1] Deposition Excerpts of Rudolph Rogel Deposition taken on June 18, 2012, attached to
Plaintiffs Motion. Deposition Excerpts of Rudolph Rogel Deposition taken on June 18, 2012,
attached to ReDigi's Motion. Deposition Excerpts of Ossenmacher Deposition, taken on June
19, 2012, attached to Plaintiffs Motion. Deposition Excerpts of Ossenmacher Deposition, taken
on June 19, 2012, attached to Redigi's Motion.   Exhibits "K", "L" and "M" attached to Plaintiffs
Motion. Plaintiff's 56.1 Statement of Uncontested Facts, attached to Plaintiff's Motion.
ReDigi's 56.1 Statement Of Uncontested Facts, attached to ReDigi's Motion, Plaintiff's
Memorandum of Law, dated July 20, 2012. ReDigi's Memorandum of Law, dated July 20,
2012. Declaration of Gary Adelman dated July 20, 2012, in support of ReDigi's Motion.
Declaration of Larry Rudolph (aka Lawrence S. Rogel), dated July 20, 2012, in support of the
ReDigi Motion. Declaration of Colin Worth, dated July 20, 2012, in support of the ReDigi
Motion. Declaration of Jonathan Lin, dated July 20, 2012, in support of the ReDigi Motion.
(Hereinafter the "Redacted Documents").

FACTUAL BACKGROUND

In recognition of the sensitive nature of the information that would be exchanged in this action the Court entered a Protective Order dated May 14, 2012 (the "Protective Order"). The Protective Order allowed the parties to exchange certain documents marked, "Confidential" or "Attorneys Eyes Only". In addition, the Court issued an "Addendum To The Order," dated May 14, 2012, which stated in part,

> "…No document may be filed with the Clerk under seal without further order of this Court addressing the specific documents to be sealed. Any application to seal shall be accompanied by an affidavit or affidavits and a memorandum of law, demonstrating that the standards for sealing have been met and specifically addressing *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 119-120 (2d Cir. 2006) and any other controlling authority."

To comply with its discovery obligations, ReDigi produced a significant volume of confidential and sensitive information under the Protective Order in this action. In anticipation of making their motions for summary judgment, knowing that both parties would be using documents that had been produced under the confidential designation, the parties submitted a joint letter to the court dated July 12, 2012.

The July 12, 2012 joint letter requested leave to file certain confidential documents under seal and that the parties be given one week to submit the instant requests for continued sealing pursuant to the May 14, 2012 Addendum, which the Court endorsed on July 12, 2012 (the "July 12 Order"). Consistent with the July 12 Order the Parties have filed the Redacted Documents under seal which contain confidential information about ReDigi's software, service, business and financial information. See Rogel Decl., ¶4. This information should remain sealed and/or redacted to prevent competitive and commercial harm to ReDigi, and 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 precisely the type of information filed under seal in this matter. *See Lugosch*, 435 F.3d, 119-20. 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 resisting disclosure, justify the sealing and/or redacting of: (1) the confidential documents of ReDigi; and (2) ReDigi's confidential, proprietary business secrets and information, including but not limited to information concerning ReDigi's software structure and operation, the ReDigi system and its internal functionality, confidential information provided to investors and potential customers, which contain ReDigi company secrets and are protected under confidentiality agreements. *See* Rogel Decl., ¶1-15. Sealing and/or redacting documents containing this information is a narrowly-tailored means of protecting harm to ReDigi due to disclosure of the information.

**CONFIDENTIAL REDIGI DOCUMENTS SHOULD REMAIN
SEALED AND/OR REDACTED**

Both the Plaintiff and ReDigi have filed under seal information that is proprietary

business information of ReDigi, which is not generally available to the public and/or is

information that is subject to confidentiality agreements. *See* Rogel Decl., ¶1-4, 13. This

information is private, confidential, and the disclosure of this information could leave ReDigi at

a competitive disadvantage. *See id.* ¶4, 8-11.

The protection of confidential proprietary ReDigi information justifies sealing. *See*

Standard Inv. Chartered, Inc. v. Fin. Indus. Regulatory Auth., No. 08-4922, 2009 WL 2778447,

at **2 (2d Cir. 2009) (regulatory organization's "'interest in protecting confidential business

information outweighs the qualified First Amendment presumption of public access.'");

GoSMiLE, Inc. v. Dr. Jonathan Levine, D.M.D. P.C., 769 F. Supp. 2d 630, 649-50 (S.D.N.Y.

2011)(granting motion to seal "highly proprietary material concerning ... marketing strategies,

product development, costs and budgeting."); *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); *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 (1st Dep't 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.").

