UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF RHODE ISLAND

HASBRO, INC. Plaintiff, v. INFOGRAMES ENTERTAINMENT S.A. a/k/a ATARI, S.A., Defendant.	:	C.A. No. 09-cv-610

HASBRO, INC.'S OBJECTION TO ATARI'S MOTION TO VACATE ORDER SEALING EXHIBITS AND REPLY TO THE OBJECTION TO PLAINTIFF'S EMERGENCY MOTION FOR SEALING

Hasbro, Inc. ("Hasbro") hereby files this brief objecting to Atari's Motion to Vacate Order Sealing Exhibits and replying to Atari's Objection to Plaintiff's Emergency Motion for Sealing.

I. HASBRO HAS SHOWN GOOD CAUSE

Rule 26(c)(1)(G) of the Federal Rules of Civil Procedure indicates that "for good cause" the court may issue a protective order for confidential commercial information. Lest there be any confusion as to the basis of Hasbro's initial Emergency Motion to Place Under Seal, Atari most satisfactorily answered its very own inquiry when it wrote in its Memorandum "Rather, the License Agreement defines its "material terms"[1] as Confidential Information. . . ." (Atari's Memorandum at p. 5.) Thus, Atari concedes that the License Agreement it filed as an exhibit specifically defines the material terms in the Agreement as "confidential information." The material terms in the Agreement

[1] Beyond the obvious financial obligations which would be considered "material terms" in this Agreement, material terms would also include heavily negotiated provisions such as indemnities, representations, warranties, intellectual property ownership, approvals,, termination rights and even definitions, all of which are particular to this agreement and are thus confidential.

include confidential monetary information as well financial performance guarantees which accrue on three different dates. This is not information that needs to be disclosed to the public. Public disclosure will impair the ability of either party to negotiate license agreements with third-parties who may have access to this information as a result of unsealing the Exhibit in question.

The Agreement also contains financial terms with regard to compensation made by Atari, including the actual method by which such payments could be recouped. The Agreement further contains the percentage of royalty payments to be made by Atari to Hasbro, based on various contingencies.

In addition to filing the License Agreement as an Exhibit, Atari also attached the schedules to that License Agreement, including a list of all of Hasbro's relevant trademarks[2], designation of countries, application numbers, filing dates, registration numbers, registration dates, status, and class; a listing of all existing sublicensees; and a schedule which provides a detailed summary sheet of the sublicensees and their relationship with Hasbro and/or Wizards of the Coast.

All of this is confidential business information which should not have been unilaterally disclosed. Hasbro will be harmed by the public disclosure of the Agreement, its contents and the attached exhibits to the Agreement. When an Agreement is filled with negotiated terms, provisions, indemnities, representations, warranties, intellectual property ownership, approvals, termination rights and even definitions it would not be possible to redact the information. In such a

[2] The fact that a trademark is in the public domain does not mean that a definitive list of all trademarks owned by entity should be considered public information.

case, the Court should allow the document to be sealed. *See, Harrell, Jr., v. Duke Univ. Health Systems, Inc.,* 2007 WL 4460429 (D.S.C.).

II. THE TIME THE LICENSE HAS BEEN IN EXISTENCE IS IRRELEVANT

On more than one occasion, Atari appeared to assert that because the License Agreement was more than four years old it is no longer confidential.[3] Since when does the age of any document, no less a still operative license agreement, have any bearing on its confidential nature? Is a document's confidential nature subject to some form of statute of limitations? Whether the Agreement is four days old or four-and-a-half years old is completely immaterial to whether its contents should be disclosed in a public forum. In *Encyclopedia Brown Productions v. Home Box Office, Inc*. 26 F. Supp.2d 606, 614 (S.D. NY 1998), the Court rebuffed a claim that certain business information was stale and did not need to be sealed when it proclaimed:

> Confidential business information dating back a decade or more may provide valuable insights into a company's current business practices that a competitor would seek to exploit.

There is no reason to disclose the Hasbro/Atari License Agreement to the public unless it is an attempt by Atari to make information available to Hasbro's competitors.

III. ATARI SUFFERS NO PREJUDICE

Although under no express obligation so to do, it also is curious why Atari has noticeably failed to articulate any reason why a private License Agreement between two commercial entities should be unsealed and disclosed to the viewing public. Certainly, Atari is in no way limited by sealing these Exhibits. Moving to unseal the Exhibits appears to be a tactical measure designed by Atari to raise the litigation ante and

[3] This is particularly concerning in light of the fact that one of Hasbro's allegations against Atari involves Atari's breach of confidential information. It appears that Atari does not respect the requirement to maintain the confidences expressly outlined in a business agreement.

increase costs. Not only do courts disfavor the frivolous disclosure of confidential business information, two courts recently sanctioned litigants who used the disclosure of confidential documents in a lawsuit as a type of gamesmanship. *See, Salmeron v. Enterprise Recovery Systems, Inc.* 2008 Dist. Lexis 73616, 2008 WL 3876135 (N.D. Ill. Aug. 18, 2008)[4]; and *Wallis v. PHL Associates, Inc.* 168 Cal. App. 4th 882 (2008)[5]. Certainly, sealing confidential documents which Atari already possesses and to which it is a party has no deleterious effect on it.

