

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

AL JAZEERA AMERICA, LLC,	:	
	:	
Plaintiff,	:	
	:	
v.	:	C.A. No. 8823-VCG
	:	
AT&T SERVICES, INC.,	:	
	:	
Defendant.	:	

**MOTION TO STAY OCTOBER 14, 2013 LETTER
OPINION AND ORDER REQUIRING THE FILING OF
LARGELY UNREDACTED VERIFIED COMPLAINT**

Plaintiff Al Jazeera America, LLC (“Al Jazeera”), by and through its undersigned counsel, respectfully submits this motion to stay the Court’s October 14, 2013 Letter Opinion and Order (“Letter Opinion”) requiring the filing of a largely unredacted verified complaint, pending Al Jazeera’s motion (which AT&T is expected to support) for leave to withdraw the sealed Verified Complaint and other sealed papers from the Court’s records. In support, Al Jazeera states as follows:

INTRODUCTION

Al Jazeera and defendant AT&T Services, Inc. (“AT&T”) have reached a settlement in principle of their dispute, and both parties anticipate filing a stipulation of dismissal of this litigation within the next few days. Al Jazeera

intends (as suggested by the Delaware Supreme Court during oral argument on the interlocutory appeal) to make a formal request that: (i) it be permitted to withdraw the sealed version of the Verified Complaint and related sealed papers from the Court's records; and (ii) the Letter Opinion be vacated or modified accordingly. It is expected that AT&T will support that motion. As shown below, there is substantial authority for this relief.

To preserve the status quo, Al Jazeera now moves for an order staying the effect of the Letter Opinion, until the Court rules on the parties' motion to withdraw. Without such a stay, Al Jazeera will be compelled to file largely unredacted versions of the documents in question in the public docket before the Court can rule on withdrawal, which would make the withdrawal motion moot.

BACKGROUND

On August 20, 2013, Al Jazeera filed its Verified Complaint as a Confidential Filing under Court of Chancery Rule 5.1. (D.I. 1.) The Verified Complaint sought a declaration that Al Jazeera was not in breach of its Affiliation Agreement with AT&T, that AT&T's termination of the Affiliation Agreement was invalid, and that the Agreement remained in full force and effect; an order directing AT&T to specifically perform its contractual obligations, including resuming carriage of the Al Jazeera America service; and compensatory damages. As required by Court of Chancery Rule 5.1, Al Jazeera provided AT&T with a

copy of the proposed public version of the complaint, which redacted the material that Al Jazeera considered entitled to confidential treatment. AT&T made additional redactions and filed a public record version of the Verified Complaint that contained both parties' redactions.¹

Five press representatives then filed objections or challenges to the parties' confidential designations (the "Objectors"). As required by Rule 5.1, Al Jazeera and AT&T filed separate motions to continue the confidential treatment of the material redacted from the public record, supporting their claims of good cause with affidavits. This Court then heard oral argument on the motions on September 24, 2013 and, at the Court's request, Al Jazeera provided a narrowed set of proposed redactions for the public record version. (D.I. No. 34.)

The Letter Opinion concluded that the parties had shown that disclosure of the redacted contract terms and how the parties interpret them would give a competitive edge to third parties in unrelated transactions, much as disclosure of a price term would. The Court noted that the parties had shown the "unique features

¹ While the confidentiality issue was being litigated in the Court of Chancery and the Delaware Supreme Court, AT&T moved to dismiss the Verified Complaint, and Al Jazeera responded by filing a First Amended Verified Complaint. AT&T again moved to dismiss the First Amended Verified Complaint, which has been fully briefed. Al Jazeera has filed redacted versions of the First Amended Verified Complaint and papers on the AT&T motions to dismiss in the public docket, and the unredacted originals have been filed under seal. Al Jazeera understands that unless the Court stays its October 14, 2013 opinion and order, Al Jazeera will also be required to file largely unredacted versions of these papers in the public docket.

of the industry, including widespread industry practice of preserving the confidentiality of negotiations and contract terms.” Letter Opinion at 10.

The Court found, however, that even if disclosure “could cause the litigating parties significant economic and competitive harm,” this was outweighed by the public’s right to be informed and thus to have access to almost all of the redacted material. *Id.* at 12. It held that the only material that the parties could withhold under Rule 5.1 is information like price terms, whose non-disclosure “does not impinge on the public’s understanding of the disputes before this Court.” *Id.* at 13. The Court thus directed Al Jazeera to file a “largely unredacted” version of the Amended Complaint, with only a few price and subscriber terms to be maintained as confidential. The Court stayed the order to permit the parties the opportunity to take an interlocutory appeal. Letter Opinion at 19.

