

Aerogen LLC v Tapjets Holdings Inc.

2024 NY Slip Op 32996(U)

August 22, 2024

Supreme Court, New York County

Docket Number: Index No. 652472/2024

Judge: Anar Rathod Patel

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 45

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AEROGEN LLC, STARSHIP 1 LLC,	INDEX NO. <u>652472/2024</u>
Plaintiffs,	MOTION
	DATE <u>06/11/2024</u>
- v -	
TAPJETS HOLDINGS INC., TAPJETS, INC., TAPJETS TECHNOLOGIES INC., EUGENE KESSELMAN, MARIA TSENAEVA-KESSELMAN	MOTION SEQ. NO. <u>003</u>
Defendants.	DECISION + ORDER ON MOTION
-----X	

HON. ANAR RATHOD PATEL:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 59, 60, 61, 63, 64, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90 were read on this motion to/for SEAL.

Plaintiffs Aerogen LLC and Starship 1 LLC (hereinafter “Plaintiffs”) seek an order: (1) “Directing Defendants to deliver to Starship all Books and Records, including Maintenance and Flight Logs and Financial Documents;” (2) Enjoining Defendant Eugene Kesselman “from prosecuting the litigation he commenced in the... 11th Judicial District,” of Florida (hereinafter “Florida Action”); (3) Enjoining Defendant Kesselman “from disclosing the name of the Original Lender referenced in the complaint filed by the above-named Plaintiffs, in any document filed in connection with this litigation,” except with express written consent of Plaintiffs or by court order; and (4) permanently sealing NYSCEF Doc. Nos. 16–19, and 28.

Relevant Factual and Procedural History

This matter presents a multifaceted dispute arising from the parties’ relative relationships pertaining to a pair of aircrafts located in Florida. NYSCEF Doc. No. 1, at ¶ 1. Plaintiffs bring the present suit seeking to recover based upon: (1) “Defendant Tapjets’ failure to manage and maintain a Bombardier turbo-fan jet aircraft and a Cirrus Design Corp. propellor aircraft under management agreements between Tapjets and Starship;” (2) breach of the “loan agreements under which Plaintiff Aerogen and a third party lender advanced millions of dollars to cover all alleged expenses to operate and maintain the aircraft under the management agreements;” and (3) “Defendants’ misrepresentations and Tapjets’ breaches of warranty arising from the purchase of all issued and outstanding membership interests in Starship, the owner of the two aircraft.” *Id.*

Plaintiffs commenced the present suit by the filing of the Summons and Complaint on May 13, 2024. NYSCEF Doc. No. 1. However, two days prior, Defendant Eugene Kesselman filed a

complaint against Plaintiff Starship 1 LLC (hereinafter “Starship”) *pro se* in the Eleventh Judicial Circuit of Florida (hereinafter “Florida Action”). NYSCEF Doc. 105, at ¶ 6.

Certain of the above-referenced loan agreements in dispute were either partly or entirely financed by an unidentified, non-party natural person (hereinafter “Original Lender”). NYSCEF Doc. No. 60, at 7–8. Original Lender is a “cryptocurrency entrepreneur with significant cryptocurrency holdings.” *Id.* Defendant Kesselman has previously threatened to identify Original Lender as a bargaining token in other matters. *Id.* The Southern District of Florida previously enjoined Defendant Kesselman from identifying Original Lender; however, the Honorable Corali Lopez-Castro subsequently ordered that such injunction cannot be used to seek similar injunctions in other cases. *Id.*; *but see* NYSCEF Doc. No. 95 (Amended Order of Judge Corali Lopez-Castro) (“the fact that this Court entered the Redaction Order shall not be used, [*sic*] in any other proceeding outside of this Court. The Redaction Order was entered by the Court due to the specific facts and circumstances in the bankruptcy case in which it was entered.”).

All parties appeared before this Court on July 12, 2024, for a Preliminary Conference. NYSCEF Doc. No. 121. At the Preliminary Conference, Plaintiffs represented that Plaintiffs had received the requested “Books and Records” and further stated that Defendants had previously attempted to send the same in June. *Id.* at 8.