IV. HASBRO'S REQUEST WAS LIMITED

Hasbro proceeded with justifiable caution. Recognizing that the License Agreement was confidential, Hasbro did not attach it to its Complaint. After Atari filed the Exhibits, Hasbro did not seek to have all the pleadings placed under seal, recognizing that the pleadings serve the purpose of allowing the public to remain informed of this controversy. Atari's public disclosure of a confidential License Agreement, as well as private written communication between the two parties, by attaching these documents as Exhibits to its Answer and Counterclaim, cannot be explained by Atari's professed thirst for judicial transparency. Atari is privileged to view all these documents. Their view has not been obstructed.

V. THE CASE LAW DOES NOT SUPPORT ATARI'S POSITION

Atari cites the First Circuit Court of Appeal's apparent disposition towards carefully reviewing documents before they are allowed to be filed under seal. *See,*

[4] In this case, the Court levied the ultimate sanction of dismissal against the plaintiff because the plaintiff had deliberately disclosed the defendant's confidential contractual documents it obtained through discovery, even though no protective order had yet been executed by both parties.

[5] In this case, a filing which should have been sealed appeared in the publicly available portion of the Court file. Plaintiff's counsel asked third parties to view and copy the documents. Thereafter, Plaintiff's counsel tried to argue that the trade secret portion of the document had been forfeited. For this gamesmanship, the Court imposed at $44,000 sanction against Plaintiff and its counsel.

Siedle v. Putnam Investments, Inc., 147 F.3d 7, 10 (1st Cir. 1998). However, in *Siedle*, the First Circuit actually held that rescission of a seal order by the District Court was an **abuse of discretion.** *Id.* Mr. Siedle, Putnam's former in-house counsel, filed a complaint which Putnam believed "needlessly divulged information obtained in the course of the parties' attorney-client relationship." *Id. at 8*. Moreover, Putnam insisted that this breach of trust was "hardly a slip of the pen." *Id. at 9.* Putnam, therefore, obtained an order to seal "virtually all of the pleadings." *Id. at 9*. Yet, even in this circumstance, the First Circuit held that the rescission of the Seal Order was still made in error. *Id.*

Unsealing an order usually warrants immediate review under the Collateral Order Doctrine. *Id. at 9* (citing *FTC v. Standard Fin. Mgmt. Corp.*, 830 F.2d 404, 407 (1st Cir. 1987). The First Circuit has made clear that when a seal order is granted to protect certain confidential interests and then revoked, an immediate appeal will lie. *Id. at 9* [6].

The *Siedle* court also noted that although the public's right of access to certain material may be vibrant, it was not unfettered. *Id. at 10*. The reason that Putnam sought an order to seal the records was because it was trying to prevent privileged attorney-client information from making its way to the public domain. *Id. at 10-11*. In the case at bar, the very License Agreement that was offered as a publicly disclosed Exhibit by Atari expressly indicates that the material terms of the Agreement are confidential information. Thus, the Agreement speaks for itself as to the confidential nature of the information contained therein.

[6] Compelling a party who disputes an unsealing order to forego an appeal until the conclusion of the underlying litigation "would let the cat out of the bag without any effective way of recapturing it" if the District Court's directive was ultimately found to be erroneous. *Id. at 9* (citing *Irons v. FBI*, 811 F.2d 681, 683 (1st Cir. 1987).

In its Memorandum Atari wrote that the First Circuit Court of Appeals has stated that "sealing orders are not like party favors, available upon request or as a mere accommodation." (*R&G Mortgage Corporation v. Federal Home Loan Mortgage Corporation,* 584 F.3d 1, 12 (1st Cir. 2009). Atari did not state, however, that the First Circuit Court also noted that "decisions about whether or not to seal are committed to the sound discretion of the District Court." *Id. at 12*. In the case at bar, Hasbro is not asking that the entire case be sealed, as was requested by the plaintiff in *R&G Mortgage Corporation*. *Id. at 2*. Hasbro is simply asking that the Exhibits filed by Atari continue to be placed under seal. In so doing, Hasbro is not attempting to circumvent the policy of having judicial disputes open to the public. Hasbro is simply trying to limit the disclosure of information which was only intended to accessible to Atari.

