

 DirecTV, LLC v Nexstar Broadcasting, Inc.
2022 NY Slip Op 30930(U)
March 18, 2022
Supreme Court, New York County
Docket Number: Index No. 653733/2019
Judge: Andrea Masley
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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DIRECTV, LLC	INDEX NO. <u>653733/2019</u>
Plaintiff,	MOTION DATE <u>N/A</u>
- v -	MOTION SEQ. NO. <u>011 012</u>
NEXSTAR BROADCASTING, INC.,	
Defendant.	DECISION + ORDER ON MOTION
-----X	

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 011) 280, 281, 282, 286, 288
were read on this motion to/for SEAL.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 283, 284, 285, 287
were read on this motion to/for SEAL.

In motion sequence number 011, plaintiff DIRECTV, LLC (DirecTV) moves, by Order to Show Cause, to seal NYSCEF Doc. Nos. (NYSCEF) 218 and 240 and redact NYSCEF 202, 206, 229, 237, 244, and 246. In motion sequence number 012, defendant Nexstar Broadcasting, Inc. (Nexstar) moves, by Order to Show Case, to seal NYSCEF 273 and redact NYSCEF 255, 257, 259, 260, 262, 271, 274, 276, and 278.

DirecTV’s Documents (Motion Sequence Number 011)

DirecTV requests the sealing of NYSCEF 218 and 240. NYSCEF 218 is an agreement between nonparty NBCUniversal Media, LLC (NBC) and Nexstar (Affiliation Agreement). DirecTV received the Affiliation Agreement with redactions already made by NBC. According to Nexstar, the Affiliation Agreement contains competitively sensitive information, the disclosure of which would harm its business, and thus, sealing

the Affiliation Agreement in its entirety is appropriate. NYSCEF 240 is an email communication that refers to negotiation terms for the Affiliation Agreement.

DirecTV requests the redaction of NYSCEF 202, 206, 229, 230, and 237. NYSCEF 202 is the September 10, 2020 deposition transcript of Perry Sook that contains negotiation terms and discussions pertaining to the Affiliation Agreement and a retransmission license. NYSCEF 206 is the November 20, 2020 and August 12, 2021 deposition transcripts of Elizabeth Ryder that contain business negotiation terms for a retransmission license, the Affiliation Agreement, and other business negotiation discussions with third parties. NYSCEF 229 is the November 13, 2020 deposition transcript of David Randall Bradford that contains references to business strategy and negotiation discussions that themselves refer to calculation rates and financial forecasts. NYSCEF 237 is an email communication that contains internal business strategy, financial forecasts, and references to contracts/pricing information or rates and business terms with other parties not in this action.

NYSCEF 244 is DirecTV's Statement of Material Facts and NYSCEF 246 is DirecTV's Memorandum of Law in Support of its Motion for Summary Judgment, both of which make references to the same material contained in the documents DirecTV wishes to have sealed or redacted.

Nexstar's Exhibits (Motion Sequence Number 012)

Nexstar requests the redaction of NYSCEF 255, 257, 259, 260, 262, 271, 274, 276, and 278.¹ NYSCEF 255 is the October 7, 2020 deposition transcript of Linda

¹ It is unclear whether Nexstar is in fact seeking the sealing of NYSCEF 265, the August 16, 2021 deposition transcript of Rob Thun. NYSCEF 265 is not included in the sealing chart set out in Nexstar's Memorandum of Law, nor is there a ground on which to redact