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 income tax returns, financial statements and reports, and 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.*

The Redacted Documents filed in connection with the motions for summary judgment include proprietary details of ReDigi's software trade secrets, non-standard protocols that do not involve making reproductions, specific details concerning how the software functions, investor business plans, marketing plans, and subscription agreement forms. *See* Rogel Decl., ¶4, 8-12.

Here the protection of ReDigi's confidential propriety information justifies the sealing and redaction of documents containing such information. Technology firms like ReDigi closely safeguard their information as it is the essence of their competitive advantage and the disclosure of this information would place them at a severe competitive disadvantage and cause irreparable harm. *Id.* ¶4-6. The technological services industry is a highly competitive one, and no market is as competitive as the music market. Moreover, technology firms do not generally share the type of information that is contained in the Redacted Documents.

This particularly rings true today in light of the highly competitive technology market, where patents and trade secrets are an issue and intellectual property litigation is an everyday occurrence. Having an edge in technology is vital to the success of ReDigi's business and the release of these business and technology secrets would have a negative effect on its ability to be competitive. *Id.* ¶11. Technology firms like ReDigi must continually develop strategies and technology's to keep ahead of not only their competitors, but also hackers whose sole goal is to defeat a web sites technology. *Id.* ¶9-10. Publicizing information in the Redacted Documents, would give ReDigi's competitors and hackers insight into how ReDigi works. *Id.* ¶9-11. With access to ReDigi's confidential and proprietary information, other tech firms and hackers, alike, would be able to reap the benefits of ReDigi's efforts, time and investment at no cost to them, and undercut ReDigi's future business or potential harm the software itself. *Id.*

Software source code and functionality are among the most highly confidential of trade secrets and deserves trade secret protection. *See* Jager, *Trade Secrets Law*, § 9.3 at 9-5-11 (Supp. 2006) (and cases cited therein) (trade secret protection has long been afforded to computer software programs). *See, e.g., Sun Dial Corp. v. Rideout*, 108 A.2d 442, 445 (N.J. 1954) ("trade secret may consist of a formula, process, device or compilation which one uses in his business and which gives him an opportunity to obtain an advantage over competitors who do not know or use it"); *Lehman v Dow Jones & Co., Inc.*, 783 F2d 285, 297 (2d Cir. 1986) (citing Restatement (First) of Torts § 757 (1939)). *See also Apple Computer, Inc. v. Franklin Computer Corp.*, 714 F.2d 1240, 1248 (3d Cir.1983).

ReDigi has invested significant time, effort and money in developing its software, and internal processes, and zealously protects its software. *See* Rogel Decl., ¶8-11. ReDigi does not make its source code or the processes of how it performs certain functions available to the public

and it otherwise takes every conceivable step to prevent public disclosure of this information, which is the "golden nugget" intellectual property that is at the core of the value of its business. *Id.* ¶4-6, 8-11.

The material that ReDigi seeks to seal through this motion is its software processes, its competitively sensitive information derived from that source code, such as "logical flow" and the information contained in the Declarations of Larry Rudolph Rogel, Jonathan Lin and Colin Worth, and the Depositions of Larry Rudolph Rogel and John Ossenmacher, and the Memorandum of Law and 56.1 Statement of Undisputed Facts of both parties. *Id.* ¶4. These documents illustrate step-by-step the sequence and flow of the ReDigi system and how they perform certain actions involved in the software and system. *Id.* If disclosed, this information would permit ReDigi's competitors and hackers, to have information that would allow them to duplicate the proprietary ReDigi system, without having to incur the significant development costs associated with engineering the software and hardware configuration themselves. *Id.* ¶10-11.

This type of information can be thought of as the "words and paragraphs" that make up the "novel" that is ReDigi's software, which are protected expressions of ideas, the logical flow, how certain processes work and which detail the logical order in which the program processes the information it receives and works towards obtaining a result, is "the plot" of the novel. A competitor or hacker with this type of information, would have a map to how ReDigi's software works and can simply "knock off" the plot, thus recreating the software without incurring the many dollars of development costs that ReDigi has. That, of course, threatens the very essence of ReDigi's business. This court should therefore allow the parties to take appropriate measures to protect ReDigi's confidential and proprietary information, including, without limitation, by

sealing the record with the redactions that the Parties have made to the documents and prohibiting disclosure of the ReDigi proprietary information.

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 harm 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 continued redaction of the material submitted in connection with ReDigi's and the Plaintiff's summary judgment motions.

Dated: New York, New York
July 27, 2012

Respectfully submitted,
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