Limiting the disclosure of confidential business information is a common circumstance faced by a wide-variety of courts. In *Sun Microsystems, Inc. v. Network Applicance, Inc.*, 2009 WL 4899209 (N.D. Cal.), the Court allowed the Defendant to file under seal confidential business information, including the operative agreement between the parties. In *Sedona Corp. v. Open Solutions, Inc.*, 249 F.R.D. 19, 25 (D. Ct. 2008), the Court acknowledged that the plaintiff's contracts with third parties contained confidential business information and ordered that any third-party agreements filed with the court be done under seal.

In *Vista India, Inc. v. Raaga, LLC*, 2008 WL 834399 (D.N.J.), the Court indicated that courts will generally grant motions to seal when the materials contain commercial information, trade secrets or confidential research to prevent harm to a litigant's standing in the marketplace. *Id.* at 2. The Court noted that public access to

materials filed with the court may also be restricted to keep private agreements confidential. *Id.* The Court further noted that in disclosing business agreements to the public, the parties could be harmed by losing their future competitive negotiating positions and strategies *Id. at 3.* All of these reasons apply to Hasbro in the case at bar.

Atari cites to *In Re Providence Journal Co., Inc.*, 293 F.3d 1, 9 (1st Cir. 2002) for the proposition that the public monitoring of the judicial system fosters the important values of quality, honesty, and respect for our legal system. The *In Re Providence Journal* case involved Rhode Island's largest newspaper trying to accurately report the most significant news story of the day - the corruption prosecution of Providence Mayor Vincent A. (Buddy) Cianci, Jr. The Court noted in its decision, "[T]he public and the press enjoy a constitutional right of access to criminal proceedings under the First and Fourteenth Amendments." *Id. at 10*. No one would think to argue that the issues in the "Plunderdome" case were not of wide-spread public importance.

However, in the case at hand, the disclosure of the confidential License Agreement, and the correspondence between Hasbro and Atari immediately before suit commenced, does not carry the same social weight. The First Circuit has made it clear that it is for the District Court to balance the competing interests of transparency with disclosure of confidential information in determining if records should be filed or maintained under seal. This specifically applies to confidential business records.

In *Gitto Global Corp. v. Worcester Telegram & Gazette Corp.*, 422 F.3d 1 (1st Cir. 2005, the First Circuit noted the following:

> Courts have exercised their discretion under the common law to abrogate the right of public access where doing so was necessary to prevent judicial records from being . . . sources of business information that might harm the litigant's competitive standing.

Id. at 8. *Gitto* was a bankruptcy proceeding in which certain portions of the bankruptcy examiner's report was filed under seal. The Court acknowledged the importance of the public's faith in bankruptcy proceedings as a reason why the report should not have been sealed. Obviously, creditors who may go unpaid as a result of bankruptcy want to ensure that the proceeding did not unfairly prejudice their rights of compensation. However, Hasbro and Atari are locked in a business dispute – a fundamental contract action which is devoid of the wide-reaching ramifications found in a criminal action or a bankruptcy proceeding.

Another reason that this Circuit has unsealed records occurs when the dispute involves a governmental entity. In *FTC v. Standard Fin. Mgmt Corp.*, 830 F.2d 404, 410-411 (1st Cir. 1987), the Court was faced with unsealing records that were part of a Federal Trade Commission investigation. The Court claimed that the "appropriateness of making court files accessible is accentuated in cases where the government is a party. In such circumstances, the public's right to know what the Executive Branch is about coalesces with a concomitant right of the citizenry to appraise the Judicial Branch." *Id. at 410.* However, the Court then went on to say, "[T]o be sure, the public's right to inspect such records is not absolute. It can be blunted if court files might become a vehicle for improper purposes or where access could interfere with the administration of justice." *Id.*

Even with the overarching objective of transparency which is required in bankruptcy proceedings, there are still federal statutes in place to guard against the

disclosure of certain information. 11 U.S.C. § 107(b) mandates that upon the request of a party-in-interest, the Bankruptcy Court *shall* protect an entity with respect to a trade secret or confidential research, development or **commercial information**. This protection is not discretionary – it is mandatory. See, *In Re Orion Pictures Corporation*, 21 F.3d 24, 27 (2nd Cir. 1994). Thus, if the information fits into any of the specified categories – in this case confidential commercial information - the Court is required to protect the requesting party's interest. *Id.* If Congress carved out this exception in proceedings which require great transparency, then no lesser protection should be afforded a litigant in a purely commercial dispute.

VII. CONCLUSION

WHEREFORE, Hasbro respectfully requests that the Order to seal the Exhibits filed with Atari's Answer and Counterclaim remain in effect and that Atari's Motion to Vacate Order Sealing Exhibits be denied.

Dated: January 7, 2010

HASBRO, INC.
By its Attorneys,

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CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of January, 2010, the within document was served upon the following counsel of record via ECF filing:

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