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. No. 09 Civ. 610/S

DEFENDANT ATARI, SA'S REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF ITS MOTION TO VACATE TEXT ORDER SEALING EXHIBITS

This reply memorandum is submitted on behalf of defendant Atari, SA ("Atari') in further support of its motion to vacate the text order entered December 28, 2009 (the "Text Order") granting the "emergency" motion of plaintiff Hasbro, Inc. ("Hasbro"), filed December 24, 2009, seeking an order sealing all of the exhibits to Atari's Answer and Counterclaims. This memorandum of law responds to the arguments in Hasbro's objection to Atari's motion.

I

HASBRO HAS NOT SHOWN GOOD CAUSE FOR SEALING

Hasbro asserts that it has established good cause under Fed. R. Civ. P. 26(c) for continuation of the Text Order. (Hasbro Obj. at 1.) Hasbro's objection, however, offers only conclusory statements about why the Dungeons and Dragons License Agreement dated June 3, 2005 between the parties ("the License Agreement") is supposedly confidential and that unsealing would harm Hasbro.

Hasbro claims, without providing any factual support, that the License Agreement has all sorts of confidential matter which will spoil license negotiations now and in the future for Hasbro and Atari. This is nothing more than a conclusory argument. Hasbro does not even attach a sworn statement by any of its officers or employees to support this assertion.

Nor does Hasbro's objection provide support as to why the correspondence annexed as exhibits to the Answer and Counterclaims is supposedly confidential and how unsealing it would harm Hasbro. In fact, the objection refers to the correspondence only once. (Hasbro Obj. at 7.) By failing to oppose Atari's motion substantively in this respect, Hasbro should be deemed to have conceded the point, and the Text Order should be vacated, at a minimum, as to those exhibits.

Hasbro has failed to fulfill its burden to persuade the Court of the need for the Text Order. The burden of persuading the Court that a protective order, such as a sealing order, should issue or continue is placed on the party seeking the order. Initially, the party seeking the continued sealing has the burden of establishing that each and every document sought to be sealed or subject to any continued sealing is confidential. *Leucadia, Inc. v. Applied Extrusion Tech., Inc.*, 998 F.2d 157, 166 (3d Cir. 1998) (involving a non-party's challenge to documents sealed pursuant to a "blanket" protective order jointly requested by the parties). The party seeking a sealing order or its continuance must also make a specific factual showing of the potential harm in the absence of the order. Conclusory allegations are insufficient. *Id.* at 167 (*quoting, Rep. of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991) ("continued sealing must be based on '*current evidence* to show how public dissemination of the pertinent materials *now* would cause the competitive harm'" that the movant claims (emphasis in original)); *Anderson v. Cryovac, Inc.*, 805 F.2d 1, 7 (1st Cir. 1986) ("A finding of good cause must be based on a particular factual demonstration of potential harm, not on conclusory statements.").

Hasbro has failed to meet any of these standards. It has not even supplied facts by a competent witness. Given Hasbro's complete failure to submit any sworn statement to establish that any of the exhibits are confidential, the motion to vacate the Text Order should be granted.

In objecting to the motion, Hasbro had the opportunity to identify to the Court, by section number, what provisions, in Hasbro's view, are "material terms" of the License Agreement that can be treated as confidential. It chose not to do so. Instead, Hasbro argues that everything in the agreement is material and confidential and, accordingly, redacting is impossible. If the entire agreement were to be kept confidential, the License Agreement could and should have so provided. It could have been labeled a "Confidential License Agreement." There could have been a point heading called "confidential information." Instead, the License Agreement provides for confidential treatment of "material terms" only. Hasbro ignores the language of the agreement and neglects to identify any material terms. Its reading would render meaningless the language the parties chose, which is to be avoided in construing contractual language. *See Providence Journal Co. v. Providence Newspaper Guild*, 271 F.3d 16 (1st Cir. 2001) ("[I]t is a basic principle of contract law that constructions which render contract terms meaningless should be avoided.").

Hasbro's arguments that the entire License Agreement is confidential are not credible. For example, Hasbro asserts that a list of its trademarks, attached as a schedule to the License Agreement, including such information as the countries for which the marks are registered, their application and registration numbers, the classes of goods for which they are registered, and so forth, is confidential. (Hasbro Obj. at 2.) This assertion underscores that the motion to vacate the Text Order should be granted, as all that information is a matter of public record. Any trademark search firm could compile the same information from public sources in short order.

Many jurisdictions permit individuals to search electronically through trademark databases, making it even simpler to review Hasbro's allegedly "confidential" trademark information. As a further example, it is nonsensical to claim that the definitions in the License Agreement are confidential. (Hasbro Obj. at 2.)

