

**IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE**

AL JAZEERA AMERICA, LLC, )  
 )  
 Plaintiff, )  
 )  
 v. ) *Civil Action No. 8823-VCG*  
 )  
 AT&T SERVICES, INC., )  
 )  
 Defendant. )

**MEMORANDUM OPINION**

Date Submitted: October 21, 2013

Date Decided: October 23, 2013

John L. Reed, Scott B. Czerwonka and Andrew Sauder, of DLA PIPER LLP (US), Wilmington, Delaware; OF COUNSEL: Andrew L. Deutsch, Francis W. Ryan, Michael D. Hynes and Jason D. Gerstein, of DLA PIPER LLP (US), New York, New York, Attorneys for Plaintiff.

Kenneth J. Nachbar and Shannon E. German, of MORRIS, NICHOLS, ARSHT & TUNNELL LLP, Wilmington, Delaware; OF COUNSEL: Robert C. Walters and Olivia A. Adendorff, of GIBSON, DUNN & CRUTCHER LLP, Dallas, Texas, Attorneys for Defendant.

GLASSCOCK, Vice Chancellor

## I. BACKGROUND

The parties in this matter are embroiled in a contractual dispute. On August 20, 2013, Al Jazeera America, LLC (“Al Jazeera”) filed a Verified Complaint (the “Complaint”) alleging that AT&T Services, Inc. (“AT&T”) wrongfully terminated and breached an Affiliation Agreement between the parties. Despite the parties’ decision to litigate in a public court, rather than pursue private dispute resolution, the parties redacted, pursuant to Court of Chancery Rule 5.1, significant portions of the Complaint, including almost all the contract terms in dispute, descriptions of the nature of the dispute itself, and inter-party negotiations and discussions. In response to the heavily redacted public version of the Complaint, filed on August 23, 2013, several news organizations and members of the press filed objections pursuant to Court of Chancery Rule 5.1(f), demonstrating the public’s interest in being informed of “circumstances under which a journalistic enterprise can be denied entry to the American broadcast market by a provider with millions of viewers.”<sup>1</sup> Both parties subsequently moved to maintain confidential treatment of the redacted information, which they characterized as proprietary and/or sensitive business information.<sup>2</sup> The parties emphasized that if this information was made public, disclosure would have collateral economic consequences, including a

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<sup>1</sup> Joint Opposition to the Mots. to Maintain Confidential Treatment at 2.

<sup>2</sup> AT&T also submitted an amended version of its original redactions with its Motion to Maintain Confidential Treatment of the Redacted Complaint.

weakened negotiating position and overall competitive disadvantage.<sup>3</sup> Both parties argued that this potential harm outweighed any interest that the public had in the redacted portions of the Complaint.

Oral argument was heard on September 24, 2013. In addition to arguments by counsel for both parties, Andre Bouchard, representing Bloomberg News, and Delaware attorney Kyle Compton Wagner, a writer for the Chancery Daily, also addressed the Court. A portion of the September 24 hearing was closed to the public; the court transcript remains under seal in order to preserve the confidentiality of the matters at issue.

At oral argument, I requested that Al Jazeera provide this Court with additional information about the effect that disclosure of certain redacted information would have. I also requested that Al Jazeera amend and resubmit its redactions, using only Rule 5.1—and not the Affiliation Agreement’s confidentiality provision—as guidance. Al Jazeera submitted this supplemental information on October 1, 2013.

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<sup>3</sup> See, e.g. Tracy Aff. ¶ 8 (redacted version) (“[B]ecause each affiliation agreement with each network is separately negotiated, the bargaining posture of the parties varies from agreement to agreement, and thus, business motives, negotiation strategies, and information exchanged between the parties, whether oral or written, is highly sensitive and confidential business information that is unique to the relationship between a particular network and provider.”); Murano Aff. ¶ 10 (“If the terms of a distribution agreement are exposed to a network’s other distributors, the network’s ongoing relationships and current or future negotiations with those distributors may be irreparably harmed because no distributor wishes to have contractual terms that are less desirable than those enjoyed by its competitors.”).

On October 14, I issued a Letter Opinion in which I found that the public’s right of access to court documents outweighed the collateral economic consequences that disclosure could cause, with limited exceptions.<sup>4</sup> Consequently, I directed Al Jazeera to file a largely unredacted version of the Complaint within five business days of my decision. However, recognizing that the parties may want to appeal my ruling, I noted that my Order would be stayed if either party sought an interlocutory appeal.

On October 16, Al Jazeera filed a notice of a direct appeal to the Delaware Supreme Court, seeking to appeal my October 14 Order under the collateral order doctrine.<sup>5</sup> Al Jazeera has also filed this Application for Certification of Interlocutory Appeal (“Application”), lest the Supreme Court determine that application of the collateral order doctrine, and thus a direct appeal, is inappropriate.<sup>6</sup> I previously indicated, during an October 16, 2013 teleconference with Al Jazeera and AT&T, that I would certify this Letter Opinion for interlocutory appeal, provided that it met the appropriate standard for certification. Because only non-parties objected to the redactions pursuant to Rule 5.1(f), there is

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<sup>4</sup> *Al Jazeera Am., LLC v. AT&T Servs., Inc.*, 2013 WL 5614284 (Del. Ch. Oct. 14, 2013).