On October 21, 2013, Al Jazeera filed an Application in the Court of Chancery for Certification of Interlocutory Appeal, seeking certification of the Memorandum Opinion. The Court of Chancery, by Memorandum Opinion and Order, dated October 22, 2013, granted the application, and certified its October 14, 2013 Letter Opinion for interlocutory appeal. *Al Jazeera America, LLC v. AT&T Services, Inc.*, 2013 WL 5738034 (Del. Ch. Oct. 14, 2014). By Order dated November 5, 2013, the Delaware Supreme Court accepted the application for interlocutory appeal. *Al Jazeera America, LLC v. AT&T Services, Inc.*, 80 A.3d

959 (Del. 2013). Briefing on the interlocutory appeal was completed on February 10, 2014 and oral argument was held on April 23, 2014.

While the interlocutory appeal was proceeding, briefing on AT&T's pending motion to dismiss the First Amended Verified Complaint was completed and the Court scheduled oral argument on the motion for May 5, 2014. As the hearing on the motion to dismiss approached, settlement discussions between Al Jazeera and AT&T moved forward, and the parties requested that the argument date be postponed. In response to an inquiry by the Delaware Supreme Court as to the effect any action by this Court on AT&T's motion to dismiss may have on the appeal, Al Jazeera advised the Supreme Court by letter of the parties' settlement discussions. (Exhibit A.)² Al Jazeera further advised and requested the following:

If the Court of Chancery action is settled and voluntarily dismissed, Al Jazeera may move in the Court of Chancery, as members of this Court suggested during the April 23 oral argument, for an order permitting withdrawal of the complaint (and related papers) from the docket. A grant of such a motion would moot the pending appeal in this Court, because the documents that the Court of Chancery originally ordered to be disclosed would no longer be part of the public docket. Moreover, any appeal from the ruling on a motion to withdraw from the docket would substantially overlap with the issues of the current appeal. This would suggest that this Court should refrain from ruling on the current appeal until either (1) the action below is not settled and the Court of Chancery rules on the motion to dismiss, or (2) the action below is settled and the Court of Chancery rules on a

² The Objectors' May 5, 2014 letter to the Supreme Court is attached as Exhibit B.

motion to withdraw the docketed materials, and (3) an appeal is taken from that ruling.

(Id. at 1-2.)

On May 16, 2014, the parties advised this Court that they had reached an agreement in principle and were in the process of documenting the settlement. (D.I. No. 81.) On May 29, 2014, the Objectors filed a letter with the Delaware Supreme Court, arguing that “neither settlement nor dismissal of the underlying action, nor any attempt to withdraw Al Jazeera’s Complaint from the public record, will render this appeal moot, and the Court should not delay resolution of this appeal.” (Exhibit C hereto.) On May 30, 2014, the Delaware Supreme Court unilaterally dismissed the interlocutory appeal without reaching a decision on the merits, stating that the “interlocutory appeal was accepted improvidently,” without any further explanation. (D.I. No. 82.)

ARGUMENT

As Al Jazeera and AT&T have reached an agreement in principle to settle their disputes, the circumstances giving rise to the Letter Opinion and Order have materially changed. The parties expect to sign a final settlement agreement, and to dismiss this action, within the next ten days. They then anticipate moving for leave of court to withdraw the sealed documents, including the Verified Complaint, the First Amended Verified Complaint, and the motion papers, from the Court’s records. If this Court (or the Delaware Supreme Court) grants that requested relief,

the relief ordered in the Letter Opinion will be effectively mooted. Accordingly, Al Jazeera requests a brief stay of the October 14, 2013 Opinion and Order to permit the parties to (a) finalize settlement documentation, and (b) to permit Al Jazeera and AT&T to make a motion for leave to withdraw confidential filings from the Court's records.

The possibility of withdrawing the Verified Complaint from the Court's records was specifically raised by the *en banc* Delaware Supreme Court during the April 23, 2014 oral argument of Al Jazeera's appeal. The confidential portion of the argument was not videotaped, but the Court raised this possibility initially during that confidential portion. The Court continued its consideration of the withdrawal in the public portion, when questioning counsel for the Objectors:

THE COURT: Even if, let's say tomorrow, the litigation were to be terminated in some fashion without an opinion from a court, that the pleadings that have been submitted and are on record would still be "out there," and there would still be an issue as to whether the information that has been filed with the court can ever be made public. Do you have a position as to where things would stand if this case were terminated? Would you still feel that you are entitled to access to everything that has been filed?

MR. FRIEDLANDER: Yeah, absolutely, that these are judicial records, complaints are judicial records, all the filings are judicial records, they're all subject to Rule 5.1, the standard in Rule 5.1, and the right of access attached, sort of attached contemporaneously, but even if it's not contemporaneous, it's still alive...

THE COURT: Ok, so let me take the next step and ask whether you would object or think there was a grounds to object, to the trial court allowing the parties to basically have that portion of the public record that they've established be expunged, and a new complaint filed.

MR. FRIEDLANDER: I can't imagine we'd be amenable to expunging with a new complaint being filed. In the sense that we think the order of what needs to be disclosed is the correct order, and that what should apply to an old complaint, it should apply to a new complaint, it should apply to all the papers that were filed in the Court of Chancery, if I'm following Your Honor's question correctly.

(April 23, 2014 Video Recording, at 12:46-14:45.)