These arguments only demonstrate that Hasbro will seek to use claims of confidentiality to run Atari into the ground with costs and procedural maneuvers not aimed at reaching the merits but exhausting its much smaller adversary. Followed to a logical conclusion, Hasbro's reasoning would make it appear that virtually any email or letter correspondence between the parties annexed by Atari as an exhibit to a court filing in the future will be met with a motion to seal based on the same kind of conclusory assertions made by Hasbro or accusations that Atari has breached an existing sealing order.

Hasbro has failed to carry its burden to overcome the presumption of public access to judicial records. It has not shown good cause by failing to establish both the supposed confidentiality of the exhibits and the potential harm Hasbro would supposedly incur from vacating the Text Order.

II

THE AGE OF THE LICENSE AGREEMENT IS RELEVANT

Contrary to Hasbro's assertions, the old age of a document is a factor militating in favor finding that the document is not confidential. In *U.S. v. Intern. Bus. Machines Corp.*, 67 F.R.D. 39 (S.D.N.Y. 1975), after noting that some of the information for which a protective order was sought may have already been made public, the Court concluded that "[t]he very age of the data limits by any standard its current value" and "the fact that the discussion is four years old and is not necessarily current research or design information moves the court to deny [the movant's] request." Here, there has been no showing by Hasbro that the royalty terms or other terms in the

four and one-half year old License Agreement are terms used by Hasbro in license agreements it is offering, negotiating, or granting now or has granted in the recent past. Accordingly, the fact that the agreement is four and one-half years old, "limits by any standard its current value." *Id.*

III

ATARI ARTICULATED WHY A SEALING ORDER WOULD PREJUDICE IT

Hasbro would lead the Court to believe that Atari did not show how it would be prejudiced by the Text Order. (Hasbro Obj. at 3-4.) In fact, Atari clearly did so in the last part of its memorandum of law in support of its motion to vacate wherein Atari pointed out that

> [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.

Thus, Atari does not seek to vacate the Text Order "to make information available to Hasbro's competitors" (Hasbro Obj. at 3) or as "tactical measure designed … to raise the litigation ante and increase costs" (Hasbro Obj. at 3-4). Atari makes this motion to avoid future costs and wasteful litigation over whether other similar documents or documents referring to anything in the License Agreement should be sealed and whether public filing of a document violates the extant Text Order. Atari also makes this motion to abide by the law in the First Circuit.

If this motion is not granted, it is likely that Hasbro will use the Text Order as a "tactical measure" against Atari such as by filing motions against Atari for contempt or sanctions for any purported violation of the Text Order. Such tactics by Hasbro are presaged by footnotes 4 and 5

on page 4 of Hasbro's objection. There, Hasbro summarizes a case as one in which a party "deliberately disclosed the defendant's confidential contractual documents it obtained in discovery" and was sanctioned by dismissal of the action, and another case as one in which the court sanctioned a party and its counsel $44,000 for encouraging individuals to view "a filing which should have been sealed" but was not and argued that such disclosure forfeited trade secret status. The Court can be sure that if the Text Order is continued here, Hasbro will make all kinds of accusations of misconduct in relation to the order in a case which centers on the License Agreement. Hasbro will argue that every piece of correspondence that refers at all to any term in the License Agreement, if filed by Atari in the Court as an exhibit, will be the subject of Hasbro's claim that it is confidential as disclosing some supposedly material term of the License Agreement and a violation of the Text Order sealing the License Agreement. Continuing the sealing of the License Agreement and correspondence which Hasbro does not even address in its objection promises abusive and wasteful future conduct by Hasbro in this action.

IV

THE CASE LAW SUPPORTS VACATING THE TEXT ORDER

Hasbro next argues, unpersuasively, that the precedent cited by Atari in its initial memorandum of law—which consists primarily of First Circuit caselaw clearly setting forth this Circuit's presumption in favor of open access to documents filed with the Court—somehow is not applicable to this motion and should be disregarded. (Hasbro Obj. at 4.) While Hasbro quibbles with the First Circuit authority cited by Atari in its moving memorandum, Hasbro does not, and cannot, the principles of law they provide. In place of those cases cited by Atari, Hasbro directs the Court to caselaw which is clearly inapplicable to the present dispute. In fact, the

District Court for the District of Rhode Island has instructed in similar circumstances as these that an agreement in dispute should not be sealed form public access as follows: "once the alleged [] agreement becomes the subject of an adversary proceeding, it moves from the realm of a confidential understanding between the parties and into the public arena where all other litigation is conducted." *Corvello v. New England Gas Co., Inc.*, No. 05 Civ. 221, 274, 370, 522, 2008 WL 5245331, *7 (D.R.I. Dec. 16, 2008) (J. Torres) (Noting presumption in favor of full disclosure and refusing to seal settlement agreement filed in action alleging breach of that agreement by one party to the dispute).

The legion of cases cited by Atari show that the issues presented by the instant motion are not novel and have been clearly addressed by the courts in this Circuit. Nevertheless, Hasbro curiously relies on authority from courts outside this Circuit in which agreements were sealed—which presumably interpreted the law applicable to requests to seal in those jurisdictions rather than the law of the First Circuit—in support of its argument that the License Agreement should be sealed here. That Hasbro is required to seek refuge in decisions from courts as far afield as California to support its argument is particularly telling. (Hasbro Obj. at 6.)

Even were the cases cited by Hasbro binding precedent, the factual circumstances confronted in those cases are clearly distinguishable from those found here.

For example, in *Siedle*, the only First Circuit precedent on which Hasbro relies that concluded that the documents before it should be sealed, the Court addressed an application by a defendant to seal documents filed by the plaintiff which contained information belonging to defendant and subject to defendant's attorney-client privilege. *Siedle v. Putnam Invs., Inc.*, 147 F.3d 7 (1st Cir. 1998). The *Siedle* court, taking note of the defendant's important interest in preserving the confidentiality of its privileged attorney-client information, concluded that "this is

precisely the kind of countervailing concern that is capable of overriding the general preference for public access to judicial records." *Siedle*, 147 F.3d at 11. Significantly, Hasbro has demonstrated no such "countervailing concern" with respect to the documents which it seeks to seal here.

In *Sedona Corp. v. Open Solutions, Inc*., 249 F.R.D. 19 (D. Conn. 2008), and *Vista India, Inc. v. Raaga, LLC,* No. 07 Civ. 1262, 2008 WL 834399 (D.N.J. March 27, 2008), also cited by Hasbro in support of its argument, District Courts in Connecticut and New Jersey were confronted with applications to seal agreements not between parties to the actions, but rather between one party and third-parties to the dispute. Significant to the District Courts' decisions to seal those documents was that the agreements pertained only to collateral issues relevant to the litigations rather than being the very subject of the underlying disputes between the parties.

In contrast, in this action, Hasbro alleges that Atari has breached its obligations under the License Agreement and has submitted this dispute to the Court for resolution. Unlike the circumstances in *Sedona Corp.* and *Vista India, Inc*., not only is the License Agreement which Hasbro now seeks to seal an agreement between the parties to this dispute, but it is also the very document upon which this litigation is based. *See Corvello*, 2008 WL 5245331 at *7.

Whether the License Agreement itself purports to contain confidential information is clearly not an inquiry relevant to whether this document should be sealed from public view. Litigants cannot override the public policy of open access to court documents by simple agreement amongst themselves. *See Corvello*, 2008 WL 5245331 at *8 ("The fact that the parties may have agreed to keep their settlement negotiations confidential does not provide any additional support for [defendant]'s argument that documents and proceedings relating to the [disputed agreement] should be sealed.").

Hasbro points to the confidentiality mandates contained in 11 U.S.C. § 107(b), yet concedes it is applicable only to certain bankruptcy proceedings. (Hasbro Obj. at 9.) Of course, this is not a bankruptcy proceeding, and that statute is irrelevant to the present inquiry. Atari has shown that under the prevailing Rule 26(b) standards, Hasbro has failed to carry its burden of persuasion for continued sealing.

V

HASBRO HAS CONCEDED THIS CASE IS OF PUBLIC INTEREST

Hasbro asserts that this case is less deserving of public access to its records because it is merely a "business dispute - a fundamental contract action which is devoid of the wide-reaching ramifications found in a criminal action or a bankruptcy proceeding." (Hasbro Obj. at 8.) This assertion is hypocritical. In fact, Hasbro issued a press release about this action on December 16, 2009, the very same day it commenced this action. (Ross Decl. Exhs. 1 and 2.) Actions speak louder than words. Hasbro's actions demonstrate that it believes the action is a matter of public interest. It should not be permitted to say otherwise to this Court when it suits its purpose.

It would be highly inconsistent for a party to draw the public's attention to an action in which that party alleges breach of a contract, and then insist on sealing any copy of the contract filed in court to shield it from public view.

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.

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PIERCE ATWOOD LLP

By: /s/ Michael J. Daly

Brooks R. Magratten
Michael J. Daly
10 Weybosset Street
Suite 400
Providence, Rhode Island 02903
(401) 588-5113

-and-

Kyle C. Bisceglie
Herbert C. Ross
OLSHAN GRUNDMAN FROME
ROSENZWEIG & WOLOSKY LLP
Park Avenue Tower
65 East 55th Street
New York, New York 10022
(212) 451-2300

Attorneys for Defendant Atari, S.A.

CERTIFICATE OF SERVICE

I certify that the within document was electronically filed with the clerk of the court on January 14, 2010 and that it is available for viewing and downloading from the Court's ECF system. Service on all counsel of record has been effectuated by electronic means.