On August 5, 2024, Plaintiffs filed an Order of the Honorable Valerie R. Manno Schurr, of the Eleventh Judicial Circuit of Florida, which stayed the Florida Action “pending resolution of, and final judgment entered in,” the present action. NYSCEF Doc. No. 124.

Legal Discussion

Production of Books and Records

Pursuant to representations made by Counsel on the record during the July 12, 2024 Preliminary Conference, the portion of Plaintiffs’ motion seeking “Books and Records, including Maintenance and Flight Logs and Financial Documents,” is moot. NYSCEF Doc. No. 121 at 8:6–9:1.

Enjoining Prosecution of the Florida Action

Pursuant to the Order of the Honorable Valerie R. Manno Schurr, the portion of Plaintiffs’ motion seeking to enjoin Defendant Kesselman from prosecuting the Florida Action is moot. NYSCEF Doc. No. 124.

Enjoining Disclosure of the Original Lender’s Identity and Sealing

Pursuant to § 216.1(a) of the Uniform Rules for Trial Courts, the Court may seal a filing “upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties.”

“There is a presumption that the public has the right of access to the courts to ensure the actual and perceived fairness of the judicial system, as the ‘the bright light cast upon the judicial process by public observation diminishes the possibilities for injustice, incompetence, perjury, and fraud.’” *Mancheski v. Gabelli Grp. Cap. Partners*, 39 A.D.3d 499, 501 (1st Dept. 2007) (quoting *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653 (3d Cir. 1991)). “The public right to access, however, is not absolute.” *Mosallem v. Berenson*, 76 A.D.3d 345, 349 (1st Dept. 2010). “The burden of proof on a sealing application is upon the party who desires that the record be impounded or, as here, remain sealed because of the need to establish compelling circumstances for the secrecy” *Coopersmith v. Gold*, 156 Misc. 2d 594, 606 (Rockland Cty. Sup. Ct. 1992). “Although the rule does not further define ‘good cause,’ a standard that is ‘difficult to define in absolute terms,’ a sealing order should rest on a ‘sound basis or legitimate need to take judicial action,’ a showing properly burdening the party seeking to have a sealed record remain sealed.” *Danco Lab’ys, Ltd. v. Chem. Works of Gedeon Richter, Ltd.*, 274 A.D.2d 1, 8 (1st Dept. 2000) (quoting *id.*).

Here, Plaintiffs contend that disclosing the identity of Original Lender may increase the risk of physical or digital targeting of Original Lender. Plaintiffs argue that Cryptocurrency holders, such as Original Lender, are regularly targeted by physical and digital attacks by those seeking to reappropriate digital currency. Plaintiffs argue that this risk substantially outweighs any public benefit, especially considering Original Lender is not a named party to the present action.

The Court agrees with Plaintiffs’ arguments. News is replete with stories of physical and digital targeting of those holding digital assets. *See, e.g.,* Andy Greenberg and Matt Giles, *Inside a Violent Gang’s Ruthless Crypto-Stealing Home Invasion Spree*, WIRED (June 28, 2024, 6:30 AM)¹; Marco Quiroz-Gutierrez, *Mark Cuban Loses \$870,000 in Crypto Hack, Billionaire Blames Bad Version of MetaMask Software*, FORTUNE (Sept. 18, 2023, 10:30 AM).² Courts have previously held that, due to the increased risks associated with digital assets, sealing the identity of digital asset holders is provident. *See In re Genesis Glob. Holdco, LLC*, 652 B.R. 618 (Bankr. S.D.N.Y. 2023) (“The record here reflects that cryptocurrency inherently poses an increased risk of criminal theft attempts because of the near instantaneous and almost irreversible nature of cryptocurrency transactions due to their status as bearer assets.”); *Owen v. Elastos Found.*, 343 F.R.D. 268 (S.D.N.Y. 2023) (“The Court agrees that the redactions, which do not bear on the Court’s determination of the motion to compel, are ‘essential to preserve higher values and [are] narrowly tailored to preserve that interest.’”). Further, enjoining a party from disclosing the identity of another is provident where the risk of any potential prejudice to the non-movant is outweighed by privacy interest of an individual, so long as the injunction is not overly broad. *See N.S. v. Frankenhoff*, 189 N.Y.S.3d 79 (1st Dept. 2023) (holding that the lower court providently enjoined defendant from identifying plaintiff in publicly filed court documents, but overreached by preventing defendant from disclosing the identity for purposes of discovery and investigation).

