

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NORTH CAROLINA  
WESTERN DIVISION  
NO. 5:07-cv-00347-D

LULU ENTERPRISES, INC.,

Plaintiff,

vs.

HULU, LLC, et al.,

Defendants.

**DEFENDANT'S MEMORANDUM OF  
LAW IN SUPPORT OF MOTION TO  
FILE DOCUMENTS UNDER SEAL  
(Local Civil Rule 79.2, EDNC)**

Defendant Hulu, LLC (formerly N-F NewSite, LLC) ("Hulu") seeks to file certain confidential, proprietary and commercially sensitive financial and business information under seal related to its opposition to Plaintiff Lulu Enterprises, Inc.'s motion for preliminary injunction.

**NATURE OF MATTER BEFORE THE COURT**

On September 5, 2007, Plaintiff filed this action against Hulu, LLC ("Hulu") asserting various claims, including unfair competition, federal cyberpiracy, unfair and deceptive trade practices and common law trademark infringement and unfair competition. *See* Compl., Counts I-IV. On September 10, 2007, Plaintiff filed its motion for a temporary restraining order, a preliminary injunction, and expedited discovery. By order dated September 14, 2007, and with the consent of the parties upon joint motion, the Court set Plaintiff's motion for preliminary injunction for hearing on October 16, 2007, with the parties' primary memoranda of law and supporting documentation in support of and in opposition to preliminary injunction to be filed with the Court no later than October 9, 2007.

On September 28, 2007, the Court entered an Order amending and adopting the Consent Protective Order proposed by the parties regarding the handling of confidential and competitively sensitive financial and business information designated as “Confidential Information” or “Attorneys’ Eyes Only Information.” Hulu files this memorandum of law in support of its Motion to File Documents Under Seal, submitted contemporaneously herewith.

### **STATEMENT OF THE FACTS**

Hulu is a Delaware limited liability company with its principal office located in Los Angeles, California. Hulu was conceived in late 2006 as a joint venture of Fox and NBC Universal, was publicly announced in March 2007, and has been in business since that time. Hulu intends to provide its internet audience exceptional premium video content including current and past broadcast television programming and feature films. That content will be distributed over the internet by Hulu on its website, [www.hulu.com](http://www.hulu.com), and together with some of the world’s leading Internet destination sites.

The documents requested by Hulu to be filed under seal in this matter include:

- (1) Supplemental Confidential Declaration of Jason Kilar, with Exhibits A-C;
- (2) March 21, 2007 Presentation, “NewSite JV Overview” (DEF000134-DEF000147);
- (3) Transcript, Deposition of Jason Kilar, taken September 28, 2007;
- (4) August 29, 2007 “Hulu Name and Beta Announce FAQ – Internal Only,” (DEF000446-DEF000447);
- (5) September 2007 Presentation, “Hulu Overview” (DEF000252-DEF000262);
- (6) August 20, 2007 Screenshot, “Customer sign-ups for Hulu beta, dated 8/20” (DEF000001);
- (7) April 2007 Presentation, “NewSite JV Business Plan” (DEF000111-DEF000133);

- (8) May 9, 2007 Interbrand Memorandum, "NewSite Creative Brief" (DEF001227-DEF001232);
- (9) August 15, 2007 e-mail from Andrew Racine to Carolyn Glass, NBC Universal (DEF000658-DEF000661);
- (10) September 5, 2007 email from Jason Kilar to "board@projectnewsite.com" (DEF000404-DEF000405);
- (11) Image of Hulu logo (DEF001490)

All of the above-listed items contain confidential and proprietary information. Item No. 1 was prepared and is being filed by Defendant in support of its opposition to plaintiff's motion for preliminary injunction. It also has been designated by Hulu as "Attorneys' Eyes Only Information" pursuant to the Court's Order dated September 28, 2007. Item Nos. 2-11 were produced by Defendant to Plaintiff during the limited expedited discovery period ordered by the Court related to Plaintiff's motion. Defendant designated each of these items as "Confidential Information" or "Attorneys' Eyes Only Information." Pursuant to the Court's Order, counsel for the parties have conferred and Defendant requested that these items (Nos. 2-11), which Plaintiff intends to file in support of its motion for preliminary injunction, remain confidential and be filed under seal.

## **ARGUMENT**

### **Defendant Should Be Permitted To File Documents And Information Under Seal.**

The Fourth Circuit has explicitly set forth the standards and procedure for maintaining documents under seal. A court considering a motion to maintain documents under seal must first determine the nature of the information and the source of the public's right to access. *Stone v. Univ. of Md. Medical Sys. Corp.*, 855 F.2d 178, 180 (4th Cir. 1988); *Hall v. United Air Lines Inc.*, 296 F. Supp. 2d 652, 679 (E.D.N.C. 2003). Although there is a presumption that the public may have access to judicial records and documents, this access is proscribed by a party's right to

privacy and to protect trade secrets and confidential business information. *Glaxo Inc. v. Novopharm Ltd.*, 931 F. Supp. 1280, 1299 (E.D.N.C. 1996). Courts have uniformly held that a “well-settled exception to the right of access is the ‘protection of a party’s interest in confidential commercial information, such as a trade secret.’” *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653, 664 (D. N.J. 2004).

Each of the documents Hulu proposes to be filed under seal contains highly confidential and competitively sensitive commercial information relating to the business plans and financial concerns of Hulu, and as such should be permitted by the Court to be filed under seal in this matter.

The document Hulu seeks to file under seal in opposition to Plaintiff’s motion for preliminary injunction (Item No. 1) concerns information about Hulu’s business that is not generally known and is competitively significant. For example, the Supplemental Confidential Declaration of Jason Kilar, Hulu’s CEO, contains financial information related to the Hulu enterprise not generally known by the public. Exhibits A-C to Mr. Kilar’s Supplemental Declaration contain information concerning the content to be provided by hulu.com to its users at the launch of the site, as well as a DVD containing a video demonstration of the hulu.com website, none of which has been made available to the public.

Further, the confidential documents produced by Hulu that Plaintiff intends to file with its submission to the Court (Item Nos. 2-11) also contain highly confidential, proprietary, or commercially sensitive information not generally known by the public. Each of these items was designated by Hulu as “Confidential Information” or “Attorneys’ Eyes Only Information” when produced to Plaintiff. The public disclosure of such specific information could cause Hulu significant harm, disrupting its business relationships and prejudicing Hulu in the marketplace.

For example, Item Nos. 2, 5, and 7 include business plans and overviews of the new hulu.com venture. Such information has not been shared with the public and is commercially sensitive due to the current early stages of development of Defendant's business. By way of further example, Item No. 11 contains an image of the most recent design for the Hulu logo. As the hulu.com website has not been publicly launched, this logo is not available to the public.

WHEREFORE, Defendant Hulu, LLC respectfully prays the Court for an Order allowing it to file the above-listed items under seal.

Respectfully submitted this the 9th day of October, 2007.

/s/ Hayden J. Silver, III

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**CERTIFICATE OF SERVICE**

This is to certify that on this date the foregoing was electronically filed with the Clerk of the Court using the CM/ECF System which will send notice to the following CM/ECF participants:

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This the 9th day of October, 2007.

/s/ Hayden J. Silver, III  
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