<sup>5</sup> Pl.’s Application for Certification of Interlocutory Appeal of the Court’s Oct. 14, 2013 Letter Op. & Order at 2. Al Jazeera contends that a direct appeal under the collateral order doctrine is appropriate in this instance “[b]ecause the Letter Opinion finally resolves a dispute between parties and non-parties to the litigation unrelated to the substantive merits of the underlying claims in the action, and because the issue raised by the Letter Opinion cannot be effectively reviewed on appeal from a final judgment in the action.” *Id.*

<sup>6</sup> *Id.*

no opposing party under Delaware Supreme Court Rule 42(c)(ii); therefore, I have certified this Application without awaiting any response.

## II. ANALYSIS

Delaware Supreme Court Rule 42 permits an interlocutory appeal only when “the order of the trial court determines a substantial issue, establishes a legal right” and meets at least one of the enumerated criteria, including “[a]ny of the criteria applicable to proceedings for certification of questions of law set forth in Rule 41.”<sup>7</sup> Delaware Supreme Court Rule 41 provides that certification is appropriate if “[t]he question of law is of first instance in this State”; there exist conflicting trial court opinions on a matter of law; or where construction or application of a Delaware *statute* has not yet, but should, be settled by the State’s highest court.<sup>8</sup>

I find that certification of Al Jazeera’s interlocutory appeal is appropriate. First, my Order, entered October 14, determined a substantial issue. Specifically, I determined that the parties’ allegations of collateral business impact was insufficient to maintain confidential treatment of information such as the nature of the parties’ dispute and the contract provisions that this contractual dispute was based upon, because this information was to crucial to the public interest, and pivotal to the public’s understanding of the operations of this public institution. Secondly, this Order established a legal right, because once the public has a right

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<sup>7</sup> Supr. Ct. R. 42(b)(i)-(v).

<sup>8</sup> *Id.* 41(b)(i).

to view those portions of the Complaint which I have directed Al Jazeera to unredact, any right to maintain confidential treatment of this information or contest my decision are irretrievably lost. Lastly, Al Jazeera has met at least one of the criteria enumerated in Delaware Supreme Court Rule 42. Al Jazeera contends that my Order satisfies three of the enumerated criteria for an interlocutory appeal: Delaware Supreme Court Rules 41(b)(i), 41(b)(iii), and 42(b)(v).<sup>9</sup> Additionally, Al Jazeera asserts that “denial of certification would render the Letter Opinion effectively unreviewable and imply that litigants could never have review from an adverse ruling directing or denying disclosure under Rule 5.1.”<sup>10</sup> I find, however, that Delaware Supreme Court Rule 41(b)(i) is the only appropriate ground that exists. Nevertheless, this finding is satisfactory for certifying Al Jazeera’s Application.

Under Delaware Supreme Court Rule 41(b)(1), it is appropriate to certify an interlocutory appeal if the appeal involves a question of law that “is of first instance in this State.”<sup>11</sup> Delaware Court of Chancery Rule 5.1, which governs the confidential designations of public court documents, has only been in effect since January 1, 2013, having replaced now-retired Court of Chancery Rule 5(g).<sup>12</sup> This

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<sup>9</sup> Pl.’s Application for Certification of Interlocutory Appeal of the Court’s Oct. 14, 2013 Letter Op. & Order at 8-10.

<sup>10</sup> *Id.* at 10.

<sup>11</sup> Supr. Ct. R. 41(b)(i).

<sup>12</sup> Ct. Ch. R. 5.1; *see also Protecting Public Access to the Courts: Chancery Rule 5.1*, at 1 (Jan. 1, 2013), *available at* <http://courts.delaware.gov/rules/ChanceryMemorandumRule5-1.pdf>.

Rule has been applied to a limited number of filings,<sup>13</sup> but never before my October 14 Letter Opinion had this Court addressed objections from the media to redactions of both parties pursuant to Rule 5.1(f). Moreover, my decision led to an Order that the parties make public a large amount of information that they deemed sensitive proprietary and business information, and that the parties claimed would have a harsh economic impact on their business if disclosed. My October 14 Letter Opinion is the first, but unlikely the last, “comprehensive interpretation of Court of Chancery Rule 5.1 involving a challenge to confidentiality initiated by the press.”<sup>14</sup> Thus, this Letter Opinion provides an appropriate basis for the Supreme Court to review Rule 5.1 and its application to information that parties litigating before this Court seek to maintain as confidential, including information that directly intersects the nature of the dispute and the public’s interest in keeping apprised of the proceedings before a public court.

### III. CONCLUSION

For the foregoing reasons, Al Jazeera’s Application is granted. An appropriate Order is attached.

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<sup>13</sup> See, e.g. *Sequoia Presidential Yacht Grp. LLC v. FE Partners LLC*, 2013 WL 3724946 (Del. Ch. July 15, 2013); *Horres v. Chick-fil-A, Inc.*, 2013 WL 1223605 (Del. Ch. Mar. 27, 2013).

<sup>14</sup> Pl.’s Application for Certification of Interlocutory Appeal of the Court’s Oct. 14, 2013 Letter Op. & Order at 1.