Burakoff that contains references to DirecTV's internal business strategies and internal operation logistics. NYSCEF 257 is the 2021 deposition transcript of Burakoff that contains pricing information and business negotiation strategy. NYSCEF 259 is a 2011 retransmission consent agreement between DirecTV and Nexstar that contains pricing information and an internal calculation rubric. NYSCEF 260 is the September 10, 2020 deposition transcript of Sook that contains discussions of business strategies and pricing information. NYSCEF 262 is the November 20, 2020 deposition transcript of Ryder that contains discussions of business strategies. NYSCEF 271 a letter from Karen Griet to Sook and Ryder discussing DirecTV's overpayment of certain fees and identifies the amounts overpaid (financial information) which were derived from confidential pricing information and calculation rubric.² NYSCEF 274 is Ryder's affirmation that contains confidential pricing and financial information derived from agreement terms and calculation rates. NYSCEF 276 is Nexstar's Statement of Undisputed Material Facts filed in connection to its motion for summary judgment, which references confidential information to be redacted pursuant to this motion to seal or redact. NYSCEF 278 is Nexstar's Memorandum of Law in Support of its motion for summary judgment. Finally, Nexstar requests the court seal NYSCEF 273, the Affiliation Agreement between NBC and Nexstar.³

stated. (See NYSCEF 285, Memorandum of Law [MOL]; NYSCEF 284, Hollan Chelette aff.) Nexstar merely includes NYSCEF 265 in the conclusion paragraph of its MOL and in a parenthetical citation in the MOL's background section.

² NYSCEF 271 is the same document filed as NYSCEF 208, discussed in more detail below.

³ NYSCEF 273 is the same document as NYSCEF 218.

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Prior Sealing Order

Both DirecTV and Nexstar also ask the court to redact certain court documents pursuant to the court's November 26, 2019 decision and order. (See NYSCEF 48, Decision and Order [mot. seq. no. 003] [Prior Sealing Order].) In motion sequence number 003, Nexstar moved to redact Section 8 of an agreement (Retransmission Agreement) entered into between Nexstar and DirecTV as it contained "confidential pricing information for the retransmission license fees and calculations for the Unlaunched Station Fee." (*Id.* at 2.) The court granted Nexstar's motion and ordered that "future submissions containing or referencing the pricing information or calculation rubric . . . shall likewise be redacted prior to being filed publicly in NYSCEF." (*Id.* at 4.)

Therefore, pursuant to the Prior Sealing Order, DirecTV requests that NYSCEF 204, 208, 210, 219, and 231 be redacted as these documents contain confidential pricing information or calculation rubric or financial information derived thereof. NYSCEF 204 is the October 7, 2020 deposition transcript of Burakoff that refers to a pricing rate. NYSCEF 208 is a letter dated November 13, 2018 from Karen Griet to Sook and Ryder discussing DirecTV's overpayment of certain fees and identifies the amounts overpaid (financial information), which were derived from the pricing information and calculation rubric. NYSCEF 210 is a letter dated November 27, 2018 from Nexstar to DirecTV that references the amount of overpayment and contains a calculation rate of the "Unlaunched Station Fee." NYSCEF 219 is an email communication between Sook and Bradford that contains a calculation rate and resulting financial information. NYSCEF 231 is DirecTV's responses to Nexstar's interrogatories, in which pricing information is mentioned.

Legal Standard

Section 216.1(a) of the Uniform Rules for Trial Courts empowers courts to seal documents upon a written finding of good cause. It provides:

“(a) [e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in whole or in part, except 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 the parties. Where it appears necessary or desirable, the court may prescribe appropriate notice and an opportunity to be heard.”

In the business context, courts have sealed records where the disclosure of documents “could threaten a business’s competitive advantage.” (*Mosallem v Berenson*, 76 AD3d 345, 350-351 [1st Dept 2010] [citations omitted].) Records concerning financial information may be sealed where there has not been a showing of relevant public interest in the disclosure of that information. (See *Dawson v White & Case*, 184 AD2d 246, 247 [1st Dept 1992].) A party “ought not to be required to make their private financial information public ... where no substantial public interest would be furthered by public access to that information” and that “sealing a court file may be appropriate to preserve the confidentiality of materials which involve the internal finances of a party and are of minimal public interest.” (*D’Amour v Ohrenstein & Brown*, 17 Misc.3d 1130[A], 2007 NY Slip Op 52207[U], *20 [Sup Ct, NY County 2007] [citations omitted].)

A party’s designation of a document as confidential or restricted, without further explanation or supporting case law, is insufficient to support a finding of good cause to seal court records in whole or in part. (*Mosallem v Berenson*, 76 AD3d 345 [noting, rather, that New York courts have found good cause where disclosure of documents

could threaten a business's competitive advantage]; *Grande Prairie Energy LLC v Alstom Power, Inc*, 5 Misc 3d 1002(A) [Sup Ct, NY County 2004].)

