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

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RE: *N.K.S. Distributors, Inc. v. Christopher J. Tigani, et al.*,
Civil Action No. 4640-VCP

Dear Counsel, Mr. Tigani, and Ms. Milford:

I write regarding a request from Maureen Milford, a reporter with *The News Journal*, for access to the expert report of Charles J. Bramley, marked as NKS/RFT Exhibit No. 346 at trial (the "Report"), and to the trial transcripts.[1] Currently, portions of the Report and trial transcripts are designated as confidential and subject to a sealing

[1] Trial in this matter was held over twelve days on April 26-30, May 3-7, and June 3-4, 2010.

order pursuant to Court of Chancery Rule 5(g).[2] Milford asks that I terminate that sealing order and permit full public access to the Report and transcripts.

Plaintiff and Counterclaim Defendant, N.K.S. Distributors, Inc. ("NKS"), and Third Party Counterclaim Defendant, Wilmington Trust Company ("WTC"), object to Milford's request on two grounds. First, they contend that the Court is without authority to terminate the sealing order because Defendant, Christopher J. Tigani, has filed for bankruptcy and, consequently, this litigation is now subject to an automatic stay under 11 U.S.C. § 362(a). Second, they argue that the redacted portions of the Report and trial transcripts contain nonpublic financial information and, therefore, good cause exists for these court records to remain under seal pursuant to Rule 5(g).

For the reasons set forth in this Letter Opinion, I conclude that this Court has jurisdiction over Milford's request, but that, as a general matter, good cause exists to

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[2] As to the Report specifically, after a similar request in 2010, I determined that the Report appeared to contain a significant amount of proprietary commercial, competitively sensitive information, including nonpublic financial information. On that basis, I ordered the Report to remain sealed, but required the filing of a redacted version of the Report suitable for public disclosure as well. *See* Order, Docket Item ("D.I.") No. 326 (June 2, 2010); Public Version of the Report, D.I. No. 328 (June 4, 2010). Milford now requests access to the unredacted version of the Report and the complete trial transcript. Only certain portions of the transcript have been filed under seal. Milford's is the only request from a member of the public for access to the nonpublic portions of the transcript.

When Milford made her request, seven volumes of the twelve volume transcript had been docketed. As of December 2, 2011, however, all twelve volumes are listed on the electronic docket for this action, although several are under seal.

keep the Report and trial transcript under seal.[3] The confidentiality designations for two volumes of the transcript, however, are overbroad. As to those two volumes, therefore, I order the parties claiming confidentiality to review and narrow their designations and to submit redacted versions suitable for public filing within twenty days. In all other respects, Milford's request is denied.

I. DISCUSSION

A. Does § 362(a) Deprive this Court of Jurisdiction to Consider Milford's Request?

I address first the jurisdictional argument made by NKS and WTC that the automatic stay resulting from the filing of Tigani's bankruptcy petition precludes me from even considering Milford's request. Under 11 U.S.C. § 362(a), the filing of a bankruptcy petition:

> operates as a stay, applicable to all entities,[4] of — (1) the commencement or continuation . . . of a judicial . . . action or proceeding against the debtor that was . . . commenced before the commencement of the [bankruptcy] case under this title . . . .

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[3] I consider a trial exhibit such as the Report, which was designated confidential and referred to extensively in open court but not publicly displayed, to be akin to a paper filed with the Register for purposes of Rule 5(g).

[4] The term "entity" is defined to include a "governmental unit," which encompasses state courts. 11 U.S.C. § 101(15), (23); *Mar. Elec. Co. v. United Jersey Bank*, 959 F.2d 1194, 1206 (3d Cir. 1991).

The stay is "automatic" in that it applies immediately upon the filing of a bankruptcy petition.[5] Its purpose, moreover, "is twofold: (1) to protect the debtor, by stopping all collection efforts, harassment, and foreclosure actions . . . ; and (2) to protect 'creditors by preventing particular creditors from acting unilaterally in self-interest to obtain payment from a debtor to the detriment of other creditors.'"[6] Stated differently, "[t]he purpose of § 362(a)(1) is to 'preserv[e] the status quo' in any pending litigation against a debtor."[7]

There is no question that this case includes claims against the debtor, Tigani; therefore, it is subject to the automatic stay. Nevertheless, "[a]ll proceedings in a single case are not lumped together for purposes of automatic stay analysis."[8] "Within a single case, some actions may be stayed, others not."[9] For example, a state court does not necessarily violate the automatic stay simply by continuing to preside over a case that involves a debtor in bankruptcy. Rather, the federal courts have interpreted the automatic

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5 *In re Askew*, 312 B.R. 274, 280 (Bankr. D.N.J. 2004).

6 *Constitution Bank v. Tubbs*, 68 F.3d 685, 691 (3d Cir. 1995) (quoting *Mar. Elec. Co.*, 959 F.2d at 1204).

7 *In re Gronczewski*, 444 B.R. 526, 531 (Bankr. E.D. Pa. 2011) (second alteration in original) (quoting *Taylor v. Slick*, 178 F.3d 698, 702 (3d Cir. 1999)).

8 *Mar. Elec. Co.*, 959 F.2d at 1194.

9 *Id.* at 1204.

stay as applying only to those aspects of such a case that directly relate to the debtor and have the potential to constitute collection efforts, harassment, or foreclosures or otherwise to upset the status quo and frustrate the bankruptcy court's orderly resolution of claims against the debtor's estate. Federal case law, therefore, permits continued adjudication on the merits of counterclaims and cross-claims not against the debtor as well as claims brought by the debtor that would inure to the benefit of the debtor's estate.[10]

Similarly, the limitations on the scope of stays under § 362(a)(1) can be seen with respect to procedural matters. Thus, in *In re Gronczewski*, the plaintiffs did not "continue" a proceeding against a debtor by filing an amended complaint in state court that "did not advance, in any way, [their] claims *against the Debtor*"[11] because "the Amended Complaint neither 'prejudiced [the debtor] or otherwise altered [the debtor's] position' in the litigation."[12] Similarly, in *Gucci America, Inc. v. Duty Free Apparel, Ltd.*, a federal district court retained jurisdiction to amend a permanent injunction against

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10 *Id.* at 1204-05.

11 444 B.R. at 530.

12 *Id.* at 531 (quoting *Taylor v. Slick*, 178 F.3d at 702).

one of two co-defendants notwithstanding the interim bankruptcy petition filed by the other defendant.[13]

Finally, although "[r]elief from the stay can be granted only by the bankruptcy court having jurisdiction over a debtor's case,"[14] other courts "retain jurisdiction to determine the *applicability* of the stay to litigation pending before them, and to enter orders not inconsistent with the terms of the stay."[15] In *African Union*, for example, the United States Bankruptcy Court for the District of Delaware determined that then-Vice Chancellor, now Justice, Jacobs properly exercised jurisdiction over a contempt proceeding against the agents of a bankrupt church for allegedly violating a permanent injunction—notwithstanding the agents' objection that the contempt proceedings could result in personal liability against them and, thereby, trigger a claim by them against the bankrupt church—because the contempt proceedings were not a collection effort.[16]

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13 328 F. Supp. 2d 439, 442 (S.D.N.Y. 2004).

14 *Constitution Bank*, 68 F.3d at 691; *see also* 11 U.S.C. § 362(d)(1) ("[T]he [bankruptcy] court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay . . . for cause . . . .").

15 *In re Conference of African Union First Colored Methodist Protestant Church*, 184 B.R. 207, 215 (Bankr. D. Del. 1995) [hereinafter *African Union*] (emphasis added) (quoting *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 850 (5th Cir. 1990)).

16 *Id.* at 214.

