



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

DONALD F. PARSONS, JR.
VICE CHANCELLOR

New Castle County CourtHouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Submitted: April 27, 2005
Decided: May 12, 2005

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Re: *One Sky, Inc. v. Samuel P. Katz, et al.*,
Civil Action No. 1030-N

Dear Counsel:

Pending before the Court is Defendants' Motion for Protective Order (the "Motion"), which seeks to seal documents submitted as Exhibit D to the Motion (the "Documents") pursuant to Chancery Court Rule 5(g). Defendants' Motion resulted from Plaintiff, One Sky, Inc.'s ("One Sky"), then anticipated answering brief in response to Defendants' motion for sanctions under Chancery Court Rule 11. Defendants have represented that the Documents are confidential pursuant to the Confidentiality Agreement between the parties. For the reasons stated below, the Court grants the Motion in part and denies it in part.

Before turning to Defendants' Motion, however, the Court notes that it also received a letter from One Sky's counsel Mr. Koury, dated May 9, 2005, enclosing several inches of documents "for the Court's in camera review and determination as to whether any portions should be redacted prior to public filing." The Court declines to do the work of responsible parties and their counsel. Accordingly, I will not consider the request in Mr. Koury's letter. If after a good faith application of the principles of Chancery Court Rule 5(g), the relevant legal precedent, and informed professional judgment, counsel are unable to resolve any disagreements relating to whether or not certain information should be filed under seal, they may submit the dispute to the Court. Any such submission, however, shall be accompanied by:

(1) a certification that counsel have made a good faith effort to resolve the dispute without court intervention; and

(2) a letter not to exceed four pages in length stating the grounds for the requested relief.

I would hope that there would be few, if any, such applications.

Defendants' Motion

Chancery Court Rule 5(g)(2) provides:

Documents shall not be filed under seal unless and except to the extent that the person seeking such filing under seal shall have first obtained, for good cause shown, an order of this Court specifying those documents or categories of documents which should be filed under seal.

The default position of Rule 5(g) maintains public accessibility of filed documents. The Rule also provides the court flexibility in balancing the need to protect sensitive material from public disclosure and the public's right of access. A party has good cause for keeping documents under seal if they can be categorized as: "(1) trade secrets, (2) third-party confidential material, [or] (3) non-public financial information."¹ "But, if trial courts permit the sealing of . . . a judicial proceeding simply . . . because the parties take an unreasonably broad view of what matters are truly confidential, they risk injuring the public's right of access."² Any documents or information that do not fit the above criteria, cannot harm the parties or third parties, or previously have entered the public sphere should be deemed available for public disclosure.

¹ *Fitzgerald v. Cantor*, 2001 Del. Ch. LEXIS 48, at *8 (Del. Ch. Apr. 17, 2001).

² *Kronenberg v. Katz*, 2004 Del. Ch. LEXIS 77, at *104 (Del. Ch. Apr. 23, 2004).

In this case, One Sky does not oppose Defendants' Motion and essentially defers to the discretion of the Court in determining whether any of the documents submitted with its answering brief on Defendants' motion under Rule 11 should not be sealed. Based on Defendants' representations that the documents attached as Exhibit D to their Motion reflect confidential information, the Court grants the Motion as to those documents, with the following exceptions: Bates numbers D0077 through D0114 (news articles); D0176 (Grant Deed); and D0210 through D0278 (Tribal Gaming Code and Commercial Obligations Court Ordinance). The excluded documents appear to be within the public sphere. To the extent One Sky submitted additional documents in connection with its answering brief, the parties are responsible for ensuring that only documents for which a good faith claim of confidentiality is made are filed under seal. The same responsibility applies to any redacted version of One Sky's brief. In that regard, the Court accepts One Sky's agreement to keep the financial terms of transactions in issue under seal. Names of non-parties that have previously been made public in the context of such transactions, however, should not be redacted from the motion.

For the foregoing reasons and subject to the stated conditions, Defendants' motion to seal documents pursuant to Rule 5(g) is DENIED IN PART and GRANTED IN PART.

One Sky v. Katz, et al.
C.A. No. 1030-NC
May 12, 2005
Page 5

IT IS SO ORDERED.

Sincerely,

/s/Donald F. Parsons, Jr.

Vice Chancellor