UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF RHODE ISLAND

HASBRO, INC., Plaintiff, -against- INFOGRAMES ENTERTAINMENT, S.A. a/k/a ATARI, S.A., Defendant.	C.A. 09-610/S

DEFENDANT ATARI, SA'S MOTION TO VACATE AN ORDER GRANTING PLAINTIFF'S EMERGENCY MOTION TO SEAL

Defendant Atari, SA (f/k/a Infogrames Entertainment, SA) ("Atari") moves pursuant to Fed. R. Civ. P. 60 to vacate the Court's December 28, 2009 Order granting plaintiff Hasbro, Inc.'s ("Hasbro") motion to seal the exhibits to Atari's Answer and Counterclaims on the grounds that such order was entered only four days after the motion was filed and before Atari had the opportunity to respond to the motion, and prevailing First Circuit law presumes that all Court records should be open to the public, and Hasbro did not and cannot show facts sufficient to overcome that presumption..

Contemporaneously with this motion to vacate, Atari files an objection to Hasbro's motion to seal.

Atari files herewith a consolidated memorandum in support of its objection and motion to vacate.

Atari respectfully requests hearing on its objection and motion to vacate and estimates that such hearing will last 30 minutes.

Respectfully submitted,

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Dated: December 31, 2009

CERTIFICATE OF SERVICE

This document was electronically filed with the Clerk of the Court on December 31, 2009, and is available for viewing and downloading from the Court's ECF system. Service on all counsel of record has been effectuated by electronic means.

/s/ Michael J. Daly

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DEFENDANT ATARI, SA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO VACATE ORDER SEALING EXHIBITS AND OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR SEALING

Introduction

This memorandum of law is submitted on behalf of defendant Atari, SA ("Atari') in support of its motion to vacate the text order entered December 28, 2009 granting the "emergency" motion of plaintiff Hasbro, Inc. ("Hasbro"), filed December 24, 2009, for an order sealing all of the Exhibits (i.e., Exhibits 1 through 8, Document 10, Attachments 1 through 9[1]) to Atari's Answer and Counterclaims filed December 22, 2009 (Document 10). This memorandum of law also is submitted on behalf of Atari in support of its objection to Hasbro's emergency motion.

The Court should vacate the December 28th text order because (1) the text order was entered on the next business day after the motion was filed, before Atari had any meaningful opportunity to file an opposition, and long before the time for Atari to file its opposition to the motion under the Local Rules of this Court; and (2) prevailing First Circuit law presumes that all

[1] Citations to documents filed in this action correspond to the document numbers as they appear on the electronic docket sheet for this action.

court records should be open to the public, and Hasbro did not and cannot show facts sufficient to overcome that presumption.

Upon vacating the text order, the Court should deny Hasbro's emergency motion because, again, under prevailing First Circuit law which presumes that all court records should be open to the public, Hasbro did not and cannot show facts sufficient to overcome that presumption.

Nature of This Action

Hasbro filed its complaint in this action on December 16, 2009, and served it on December 22, 2009. Later on December 22, Atari served its Answer and Counterclaims, including Exhibits 1 through 8 thereto, consisting of the Dungeons & Dragons License Agreement dated June 3, 2005 by and between Hasbro, as licensor, and Atari (then known as Infogrames Entertainment, SA), as amended (the "License Agreement") as Exhibit 1 (Document 10, Attachments 1 through 2), and correspondence generally between Hasbro or its subsidiary, Wizards of the Coast LLC, on the one hand, and Atari's subsidiary, Atari, Inc., on the other hand, as Exhibits 2 through 8 (Document 10, Attachments 3 - 9). The correspondence discusses Hasbro's breaches of the License Agreement by its failure to notify Atari of its approval or disapproval of submissions of proposed sublicenses within 15 business days from the date of submission to Hasbro, refusal to permit Atari to use a former wholesaler as a wholesaler in Europe, and Hasbro's improper withdrawal of certain licensed intellectual property which Atari is contractually entitled to exploit.

The correspondence also concerns Hasbro's assertion that Atari breached the License Agreement by supposedly (a) disclosing largely unidentified "confidential information" of Hasbro to a purported competitor of Hasbro, which was acting until September 9, 2009 as wholesaler of game software for Atari in Europe, (b) sublicensing or assigning rights under the

License Agreement to that wholesaler without Hasbro's approval, and (c) having no support for marketing in Europe the brand licensed by Hasbro to Atari for games, i.e., Dungeons & Dragons ("D&D").

The License Agreement is over four and one-half years old, and its last amendment is over two years old. The License Agreement contains no trade secrets, and Hasbro failed to identify in its motion any "material terms" claimed to constitute Confidential Information under the License Agreement. If the License Agreement or any of its terms were once somehow confidential, neither the agreement nor its terms are confidential after four and one-half years. Moreover, the correspondence attached as Exhibits 2 through 8 to the Answer and Counterclaims is clearly not confidential as it relates to the disputes between the parties which are matters of public record through Hasbro's Complaint and the main body of the Answer and Counterclaims, neither of which Hasbro has sought or could reasonably seek to seal. Finally, the correspondence does not disclose any trade secrets or commercially sensitive information.

Argument

I.
THE TEXT ORDER SHOULD BE VACATED BECAUSE ATARI WAS NOT GIVEN THE TIME PROVIDED UNDER THE RULES TO OPPOSE THE MOTION TO SEAL

Local Rule LR Cv 7 (b)(1) of the United States District Court for the District of Rhode Island provides the non-movant two weeks after service of a motion in which to file the non-movant's objection to it. Here, the motion was filed and served on Christmas Eve, December 24, 2009, and was granted on the next business day, December 28, without an objection having yet been filed, without an opportunity for Atari to file such, and eleven days before any objection was due to be filed under the Local Rule. Despite Hasbro's claimed attempt to reach counsel for Atari before filing Hasbro's motion, no attorney working for Atari received any advance notice

of the emergency motion and learned of it for the first time when Hasbro filed it. Accordingly, the motion to vacate the text order should be granted, and the text order should be vacated.

II.
HASBRO DID NOT AND CANNOT SHOW FACTS SUFFICIENT TO PERMIT SEALING

The First Circuit has cautioned against easy sealing of court records as follows: "[p]lacing court records out of public sight is a serious step, which should be undertaken only rarely and for good cause. Sealing orders are not like party favors, available upon request or as a mere accommodation." *R & G Mortg. Corp. v. Federal Home Loan Mortg. Corp.*, 584 F.3d 1, 12 (1st Cir. 2009); s*ee also In re Providence Journal Co., Inc.,* 293 F.3d 1, 9 (1st Cir. 2002) (*quoting Siedle v. Putnam Inv., Inc.*, 147 F.3d 7, 10 (1st Cir. 1998) ("Courts long have recognized 'that public monitoring of the judicial system fosters the important values of quality, honesty and respect for our legal system.'"). The public's "presumptive right of access attaches to those materials 'which properly come before the court in the course of an adjudicatory proceeding and which are relevant to that adjudication.'" *Id.*

In fact, the First Circuit holds that, "under the common law, there is a long-standing presumption of public access to judicial records." *In re Gitto Global Corp*., 422 F.3d 1, 6 (1st Cir. 2005); *see also In re Providence Journal Co., Inc., supra* (*quoting FTC v. Standard Fin. Mgmt. Corp*., 830 F.2d 404, 412-13 (1st Cir. 1987)); *In re Salem Suede, Inc*., 268 F.3d 42, 45 (1st Cir. 2001) ("[T]here is a strong common law presumption favoring public access to judicial proceedings and records."). "This presumption of access 'helps safeguard the integrity, quality, and respect in our judicial system, and permits the public to keep a watchful eye on the workings of public agencies.'" *In re Gitto Global Corp.*, 422 F.3d at 6 (*quoting In re Orion Pictures Corp*., 21 F.3d 24, 26 (2d Cir. 1994)).

With the presumption in favor of public access, "'only the most compelling reasons can justify non-disclosure of judicial records.'" *In re Gitto Global Corp*, *supra (quoting Standard Fin. Mgmt. Corp.*, 830 F.2d at 410 (1st Cir. 1987). In fact, "the presumption in favor of access can only be overcome 'by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest.'" *U.S. v. Potter*, 394 F. Supp. 2d 475, 478 (D.R.I. 2005) (*quoting In re Providence Journal Co., Inc.*, 293 F.3d at 10-11. Plainly, under First Circuit law, sealing is an extraordinary step.

Rather than set forth factual explanations as to why each exhibit to the Answer and Counterclaims sets forth trade secrets or other confidential commercial information, Hasbro resorts to conclusory claims of confidentiality:

> The exhibits … all deal with a confidential license agreement … and contain communications … concerning that licensing agreement that were intended to be kept confidential. The materials also contain numerous sensitive communications regarding the parties' complex business relations, some of which include financial terms and conditions.

This is an insufficient showing under First Circuit precedent and, certainly, does not state "the most compelling reasons [that] can justify non-disclosure of judicial records." *In re Gitto Global Corp., supra.* These assertions by Hasbro are mere conclusions without any detail as to why the documents threaten any specific harm to Hasbro unless the extraordinary measure of sealing is granted. The argumentation in the correspondence discloses no grave secret information of either of the parties.

Additionally, the License Agreement itself is not confidential and was not labeled by the parties a "Confidential License Agreement." Rather, the License Agreement defines its "material terms" as Confidential Information as well as "any and all information that may be exchanged between the parties hereto (or their Affiliates) regarding one party's (or one of its

Affiliate's) business and operations, works in progress, product designs and concepts and other artistic creations." (Document 10, Attachment 2 at p. 41) Hasbro has identified no material terms at all. Even if it had, as far as terms of the License Agreement are concerned, the agreement is over four and one-half years old. After such a period, any material terms and conditions that Hasbro might argue are confidential can no longer be confidential. The royalty rates and any other expenditure required to be paid by Atari, the licensee, thereunder are old news, and impertinent to any new agreement for other intellectual property that Hasbro may be negotiating today. Additionally, a blanket sealing of the entire License Agreement would violate the rule that any sealing order must be "narrowly tailored." *U.S. v. Potter*, *supra.*

Furthermore, the correspondence which has been sealed does not constitute "information … regarding one party's (or one of its Affiliate's) business and operations, works in progress, product designs and concepts and other artistic creations." None of the letters discloses in any detail "any works in progress" such that a competitor would benefit from anything in the correspondence. None of the correspondences discloses "product designs and concepts and other artistic creations." Additionally, none of the correspondence discloses any detail of any secrets about Hasbro's "business and operations."

Finally, no matter what the Licensee Agreement states, the parties to a lawsuit cannot override by agreement the public policy favoring public access to court records. Again, sealing is a "serious step," "undertaken only rarely" and "for good cause;" they are not "party favors, available upon request or as a mere accommodation." *R & G Mortg. Corp.*, 584 F.3d at 12.

As Hasbro has not and cannot provide a basis for sealing of the Exhibits to the Answer and Counterclaims sufficient to overcome the presumption in favor of public access to court records, the December 28 text order should be vacated and the motion to seal should be denied.

A determination that the License Agreement and related correspondence should be sealed would have serious practical implications for this case. This dispute centers on the License Agreement and the parties' actions taken in connection with it. Throughout the course of this lawsuit, the parties are bound to file several documents that will refer extensively to the License Agreement and communications concerning the agreement. Thus, Hasbro's requested sealing order naturally will force the parties to file countless motions to seal future documents, which will further limit the public's access to the record, will unnecessarily increase litigation costs, and will impose unnecessary administrative burdens on the Court.

Conclusion

On the basis of the foregoing, Atari's motion to vacate the text order entered December 28, 2008 should be granted, and the order vacated, and Hasbro's motion for a an order sealing the Exhibits to the Answer and Counterclaims should be denied.

Respectfully submitted,

/s/ Michael J. Daly

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