Accordingly, the Bankruptcy Court held that "the automatic stay order did not apply to the contempt motions against parties other than Debtor" and that the Court of Chancery "was exercising its inherent authority to make determinations of matters properly before it. . . . [I]t is not the intent of Code § 362(a) to override that authority."[17]

Returning to the issue presented here, this Court has jurisdiction to determine whether the stay prescribed by § 362(a)(1) applies to Milford's request,[18] and the Delaware Supreme Court has held that this Court "retains the jurisdiction and authority to enforce, modify, or terminate any [sealing] order it has entered," like any ongoing injunction, so long as the sealing order remains in effect.[19] I am not aware of any case where a nonbankruptcy court modified a sealing order over the objections of nondebtor parties, which is what Milford seeks. Nevertheless, the sealing order in this case, which requires that the confidentiality of portions of the Report and trial transcripts be maintained, is analogous to the injunctions at issue in *Gucci* and *African Union*. Indeed, this Court's authority to entertain Milford's request is even stronger than in *Gucci* or *African Union* because the sealing order here is entirely ancillary to the core bankruptcy matters regarding Tigani now before the Bankruptcy Court. Therefore, Milford's request

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17 *Id.* at 216.

18 *Id.* at 215.

19 *Hallett v. Carnet Hldg. Corp.*, 809 A.2d 1159, 1162 (Del. 2002).

to modify or terminate the sealing order is properly before this Court, and the Court may rule on that request so long as doing so: (1) does not constitute a collection effort, harassment, or a foreclosure action against Tigani; (2) does not permit any of Tigani's creditors to obtain a payment from him to the detriment of other creditors; and (3) preserves the status quo regarding any claims against him.

Disposition of Milford's request can be accomplished in consonance with those requirements and will not require any order inconsistent with the automatic stay. The portions of the Report and trial transcript currently under seal protect the confidential information of NKS and WTC, not of Tigani. As such, public disclosure of that information is unlikely to prejudice him or otherwise alter his position before the Bankruptcy Court.[20] Nor would consideration of Milford's request amount to the continued prosecution of a claim against Tigani. Rather, absent a contrary directive from the Bankruptcy Court,[21] this Court possesses jurisdiction to enforce, modify, or terminate its sealing order without first seeking relief from the Bankruptcy Court's automatic stay.

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[20] *See In re Gronczewski*, 444 B.R. at 531.

[21] *See African Union*, 184 B.R. at 216 ("If an aggrieved party believes that the state court determination is wrong, it can seek relief in the bankruptcy court where the stay order emanated. In this regard, I view the Vice Chancellor's comment as to how he intended to proceed 'absent a contrary directive from the Bankruptcy Court' as an acknowledgment of that relief avenue.").

B. Does Good Cause Exist to Maintain the Sealing Order?

Having determined that the automatic stay does not deprive me of the authority to consider Milford's request, I now turn to the merits of that request. Generally, absent a court order for good cause shown, "all pleadings and other papers . . . filed with the Register in Chancery . . . become part of the public record of the proceedings before this Court."[22] Thus, "[t]he default position of Rule 5(g) maintains public accessibility of filed documents."[23] Nevertheless, the Rule permits a court to balance "the interests of companies in protecting proprietary commercial, trade secret or other confidential information against the legitimate interests of the public in litigation filed in the courts."[24] Consequently, courts have the flexibility to allow certain documents to remain under seal where a party can show good cause, *i.e.*, show that such documents contain valuable trade secrets, third-party confidential material, or nonpublic financial information.[25] A

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22 Ct. Ch. R. 5(g)(1); *see also Hurd v. Espinoza*, --A.3d--, No. 167,2011, slip op. at 5 (Del. Dec. 28, 2011).

23 *One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005).

24 *Stone v. Ritter*, 2005 WL 2416365, at *2 (Del. Ch. Sept. 26, 2005).

25 *Hurd*, No. 167,2011, at 5-6 (citing *In re Yahoo! Inc. S'holders Litig.*, 2008 WL 2268354 (Del. Ch. June 2, 2008), *Romero v. Dowdell*, 2006 WL 1229090 (Del. Ch. Apr. 28, 2006), and *Khanna v. McMinn*, 2006 WL 1388744 (Del. Ch. May 9, 2006)).

professed need to sanitize the record of unsavory or embarrassing information, however, typically does not constitute good cause.[26]

Milford's primary argument for terminating the sealing order is that "after more than a year the information in the expert report and trial transcript no longer qualifies as trade secrets or proprietary to the business."[27] As to the Report, regardless of whether any information contained in it constitutes a trade secret, either in the past or currently, it still contains NKS's nonpublic financial information.[28] The passage of time has not

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[26] *Id.* at 6 (quoting *Khanna*, 2006 WL 1388744, at *40); *see also* Donald J. Wolfe, Jr. & Michael A. Pittenger, *Corporate and Commercial Practice in the Delaware Court of Chancery* § 6.02 & n.13, at 6-5 (2010).

[27] Letter from The News Journal to V.C. Parsons, D.I. No. 351 (June 22, 2011). Milford also contends that the Report "was entered into evidence at a trial that has since been concluded so it no longer qualifies as discovery material and is now part of the public record." *Id.* Presumably, this argument is predicated on the Court's October 22, 2009 Order placing all "Discovery Material" containing nonpublic, confidential, proprietary or commercially sensitive information under seal pursuant to Rule 5(g). *See* Order, D.I. No. 91, at 1 (June 22, 2011). The Order itself, however, defines the capitalized term "Discovery Material" as "documents, depositions, deposition exhibits, interrogatory responses, admissions, and other written, recorded, graphic, or electronic matter or information produced, filed with or submitted to the Court and/or given or exchanged by and among the parties in the above-captioned action . . . ." *Id.* at 1. The information in question was filed with or submitted to the Court in connection with a proceeding that is stayed and Defendants took appropriate steps in that regard to maintain its confidentiality. Furthermore, although trial has concluded, post-trial briefing and argument has not occurred. Therefore, the Report continues to satisfy the definition of "Discovery Material" adopted by the Court for purposes of the sealing order in this action.

[28] *See* Order, D.I. No. 326 (June 2, 2010).

altered that fact, and there is no evidence that, in the interim, NKS publicly disclosed that financial information or otherwise failed to preserve its confidentiality. Therefore, I hold that the continued enforcement of the sealing order as to the Report is proper and that the redacted version available to the public reflects an appropriate balance between the public's right of access to court records and NKS's "legitimate interests . . . to protect sensitive nonpublic information from unfettered access."[29]

Regarding the transcript, the trial in this matter generated a transcript of twelve volumes comprising over 3,200 pages. The vast majority of that transcript currently is available to the public without any redactions. Furthermore, except as to Volumes VII and XII, all such redactions span no more than a handful of pages at a time and correspond to the limited instances during trial when the courtroom was cleared and testimony was given regarding NKS's nonpublic financial information or two documents over which NKS claimed attorney-client privilege.[30] Confidential information of this nature properly may remain under seal pursuant to Rule 5(g) as a narrow exception to the public's general right of access. Thus, good cause exists for keeping such information under seal in this case.

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[29] Wolfe & Pittenger, *supra*, § 6.02, at 6-2.

[30] More specifically, in the ten volumes of the transcript other than Volumes VII and XII combined, totaling more than 2,700 pages, only 87 pages have redactions.

In contrast, Volumes VII and XII were placed under seal in their entirety. These volumes do contain certain intermittent references to nonpublic financial information of both NKS and WTC that may remain under seal consistent with Rule 5(g). I am not convinced, however, that Volumes VII and XII need to be designated as confidential *in toto* to protect NKS's and WTC's legitimate interests. Accordingly, I direct the parties to identify by page and line numbers the portions of those volumes they believe need to be kept confidential and to file a redacted, public version of those transcript volumes.

II. CONCLUSION

For the foregoing reasons, Milford's request is granted in part and denied in part as stated herein. Specifically, any party claiming that information in Volumes VII and XII of the trial transcript must be kept under seal shall, within twenty days of the filing of this Letter Opinion:

(1) file a list identifying by page and line numbers the portions of the transcript they designate as confidential;

(2) certify, through counsel, that an attorney for the party has reviewed the identified excerpts and in good faith believes there is good cause that they should continue to be sealed; and

(3) file redacted copies of Volumes VII and XII suitable for access by the public.

In all other respects, Milford's request is denied.

IT IS SO ORDERED.

Sincerely,

/s/ Donald F. Parsons, Jr.

Donald F. Parsons, Jr.
Vice Chancellor

DFP/ptp