Original Lender is a monied individual with substantial holdings in various mediums including substantial amounts of digital currencies and/or assets. Plaintiffs contend that Original

¹ Available at <https://www.wired.com/story/crypto-home-invasion-crime-ring/>.

² Available at <https://fortune.com/crypto/2023/09/18/mark-cuban-loses-870000-in-crypto-hack-billionaire-blames-bad-version-of-metamask-software/>.

Lender is subject to increased risks of targeting due to Original Lender's substantial digital asset holdings. Allowing Defendants, including Defendant Kesselman, to identify Original Lender would create undue risk against Original Lender's physical and digital safety.

Further, there is no legitimate public interest or concern preventing sealing of Original Lender. Courts have long held that where there is a legitimate public interest or concerns that would otherwise be affected by sealing court documents, a motion to seal should be denied. *Compare Crain Commc'ns, Inc. v. Hughes*, 135 A.D.2d 351 (1st Dept. 1989) with *Mosallem*, 76 A.D.3d at 349. Where there is no legitimate concern, "as opposed to mere curiosity, to counterbalance the strong public interest in encouraging the settlement of private litigation and the resultant prejudice to the settling parties," sealing is proper. *Crain Commc'ns, Inc.*, 135 A.D.2d at 352.

Original Lender is not a named party to the present action and Defendants have not indicated any intent to bring counter or cross-claims against Original Lender. Original Lender's involvement is limited to providing funding as to certain of the loan agreements at issue. While Original Lender holds substantial assets, this alone does not establish that Original Lender regularly garners public or governmental scrutiny. Defendants have offered no opposition to the present motion to establish otherwise. Further, it does not logically follow that enjoining Defendants from identifying a non-party individual in court filings and public proceedings would create undue prejudice outweighing Original Lender's privacy concerns. Accordingly, other than mere curiosity, there is no legitimate public interest or undue prejudice to prevent preemptively enjoining Defendants from identifying Original Lender in public filings or proceedings.

Upon the foregoing, the Court determines that, in accordance with 22 NYCRR § 216.1(a), good cause exists for the sealing in part of the file in this action of sensitive, non-public financial information.

Accordingly, it is hereby,

ORDERED that the portion of Plaintiffs' motion seeking documentation from Defendants is **DENIED** as moot; and it is further

ORDERED that the portion of Plaintiffs' motion seeking to enjoin prosecution of the action currently pending before the Eleventh Judicial District of Florida is **DENIED** as moot; and it is further


ORDERED that the portion of Plaintiffs' motion seeking (1) to seal NYSCEF Documents 16, 17, 18, 19, and 28; and (2) to enjoin Defendants from identifying³ Original Lender during the pendency of the action absent express written consent of Plaintiffs or by order of this Court is **GRANTED**;

³ In this context, "identifying" includes the disclosure, through filings with the Court, on the record or otherwise, of any Personally Identifiable Information including, but not limited to, Original Lender's name, address, digital wallet address or any other information that would otherwise allow others to criminally target Original Lender.

ORDERED that the Clerk of the Court shall maintain NYSCEF Doc. Nos. 16, 17, 18, 19, and 28 under seal, so that the documents may only be accessible by the parties, their counsel, and authorized court personnel; and it is further

ORDERED that future submissions that contain the same information/subject matter that the Court has authorized to be filed in redacted form pursuant to this Decision and Order may be filed in redacted form on NYSCEF, provided that an unredacted copy of any redacted document is contemporaneously filed under seal; and it is further

ORDERED that service upon the Clerk of the Court shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website).

<p><u>August 22, 2024</u> DATE</p>	 <hr style="border: 0.5px solid black;"/> ANAR RATHOD PATEL, A.J.S.C.	
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
	<input type="checkbox"/> DENIED	<input type="checkbox"/> OTHER
		<input type="checkbox"/> REFERENCE