Discussion

Affiliation Agreement

DirecTV asserts that sealing the Affiliation Agreement (NYSCEF 218) is necessary because the agreement sets out terms between Nexstar's other nonparty stations with NBC and was designated as confidential pursuant to their Confidentiality Order. (NYSCEF 63, Confidentiality Order.) Nexstar also requests that the Affiliation Agreement (NYSCEF 273) be sealed in its entirety, citing the Confidentiality Order. Nexstar also asserts that disclosing the competitively sensitive terms of the Affiliation Agreement, including programming, clearance, and various fees, would be detrimental to nonparty NBC's business.

While reliance on the parties' Confidentiality Order is insufficient to support sealing of a document (*Mosallem*, 76 AD3d 345), the parties have demonstrated good cause to prevent disclosure of information which could threaten their competitive advantage. However, the court does not find good cause to entirely seal the document. The parties may further redact the Affiliation Agreement but sections such as "Assignment," "Confidentiality," and "Additional Terms" do not appear to pose a threat to a competitive advantage. Thus, the parties shall file a more narrowly tailored redaction of NYSCEF 218 and 273. The parties may renew their motions to explain in more detail why this Agreement should be entirely sealed if they so choose.

Documents Subject to Prior Order

The court grants DirecTV's motion to redact the pricing information and calculation rubric contained in NYSCEF 204, 208, 210, 219, and 231 as the information is subject to the Prior Sealing Order.

DirecTV's Motion to Seal (Motion Sequence Number 011)

According to DirecTV, because NYSCEF 202, 229, and 240 contain information derived from the Affiliation Agreement, redaction of those exhibits is warranted, asserting that these documents contain material that is competitively sensitive, proprietary, or internal business and financial information permitting redaction under the applicable law or confidential information covered by the Prior Order.

DirecTV may seal NYSCEF 240 as it contains confidential competitive business information. DirecTV may redact NYSCEF 202 and 229, but the redactions shall be more narrowly tailored. Certain proposed redactions should not be made as they exceed the scope of redactions permitted by Section 216.1(a) of the Uniform Rules of the Trial Courts. For example, in NYSCEF 202, there is no basis to redact the following colloquial testimony: NYSCEF 202, tr at 100:15-25. DirecTV shall file a more narrowly tailored redaction of NYSCEF 202 and 229.

Regarding NYSCEF 206 and 237, Nexstar has advised DirecTV that those exhibits contain Nexstar's confidential and competitively sensitive business dealings with other third parties, requiring redaction. Here, the proposed redacted portions concern confidential and competitively sensitive business terms of the parties' agreements. The narrowly tailored proposed redactions also contain financial

information derived from calculation rates, which is covered by the Prior Sealing Order. The court also agrees that the information refers to nonparties and their contractual agreements, terms, and rates. Therefore, good cause exists to redact the proposed portions of NYSCEF 206 and 237.

The proposed redactions of NYSCEF 244 and 246, DirecTV's Statement of Material Facts and Memorandum of Law in Support for Summary Judgment, is consistent with this decision as both documents refer to confidential and/or competitively sensitive business information.

Nexstar's Exhibits (Motion Sequence Number 012)

Nexstar seeks to redact NYSCEF 255, 257, 260, 262, 274, 276, and 278 as these exhibits contain Nexstar's competitively sensitive business information and are covered by the Prior Sealing Order.

Regarding NYSCEF 271, which is the same November 13, 2018 letter exhibit filed as NYSCEF 208 in DirecTV's motion for summary judgment, (*see supra* n 2), Nexstar's request to redact the financial information is granted as detailed above. Nexstar argues that NYSCEF 259, a 2011 retransmission agreement between the parties, contains similar pricing terms and calculation rubrics similar to that included in the Retransmission Agreement (which was signed in 2015). The court finds good cause to redact the 2011 retransmission agreement with redactions that track the redactions made in the Retransmission Agreement, the subject of the Prior Sealing Order. (See NYSCEF 48, Prior Sealing Order.)