This Court's October 2014 order did not consider whether the parties to the litigation could withdraw the sealed documents in the Court records if the actions was terminated before this Court decided any substantive motion. That issue, however, was considered by at least one judge of the *en banc* Supreme Court panel. Al Jazeera and AT&T are now on the verge of settlement and dismissal of the action, without this Court having given any substantive consideration to the documents filed under seal.

There is substantial support for a party's right to withdraw sealed documents from court records where a case is terminated without a court having given those documents substantive consideration. Courts have held in similar circumstances that documents filed in court are not considered "judicial documents" subject to a presumption of public access, because the documents have not played an

adjudicative role in a case. *See, e.g., In re Policy Mgmt. Sys. Corp.*, 67 F.3d 296, 1995 WL 541623, at *3-4 (4th Cir. 1995) (holding that “a document becomes a judicial document when a court uses it in determining litigants’ substantive rights” and denying public access to document that did not play any role in the district court’s adjudication of a motion to dismiss); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (noting that the mere filing of a document does not render it a judicial document, the document must “be relevant to the performance of the judicial function and useful in the judicial process”); *iHance, Inc. v. Eloqua Ltd.*, 2012 WL 4050169, at *1 (E.D. Va. 2012) (ordering motion papers and exhibits to be expunged from the record because the “confidential motion papers and exhibits have played no adjudicative role in this case, the case having been dismissed prior to disposition of the pretrial motions to which they relate, [and] they have not attained the status of judicial documents to which a constitutional or common law presumption of public access might attach.”).³

³ While the Third Circuit has noted that the test of whether a document constitutes a judicial record considers “whether a document is physically on file with the court,” *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 782 (3d Cir. 1994), courts have recognized that that is just one condition and the key is whether the case “dealt with documents that were *relevant to a court's decision.*” *Garber v. Pharmacia Corp.*, 2009 WL 3424186, at *2 (D. N.J. Oct. 20, 2009) (emphasis added).

Here, the Court has not considered any of the sealed papers filed in this case in connection with any hearing or ruling on the merits, and the settlement of the case will mean that the documents will have “played no adjudicative role in the case.” *iHance, Inc.*, at *1. The authorities cited above support the parties’ right, upon settlement, to withdraw the sealed documents from the Court.⁴

⁴ In their May 29, 2014 letter to the Supreme Court, the Objectors cited two decisions as supporting a public right of access to confidential filings made before settlement. Neither decision supports this reading. In *Sequoia Presidential Yacht Group LLC v. FE Partners LLC*, 2013 WL 3724946 (Del. Ch. July 15, 2013), there was no settlement between the parties. The Court held several hearings related to the merits of the case, including a ruling on a motion for temporary restraining order and expedited proceedings. The plaintiffs submitted to the entry of a default judgment after discovery revealed they had engaged in the fabrication of evidence, the alteration of evidence, the intentional destruction of evidence and witness intimidation. *Sequoia Presidential Yacht*, 2013 WL 3724946, at *1. Plaintiffs sought to maintain the confidentiality of the default motion because it wanted “to avoid the embarrassment it would face if [the Court] were to unseal the record, mostly due to its alleged conduct in the course of the litigation itself.” *Id.* at *3. The Court declined to permit this filing to remain confidential.

The Objectors also cited *In re Peregrine Systems, Inc.*, 311 B.R. 679 (D. Del. 2004) in support of its position that Al Jazeera’s complaint “cannot be removed from the court record and rendered impervious to a claim of public access.” (Exhibit C at 3.) However, in *Peregrine Systems*, the bankruptcy court ordered a document unilaterally stricken from the record in the face of a motion to unseal that had already been filed. 311 B.R. at 691. As no party had made a motion to strike the document from the record, the District Court reversed and remanded the case to the bankruptcy court for additional proceedings. *Id.*

Here, it is not the Court, but the parties, that would seek withdrawal of sealed filings. No party litigating this case would oppose withdrawal. The circumstances of this case are vastly different than both *Sequoia Presidential Yacht* and *Peregrine Systems*, and those cases therefore provide no authority against withdrawal of sealed filings. The parties here are on the brink of entering into a

Should the Court's order of October 14, 2013 go into effect, however, Al Jazeera would be required to file a largely unredacted public version of the Verified Complaint on or before June 6, 2014, as well as the other sealed papers. That would preclude Al Jazeera and AT&T from applying to withdraw those sealed documents from the docket of the Court, and prevent the Court from considering the merits of such an motion. Rather than moot this motion, the Court should stay its October 14, 2013 order for ten further days, and, if Al Jazeera and AT&T move to withdraw the sealed filings from the docket, should continue that stay until the motion is decided.

confidential settlement agreement before *any* hearing has occurred on the underlying merits of the lawsuit. Dismissal of the case will moot AT&T's pending motion to dismiss the First Amended Verified Complaint, and the Court will not rule on that motion.

CONCLUSION

For the reasons set forth above, Al Jazeera respectfully requests that the Court stay its October 14, 2013 Letter Opinion and Order.

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