Regarding NYSCEF 255, 257, 260, 262, and 274, these exhibits contain contractual terms, financial information relating to payment rates, business negotiation

histories and strategies, and references to Section 8 of the Retransmission Agreement. To the extent Nexstar's proposed redactions implicate competitively sensitive and confidential business information, Nexstar has shown good cause to redact those narrow portions. (See *Mosallem*, 76 AD3d at 350-351.) Moreover, good cause exists to redact the internal finances contained in these records because information of that nature is not a matter of public interest. (See *Feffer v Goodkind, Wechsler, Labaton & Rudoff*, 152 Misc 2d 812, 815-816 [Sup Ct, NY County 1991].)

However, good cause does not exist to redact portions of the testimony. Nexstar cannot show good cause to redact portions that do not refer to competitively sensitive information (without any specific explanation), such as isolated objections to testimony questioning and job title of the deponent. (See NYSCEF 255, Burakoff deposition tr [Oct. 7, 2020] at 16:14-24; *id.* at 79:25.) Therefore, good cause exists to redact NYSCEF 257, 260, 262, and 274 and good cause only exists to redact NYSCEF 255 as to those portions that refer to competitively sensitive information. Nexstar shall file a more narrowly tailored redaction of NYSCEF 255.

The court will permit the redaction of NYSCEF 276 and 278, Nexstar's Statement of Material Facts and Memorandum of Law in Support for Summary Judgment as both documents refer to confidential and/or competitively sensitive business information.

The parties are reminded to comply with Part 48 rules governing motions to seal or redact. (See *especially* Rule 13 [B] [i] [requiring that all proposed redactions highlighted yellow].) For example, in NYSCEF 255, proposed redactions are highlighted in both blue and yellow; the court cannot decipher whether there is a distinction between the two different colors, i.e., in substance or reasoning for the requested

redaction. In NYSCEF 274 and 275, the unredacted and redacted version of Ryder's affirmation, respectively, is filed incorrectly because the proposed unredacted version contains no highlights of what is to be redacted.

Accordingly, it is

ORDERED that motion sequence number 011 is granted in part. DirecTV shall file publicly narrowly tailored redacted versions of NYSCEF Doc. Nos. 202, 218, and 229 in accordance with this decision. As to NYSCEF Doc. No. 218, DirecTV may file a new OSC giving reasons for its request to seal within 7 days of the date of this decision; and it is further

ORDERED that as redacted versions of NYSCEF Doc. Nos. 204, 206, 208, 210, 231, 237, 244 and 246 have already been filed publicly and unredacted copies under seal, DirecTV need not re-file duplicates; and it is further

ORDERED that motion sequence number 012 is granted in part. Nexstar shall file publicly narrowly tailored redacted versions of NYSCEF Doc. No. 255 and 273 in accordance with this decision; and it is further

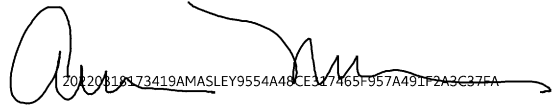
ORDERED that as redacted versions of NYSCEF Doc. Nos. 257, 259, 260, 262, 271, 276 and 278 have already been filed publicly and unredacted copies under seal, Nexstar need not re-file duplicates; and it is further

ORDERED that the County Clerk, upon service to him of this order, shall seal NYSCEF Doc. Nos. 202, 204, 206, 208, 210, 218, 219, 229, 231, 237, 240, 244, 246, 255, 257, 259, 260, 262, 271, 273, 274, 276, 278; and it is further

ORDERED the New York County Clerk shall restrict access to the sealed documents with access to be granted only to authorized court personnel and designees,

the parties and counsel of record in the above-captioned action, and any representative of a party or of counsel of record upon presentation to the County Clerk of written authorization from counsel; and it is further

ORDERED that this order does not authorize sealing or redacting for purposes of trial.



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3/18/2022

DATE

ANDREA MASLEY, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE