

IN THE SUPREME COURT OF THE STATE OF DELAWARE

AL JAZEERA AMERICA, LLC,

Plaintiff-Below/  
Appellant,

v.

AT&T SERVICES, INC.,

Defendant-Below,

and

BLOOMBERG L.P., PEG BRICKLEY,  
RITA FARRELL, RANDALL CHASE,  
KYLE WAGNER COMPTON, and  
SHARON BRADLEY,

Objectors Below/  
Appellees.

No. 600, 2013

APPEAL FROM THE  
OPINION DATED OCTOBER  
14, 2013 OF THE COURT OF  
CHANCERY OF THE STATE  
OF DELAWARE IN C.A. No.  
8823-VCG

REDACTED PUBLIC VERSION  
FILED: December 20, 2013

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**NATURE AND STAGE OF THE PROCEEDINGS**

This is an appeal from an October 14, 2013 Letter Opinion of the Court of Chancery (“Letter Opinion,” cited as “Ltr. Op.”), which denied, with “minor exceptions” (Ltr. Op. at 3), motions by both parties to continue the confidential treatment of a verified complaint which had been filed as a Confidential Filing.

Plaintiff-Appellant Al Jazeera America, LLC (“Al Jazeera”) operates a news, information and lifestyle network called Al Jazeera America, which launched on August 20, 2013. Defendant AT&T Services, Inc. (“AT&T”) operates a nationwide system that distributes cable television to subscribers. Until August 2013, Al Jazeera and AT&T were parties to an agreement (the “Affiliation Agreement”) under which AT&T was to distribute the Al Jazeera America network once it launched. In July 2013, AT&T alleged that Al Jazeera was in material breach of the Affiliation Agreement’s

AT&T announced that it would terminate the Affiliation Agreement on August 19, 2013, one day before the launch of Al Jazeera America. Despite Al Jazeera’s emphatic rejection of AT&T’s baseless allegations, AT&T abruptly terminated the Affiliation Agreement and never carried the Al Jazeera America service.

On August 20, 2013, Al Jazeera sued AT&T in the Court of Chancery for (i) a declaration that it was not in breach of its Affiliation Agreement with AT&T, (ii) an order compelling AT&T to specifically perform that agreement by distributing the Al Jazeera America channel to its subscribers, and (iii) an award of damages. The Affiliation Agreement was made an exhibit to Al Jazeera's Verified Complaint, and portions were quoted in the Verified Complaint's allegations. It also provided detailed allegations showing that AT&T's termination was in bad faith and that AT&T's real motivation was fear that its subscribers would object to receiving the Al Jazeera America service, and that they would seek to boycott other AT&T services.

Al Jazeera filed its Verified Complaint under seal, pursuant to Rule 5.1 of the Delaware Court of Chancery Rules ("Rule 5.1"). The allegations and exhibits of the Verified Complaint disclosed details of the Affiliation Agreement and [REDACTED], and public disclosure of this information would harm Al Jazeera's on-going negotiations with other television carriers, and provide a competitive advantage to other networks that compete with Al Jazeera America for distribution.<sup>1</sup> As required by Rule 5.1, Al Jazeera provided a proposed redacted

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<sup>1</sup> While the confidentiality issue was being litigated in the Court of Chancery, AT&T moved to dismiss the Verified Complaint, and Al Jazeera responded by filing a First Amended Verified Complaint, pursuant to Court of Chancery Rule 15(aaa). A561-739. Al Jazeera also filed a public version of the First Amended Verified Complaint, which redacted the same kinds of confidential information that Al Jazeera had redacted from the Verified Complaint. A740-771.

version of the complaint to AT&T. AT&T made additional redactions (largely dealing with Al Jazeera's allegations that AT&T's termination was motivated by fear of subscriber bias, and was not in good faith), and then filed a public record version of the Verified Complaint that contained both parties' redactions.

Five individual reporters and Bloomberg L.P. (the "Press Intervenors") then filed objections or challenges to the parties' confidential designations. 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. The Court of Chancery heard oral argument on the motions. At the court's request, Al Jazeera provided a fuller explanation of its position and a narrowed set of proposed redactions for the public record version.

The Court of Chancery then issued its Letter Opinion. The court acknowledged 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 price terms would. The court also agreed that the parties had shown the "unique features of the industry,

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AT&T decided not to designate any material in the First Amended Verified Complaint as confidential. Because the information that Al Jazeera redacted from the First Amended Verified Complaint is of the same nature as the material it redacted in the Verified Complaint, this Court's ruling will provide appropriate direction to the Court of Chancery as to what portions of both pleadings should remain confidential and what portions should be included in the public versions of the pleadings.



including widespread industry practice of preserving the confidentiality of negotiations and contract terms.” Ltr. Op. at 10.

The Court of Chancery found, however, that even if disclosure “could cause the litigating parties significant economic and competitive harm,” that harm 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 such as price terms, the non-disclosure of which “does not impinge on the public’s understanding of the disputes before this Court.” *Id.* at 13. As to other information, the Court of Chancery found that the public’s interest in access outweighed the economic harm that the parties may suffer from disclosure. *Id.* The court thus directed Al Jazeera to file a “largely unredacted” version of the Verified Complaint, with only a few price and subscriber terms to be maintained as confidential.<sup>2</sup> That order has been stayed pending this appeal.

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<sup>2</sup> The court also rejected AT&T’s redactions of the Verified Complaint dealing with allegations of AT&T’s true motive for terminating the contract, because “potential embarrassment” is not a sufficient reason for maintaining a pleading as confidential. Ltr. Op. at 14. However, Al Jazeera did not seek to redact these allegations, and AT&T, by not appealing from the order below, has indicated that it no longer wishes to claim that these allegations are confidential. Thus, they are not part of this appeal. In fact, unredacted allegations of AT&T’s true motive are disclosed in the public record version of Al Jazeera’s First Amended Verified Complaint, because AT&T did not designate them as confidential when given the opportunity. *See, e.g.*, A743, 758.

## SUMMARY OF ARGUMENT

This Court should reverse the opinion below for any of the following independent reasons:

1. The Court of Chancery erred by interpreting Rule 5.1 too narrowly. The Rule provides that where a court filing contains “sensitive financial, business, or personnel information,” that information may be protected from public access. The court limited the scope of what can be protected from disclosure to trade secrets and sensitive business information of no significance to the public. This interpretation, a matter of first impression, is not supported by the language or underlying intention of the Rule.

2. The Court of Chancery also erred in giving insufficient weight to the parties’ joint and unrefuted proof. The court itself acknowledged that the parties had shown that in the business in which they operate, confidentiality of contract terms is paramount, and that public disclosure of those terms would cause both parties significant economic harm. In similar circumstances, other courts have recognized that confidential information in court filings is entitled to protection against public disclosure. The court below should have struck the balance of interests in favor of continued confidential treatment.

3. Finally, the Court of Chancery erred in ignoring the serious policy consequences of its ruling. The decision below, if affirmed, would undermine the role of the Court of Chancery as the leading and most respected business court in the United States. That decision essentially tells business parties that they must be willing to suffer serious economic loss from disclosure of confidential business information in order to enforce their contractual rights in Delaware. If the Court of Chancery's ruling remains intact, future contracting parties will avoid selecting Delaware as a dispute resolution forum. They will instead choose private arbitration or decide to litigate in courts that show more understanding of the serious harms that flow from unrestricted disclosure of confidential business information.

## STATEMENT OF FACTS

### **A. Relevant Background**

The order on appeal arises in a litigation between Al Jazeera, which owns and operates a nationally-distributed news, information and lifestyle television channel called “Al Jazeera America,” and AT&T, which operates a major cable carrier system that distributes television network content to subscribers concentrated in the South and Southwest United States. Al Jazeera is a Delaware limited liability company, and has its principal place of business in New York City, New York. AT&T is incorporated in Delaware, and has its principal place of business in Dallas, Texas. Verified Complaint (“Compl.”) ¶¶ 29-32, 35; A20-21.

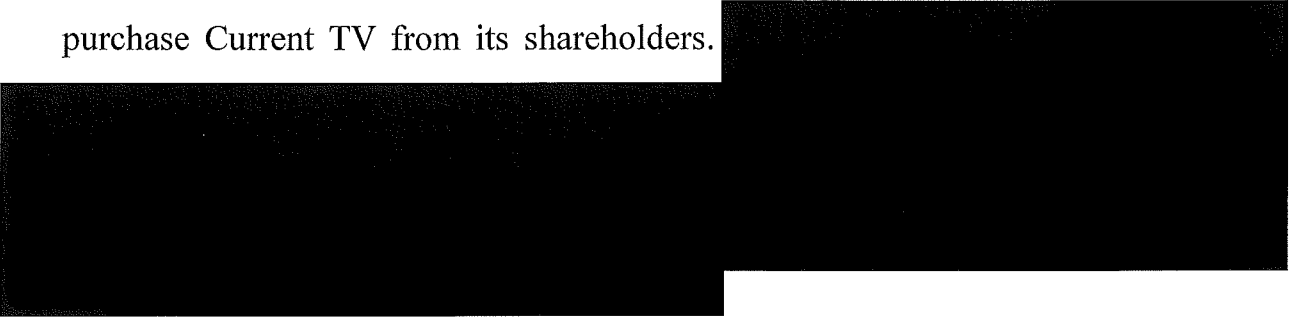
Al Jazeera’s Verified Complaint alleged the following relevant facts:

Al Jazeera is a successor-by-merger to Current TV, LLC (“Current TV”), which previously operated a news, information and lifestyle channel called Current. Al Gore, the former Vice-President, was the Chairman of the Board of Current TV and a major shareholder of Current TV. *Id.* ¶¶ 33-34; A21. Current TV was party to an affiliation agreement (the “Affiliation Agreement”) with AT&T dated as of December 21, 2011, under which AT&T agreed to distribute the Current channel to AT&T subscribers through December 31, 2015. *Id.* ¶ 36; A22, A42-85. As of the end of 2012, Current was available in 60 million U.S.


households, and could be seen by approximately 2.8 million AT&T subscribers.


*Id.* ¶¶ 33, 35; A21.

Al Jazeera's parent, Al Jazeera Media Network ("AJMN") wanted to create a new U.S. network that could successfully compete with companies like CNN and Fox News. The primary obstacle to this goal was distribution, because cable and satellite companies resist adding new channels to their existing offerings. AJMN decided to purchase an existing U.S. cable network which had ongoing distribution agreements with carriers. AJMN thus entered into a Merger Agreement to purchase Current TV from its shareholders.



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<sup>3</sup> Al Jazeera's First Amended Verified Complaint further alleges that when AT&T's President of Content and Advertising was approached by Hyatt  he objected because AT&T believed that its customers did not want to receive Al Jazeera America programming, even though AT&T's President also realized that this customer reaction was based on bias and ignorance. *Id.* ¶ 48; A574.



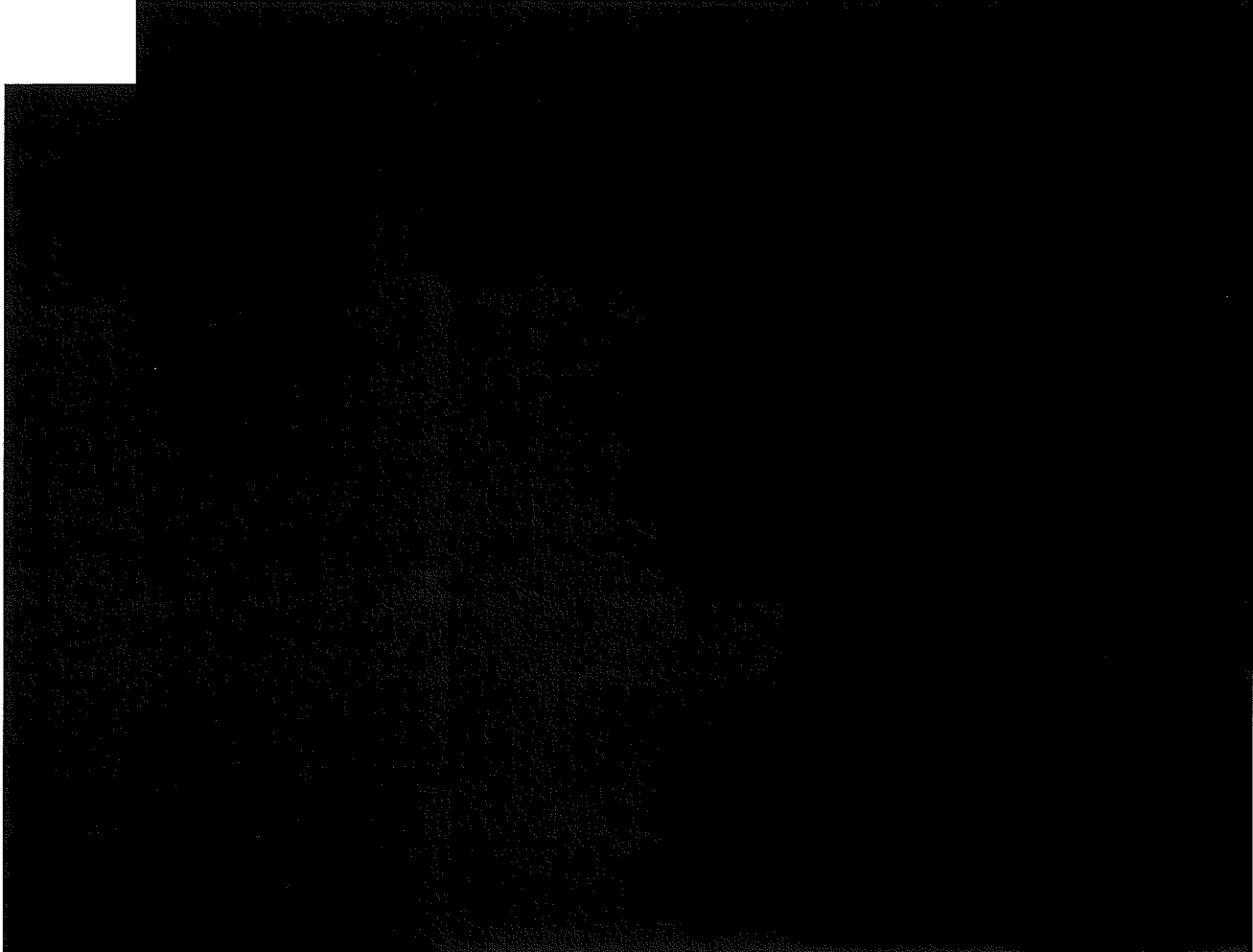
[REDACTED]

The Merger Agreement closed on January 2, 2013, and Al Jazeera began to provide programming under the Current brand. It also began preparations to relaunch the network under the Al Jazeera America brand as of August 20, 2013, such as obtaining new office and studio space, and hiring new on-air talent, editors, and managers. *Id.* ¶¶ 66-69; A28-29.

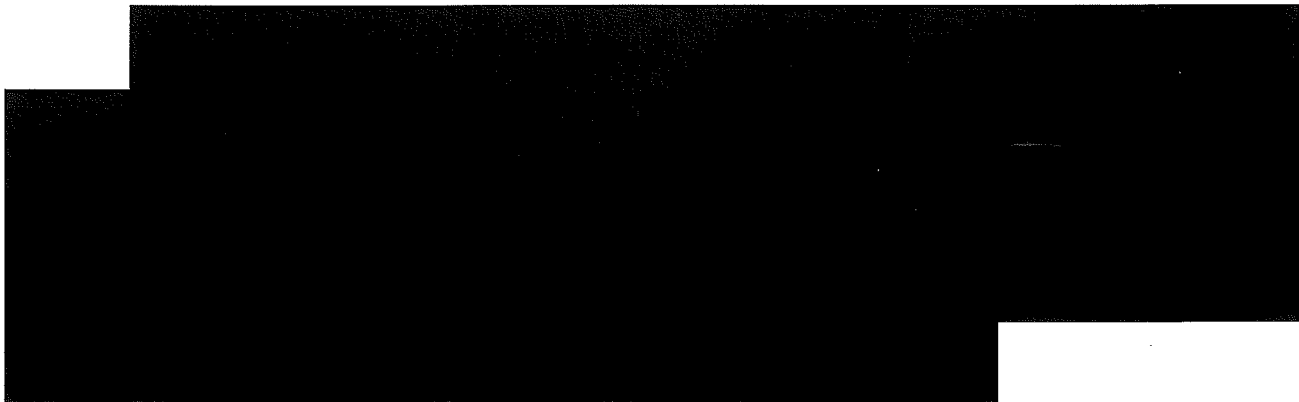
[REDACTED] AT&T continued to fear a subscriber backlash if it carried Al Jazeera America and began looking for any excuse to terminate the Affiliation Agreement. It ultimately decided, in bad faith, to allege that Al Jazeera was in breach of the Affiliation Agreement's [REDACTED] as the excuse for termination. *Id.* ¶¶ 70-73; A16-17.

[REDACTED]

[REDACTED] Once agreement is reached, both parties jealously guard the confidentiality of this and other contract terms. A166-168, A279-281, A481-485.



AT&T was not permitted to unilaterally terminate the Agreement or threaten unilateral termination simply because the Network did not accept AT&T's interpretation of the Affiliation Agreement.



In March 2013, [REDACTED]

[REDACTED] In May 2013, Al Jazeera announced that it would launch Al Jazeera America on August 20, 2013. Compl. ¶¶ 73-75; A30. On July 15, 2013, [REDACTED]

[REDACTED]

On July 19, 2013, AT&T delivered a letter to Al Jazeera purporting to terminate the Affiliation Agreement based upon the assertion that [REDACTED]

[REDACTED] AT&T

threatened to cease carrying Al Jazeera's service on August 19, 2013 – one day before the launch of Al Jazeera America. *Id.* ¶ 79; A31. Al Jazeera disputed this assertion [REDACTED]

[REDACTED]

Al Jazeera then met with AT&T representatives. It urged AT&T to withdraw the purported termination and made various offers to incentivize that outcome. However, AT&T refused to even speak with Al Jazeera

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<sup>4</sup> The parties' correspondence concerning [REDACTED] was recited in the Verified Complaint and copies were attached. [REDACTED] ought confidential treatment for allegations detailing this correspondence and for the Exhibits.

[REDACTED]



unless

At a meeting between Al Jazeera and AT&T representatives, the President of AT&T Content and Advertising Sales admitted that AT&T was concerned that its subscribers would object to AT&T distributing Al Jazeera America, and could boycott or bring economic pressure against other AT&T services such as cellular service.

This meeting, and subsequent correspondence, did not result in any resolution. AT&T never carried the Al Jazeera America service. *Id.* ¶ 95; A35.

**B. Proceedings In The Court of Chancery Regarding Rule 5.1**

On August 20, 2013, Al Jazeera filed its Verified Complaint as a Confidential Filing under Rule 5.1. The Verified Complaint sought a declaration that Al Jazeera was not in breach of the Affiliation Agreement, that AT&T's termination of the Affiliation Agreement was a breach and 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 distribution of

the Al Jazeera America service; and compensatory damages for AT&T's breach. A38.

Al Jazeera viewed the terms of the Affiliation Agreement quoted in the Verified Complaint and attached as exhibits, the fact that the dispute between the parties was over [REDACTED], as highly confidential business information that was Confidential Information under Rule 5.1. Beyond the fact that the Affiliation Agreement contained a confidentiality clause, Al Jazeera also relied on the unique features of the network-carrier industry, where there is a uniform practice of keeping negotiations and contract terms in strict confidence. Al Jazeera was then and is still in negotiations with other carriers to expand its viewer base. It believed that disclosure of the contract terms and [REDACTED], (2) cause carriers with which Al Jazeera was negotiating to demand terms more favorable to those carriers, and (3) be exploited by other networks, which are competing with Al Jazeera for scarce spots on already-crowded cable and satellite systems. All this would cause Al Jazeera serious economic harm. A163-169.

As required by 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 a substantial number of additional redactions, which it claimed was necessary to preserve its own interests in confidentiality. Among the portions redacted by AT&T were the allegations that AT&T's basis for termination was pretextual and that its real reason for terminating was fear of backlash among its subscribers. AT&T then filed a version of the Verified Complaint, containing both parties' redactions, in the public record. A125-152. AT&T later provided the court below with a more limited version of its proposed redactions. A249-276.

Within five days, oppositions to continued Confidential Treatment were filed by Bloomberg L.P. and five reporters: Peg Brickley, Rita K. Farrell, Randall Chase, Kyle Wagner Compton and Sharon Bradley. A153-157. Al Jazeera and AT&T separately moved in the Court of Chancery for continued Confidential Treatment of the full version of the Verified Complaint. A158-281. Al Jazeera's motion was supported by an affidavit of Mary Murano, its Executive Vice President for Distribution, who explained the harm that Al Jazeera expected to incur if the portions it designated as Confidential were disclosed. A163-169. Al Jazeera expanded on this explanation in a supplemental memorandum requested by the court. A479-485.

Al Jazeera explained that its chances for economic success depended on its being able to obtain distribution that is equivalent to its competitors such as CNN and Fox News Network (each of which reach more than 100 million viewers). Disclosure of the redacted terms would invariably cause future carriers to demand similar clauses, and prevent Al Jazeera from negotiating better terms in such areas as [REDACTED]. AT&T voiced similar concerns over disclosure, from its perspective of a carrier negotiating with many networks.

Al Jazeera also stated that it would lose leverage in its negotiations if [REDACTED] [REDACTED], were disclosed. In addition, disclosure would also [REDACTED] [REDACTED]. Al Jazeera suggested that if the Court of Chancery concluded that confidential information must be disclosed, it should do so when it issues an opinion deciding the case, not at the earliest stages of pleading, when Al Jazeera would suffer the greatest harm from disclosure. Al Jazeera pointed out that [REDACTED] [REDACTED]

The Press Intervenors opposed the parties' motions. A282-289. Oral argument on the motions was held on September 24, 2013. A304-390. A portion of the oral argument, in which the Confidential Information was discussed, was

closed to the public and the transcript of that portion was maintained under seal pending resolution of the confidentiality dispute. At the Court of Chancery's request, Al Jazeera submitted a less-redacted version of the Verified Complaint as its proposed public record version, along with the supplemental memorandum requested by the court below. A479-515.

**C. The Court of Chancery's October 14, 2013 Opinion**


On October 14, 2013, the Court of Chancery issued a Letter Opinion ordering Al Jazeera to file a largely unredacted copy of the Complaint. The Court of Chancery's Letter Opinion was based upon the modified versions of the redactions provided by Al Jazeera and AT&T. The court recognized that, as to some of the redacted matters, Al Jazeera and AT&T had "understandable business reasons" to maintain them in confidence. Ltr. Op. at 1. The court assumed that the parties had shown that public disclosure of their contract terms and how the parties interpreted those terms could cause them to suffer harm "similar" to disclosure of a price term: it would "giv[e] a competitive edge to third parties in unrelated transactions." *Id.* It noted that both parties' affidavits explained in detail the nature of the collateral damage that could arise from disclosure, including, in Al Jazeera's case, "an economic disadvantage with respect to competitors and others within the industry, such as those parties with whom Al Jazeera is currently negotiating." *Id.* at 9.

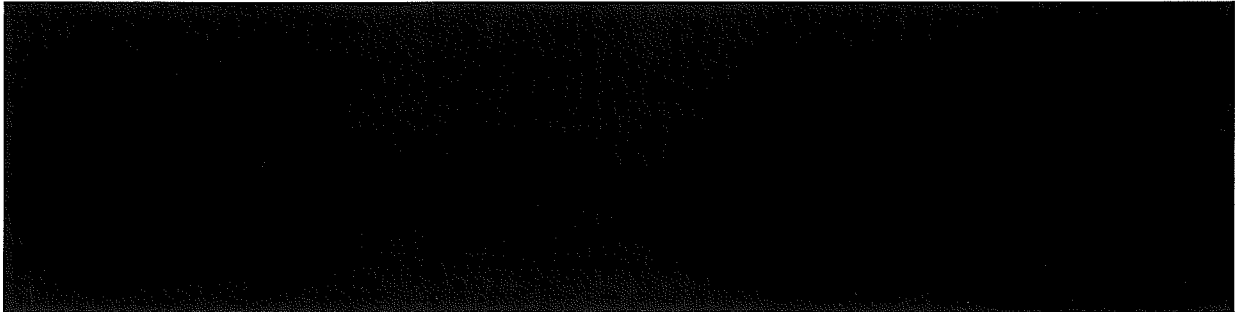
The court also found that the parties had shown the “unique features of the industry, including widespread industry practice of preserving the confidentiality of negotiations and contract terms,” and quoted at length from the detailed explanation of harm that both Al Jazeera’s and AT&T’s affiants and counsel had provided. *Id.* at 10-11. The court stated that the parties defined “sensitive business and financial information” in Rule 5.1 as information whose disclosure “could cause the litigating parties significant economic and competitive harm.” *Id.* at 12.

The Court of Chancery held that it must weigh this significant economic harm against the public’s interest in access. It found that the private interest in non-disclosure of a price term outweighs the public’s interest in access because knowledge of price terms “does not impinge on the public’s understanding of the disputes before this Court.” *Id.* at 13. But when the “supposedly-confidential” information concerns the nature of the dispute itself, the court concluded, the public’s interest in access outweighs the economic harm that the parties may suffer. *Id.*

The court found that because Al Jazeera is the first major news network to emerge in many years, the circumstances under which AT&T denied it access to AT&T subscribers constitutes information of which the public has a “right to be informed.” *Id.* The court asserted that if information such as the nature of the dispute could be redacted because of the economic harm from disclosure, this

would transform the court into “something akin to a private arbitrator, replicating an option – private arbitration, that the parties could have, but did not, choose for themselves.” *Id.* at 14.

The Court of Chancery also reproduced paragraphs 11 to 20 of the original public version of the Redacted Complaint, in which virtually all words were blacked out. *Id.* at 14-17. Although so much black ink has a visual impact, there is a plain explanation: the redactions are from the “Introduction” suggestion of the Verified Complaint that summarizes and compresses key facts. What Al Jazeera redacted is the most competitively sensitive information in the entire case: 



The court found that Rule 5.1 only protects sensitive proprietary and commercial information when nondisclosure “does not greatly disadvantage the public’s ability to understand the nature of the dispute before this Court.” *Id.* at 18. The court warned that if parties litigate in the Court of Chancery, rather than in private arbitration, they must expect to disclose information that “could have unfavorable economic or reputational consequences, such as a weakened negotiating position or public embarrassment.” *Id.* at 18. Only “the confidentiality

of discrete information of low interest to the public, disclosure of which would impose significant costs on a litigant, may be maintained.” *Id.*

The Court of Chancery thus ruled that the parties had failed to establish “good cause” under Rule 5.1 to maintain the confidentiality of the information they redacted, with very limited exceptions. The Court of Chancery specified that its order requiring further disclosure and unsealing the oral argument transcript would be stayed for five days, and if a party sought to appeal, would continue to be stayed pending resolution of the appeal.

**D. Facts Relating To This Appeal**

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. A541-552. The Court of Chancery, by order dated October 22, 2013, granted the application, and certified its October 14, 2013 Letter Opinion for interlocutory appeal. A553. By Order dated November 5, 2013, this Court accepted the application for interlocutory appeal. (Trans. Id. 54470616.)



## ARGUMENT

### **I. THE COURT OF CHANCERY ERRED IN REFUSING TO EXTEND CONTINUED CONFIDENTIAL TREATMENT TO SENSITIVE BUSINESS INFORMATION IN COURT FILINGS EVEN THOUGH DISCLOSURE WOULD CAUSE SIGNIFICANT ECONOMIC HARM TO THE PARTIES**

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#### **A. Question Presented**

Did the Court of Chancery err in ruling that even though Al Jazeera and AT&T had demonstrated that they would likely suffer significant harm from disclosure of sensitive business information, none of the allegations or exhibits to Al Jazeera's Verified Complaint, with minor exceptions, qualified for continued confidential treatment under Court of Chancery Rule 5.1? This issue, which is a matter of first impression, was preserved in the motions of Al Jazeera and AT&T, in submissions by the Press Intervenors and at oral argument. A153-515.

#### **B. Scope of Review**

This Court reviews *de novo* a trial court decision regarding the interpretation of court rules. *State v. Kelly*, 947 A.2d 1123 (Del. 2008); *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995). In this case, the Court of Chancery issued the first comprehensive interpretation of Court of Chancery Rule 5.1 involving a challenge to confidentiality initiated by the press. Accordingly, this Court should review the trial court's decision *de novo*.

**C. Merits of Argument**

**1. Sensitive Business Information, Such As Contractual Terms Whose Disclosure Is Likely To Cause Serious Economic Harm to Litigants, Is Entitled To Confidential Treatment Under Rule 5.1**

Court of Chancery Rule 5.1, effective as of January 1, 2013, provides a streamlined mechanism for making and challenging “Confidential Filings” in the Court. Among other things, it permits the initial filing of a complaint and supporting documents as confidential. Ch. Ct. R. 5.1(e). The plaintiff must make immediate best efforts to contact anyone who could have a legitimate interest in designating information in the complaint as confidential, in order to give them an opportunity to make such a designation. Ch. Ct. R. 5.1(e)(2). A public version of the complaint and related documents, with confidential redactions by the plaintiff and any other interested party, is to be filed within three days after the Confidential Filing. Ch. Ct. R. 5.1(e)(3).

Anyone, including the public or press, may challenge the “Confidential Treatment” of a Confidential Filing by filing a notice with the Register in Chancery. Ch. Ct. R. 5.1(f). Each of the Press Intervenors filed such a notice in this case. A153-157. The party or parties seeking to maintain continued Confidential Treatment must file a motion for that relief within five days. Ch. Ct.

R. 5.1(f)(2). The party or parties bear the burden of showing “good cause” for continued Confidential Treatment. Ch. Ct. R. 5.1(b)(3).

While “good cause” was also the standard for sealing a complaint under former Court of Chancery Rule 5(g), current Rule 5.1(b)(2) provides, for the first time, a definition of “good cause”:

‘[G]ood cause’ for Confidential Treatment shall exist only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive, non-public information would cause. Examples of categories of information that may qualify as Confidential Information include trade secrets; sensitive proprietary information; sensitive financial, business, or personnel information . . . .

The Court of Chancery, in adopting Rule 5.1, issued an explanatory memorandum, titled Protecting Public Access to the Courts: Chancery Rule 5.1. (“Protecting Public Access”). The memorandum stated that “any information designated ‘Confidential’ [must] meet the tests traditionally recognized by courts as sufficient to justify limiting the public’s right of access.” *Id.* at 4. The Court of Chancery thus made clear that Rule 5.1 was not intended to change the law of confidentiality, but to cut back on the widespread litigation practice of designating as confidential material that “was not truly sensitive or confidential in nature,” or that redacted “far too much information” from the public version. *Id.* at 2-3.

The “tests traditionally recognized by courts as sufficient to justify limiting the public’s right of access,” to use the Court of Chancery’s own words in

promulgating Rule 5.1, recognize that a party should not be forced to undergo serious economic harm as the price for enforcing its contractual rights through the judicial system.

Al Jazeera is itself an international news organization, and respects the presumptive common-law right of public (and therefore press) access to records and documents filed in criminal and civil judicial proceedings. It also recognizes that this right is protected by the First Amendment. *Republic of the Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659-60 (3d Cir. 1991). However, the public's presumed right of access is not absolute. *Gannett Co. v. State*, 571 A.2d 715, 742-43 (Del. 1990); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 165 (3d Cir. 1993); *Joint Stock Soc'y v. UDV N. Am., Inc.*, 104 F. Supp.2d 390 (D. Del. 2000); *In re Gabapentin Patent Litig.*, 312 F. Supp. 2d 653, 664 (D.N.J. 2004) ("In short, the public right of access to judicial records does not trump all other interests and may be limited where there are important overriding interests."). See also *In re du Pont*, 1997 WL 383008, at \*3 (Del. Ch. June 20, 1997) (courts have discretion and power to keep records under seal where appropriate).

Where the disclosure of information in court-filed documents is likely to harm important competitive interests of a party, public access may be appropriately limited. The U.S. Supreme Court stated in *Nixon v. Warner Communications, Inc.*,

435 U.S. 589, 598 (1978), that “the right to inspect and copy judicial records is not absolute. . . . [C]ourts have refused to permit their files to serve as . . . sources of information that might harm a litigant’s business standing.” Later courts have reaffirmed this principle. *See, e.g., Leucadia*, 998 F.2d at 165-66; *Littlejohn v. BIC Corp.*, 851 F.3d 673, 678 (3d Cir. 1988).

The authorities also make clear that a litigant has a legitimate interest in protecting the confidentiality in sensitive non-public information in a court filing, even where the information does not qualify as a trade secret. *Westinghouse*, 949 F.2d at 662-63. They have recognized that confidential business and financial information is also entitled to be protected against disclosure, where disclosure would risk serious harm to a party’s ability to compete in the marketplace.

In *Joint Stock Soc’y*, for example, the parties were contesting the rights to the Smirnoff name for vodka, and designated certain discovery documents as confidential. One of the Press Intervenors in the current case (Rita Farrell) challenged the confidential designation of material as contrary to the public right of access to judicial records. The federal district court appointed a special master to narrow the documents in dispute and to determine “whether any of these documents contained legitimate trade secrets or other proprietary information which would warrant their continued ‘confidential’ designation.” 104 F. Supp. 2d at 393.

The court held that the special master had properly balanced the interest between rights of access and a party's specifically demonstrated need to keep court documents under seal. The court affirmed the special master's conclusion that disclosure of certain materials would cause the litigants "to suffer a clearly defined and serious injury." *Id.* at 396. Among the materials that the court permitted to remain under seal were documents disclosing the defendants' "consumer research studies, strategic plans, and marketing information." *Id.* at 407. The court found that this information

would give competitors new insights into the factors which determine how SMIRNOFF vodka is advertised, distributed and marketed. The competitive harm to the defendants in this instance is obvious. Once competing firms in the alcohol industry obtained this information, they could incorporate it into their own strategic plans and better position their products in the marketplace to the defendants' detriment.

*Id.* at 408-09. Thus, courts have traditionally limited access to information where disclosure would significantly harm a party's ability to compete.

Another fact that courts have traditionally considered in access cases is whether there is a "binding contractual obligation not to disclose certain information which to the court may seem innocuous but newsworthy; in that situation unbridled disclosure of the nature of the controversy would deprive the litigant of his right to enforce a legal obligation." *Publiker Indus., Inc. v. Cohen*,

733 F.2d 1059, 1073 (3d Cir. 1984). Such an obligation may take the form of an “enforceable confidentiality agreement.” *Id.* at 1074. Here, the Affiliation Agreement between Al Jazeera and AT&T contains an express confidentiality provision barring disclosure of the Agreement’s terms to unaffiliated third parties. A69-70. Moreover, the parties showed, and the Court of Chancery did not dispute, that cable and satellite distribution of television networks is highly competitive, and that broad enforceable confidentiality provisions in individual carrier-network agreements are essential to protect both sides’ economic interests. Of course, a confidentiality agreement is not alone sufficient: the party seeking to maintain confidentiality must still show that it has a legitimate interest in maintaining confidentiality and is likely to suffer serious competitive harm were the information subject to the confidentiality agreement disclosed. *In re Cendant Corp.*, 260 F.3d 183, 194 (3d Cir. 2001).

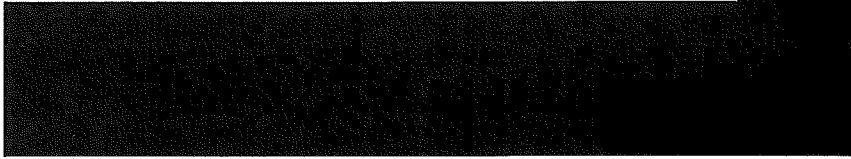

**2. The Parties Showed that They Would Suffer Serious Economic Harm from Public Disclosure of Their Sensitive Business Information**

The Court of Chancery agreed that Al Jazeera and AT&T had shown that they were likely to suffer competitive injury if the terms of their contract and the exact subject matter of their dispute were publicly disclosed. Among other conclusions, the court found that disclosure of this information could cause harm similar to the disclosure of a key price term, and other information that the Court of Chancery has “traditionally” permitted to be redacted. Ltr. Op. at 1. It found that the parties’ affidavits explained in detail the nature of the damage that could arise from disclosure, including, in Al Jazeera’s case, “an economic disadvantage with respect to competitors and others within the industry, such as those parties with whom Al Jazeera is currently in negotiation.” *Id.* at 9.

Moreover, the Court of Chancery recognized that Al Jazeera was not suing over a garden-variety contractual dispute in which only the parties themselves believe that the redacted information is important enough to be kept confidential. Nor was this a case where an allegation of harm from disclosure is speculative. The court thus acknowledged that the parties had shown the “unique features of the industry, including widespread industry practice of preserving the confidentiality of negotiations and contract terms.” *Id.* at 10-11.



Al Jazeera specifically showed that disclosure of its confidential information would economically disadvantage it at a highly vulnerable moment, as it is now negotiating for distribution with carriers which are reluctant to add new networks to their systems. It also showed that disclosure would give an unwarranted advantage to networks competing with Al Jazeera for distribution on crowded cable networks. Al Jazeera also showed that



In short, Al Jazeera made a very strong showing, under the traditional tests embodied in Rule 5.1, that the information it sought to redact was “sensitive business information” that qualified as Confidential Information, disclosure of which would cause Al Jazeera serious economic harm.

### **3. The Court of Chancery Failed to Properly Balance The Competing Interests**

Despite acknowledging Al Jazeera’s showing – certainly as strong a showing as a litigant can make of Confidential Information and harm from disclosure under Rule 5.1 – the Court of Chancery found that Al Jazeera was entitled to practically no protection at all. The only items the court permitted to remain confidential were a few scattered facts, such as the per-subscriber fee to be paid by AT&T.

The problem in the decision is not any flaw in Rule 5.1. As the Court of Chancery stated in promulgating the Rule, Rule 5.1 did not change the substantive law and was designed to embody the “tests traditionally recognized by courts as sufficient to justify limiting the public’s rights of access.” Protecting Public Access at 4. The problem is the Court of Chancery’s erroneous application of that Rule.

First, the Court of Chancery failed to apply the “traditional” tests that, when satisfied, justify limiting public access to sensitive business information contained in court filings. Al Jazeera and AT&T satisfied the “traditional” tests, and the Court of Chancery itself acknowledged that the information designated confidential was in many respects similar to the price terms that the Court of Chancery has traditionally protected from disclosure. But the court then erroneously concluded that Rule 5.1 required a result that no previous decision in this State has suggested: highly sensitive business information may be redacted only if the public has no material interest in that information. Although nothing in Rule 5.1 or prior Delaware decisional law supports such a result, the court concluded that the only information that can be successfully designated as confidential are price terms and other items of “discrete information of low interest to the public.” Ltr. Op. at 18. The underlying rationale appears to be that any information that the public might consider germane to a case cannot be protected

from public disclosure, no matter how serious the collateral damage to the parties from that disclosure. Nothing in Rule 5.1, or the prior case law regarding public access to court filings, justifies this result.

Second, the Court of Chancery failed to properly balance the interests at stake. Indeed, it appears that it did no balancing at all. While the court accepted as fact the parties' proof that likely harm would result from disclosure, it did not give that evidence any weight. The parties showed that they had a confidentiality agreement, that confidentiality was particularly important in their industry, and that it was important to prevent competitors and potential contracting parties from learning the parties' final negotiated rights and obligations. Yet the Court of Chancery, at oral argument, stated that it would give no weight to either this agreement or the importance of confidentiality in the industry. A320-21. It essentially found that the public has a virtually absolute right to access confidential business information in court filings, despite the large body of authority to the contrary. *See supra* at 23.

Another indication that the Court of Chancery failed to balance the interests properly was the untailored nature of the remedy it ordered. Its expressed concern was that, as a result of the confidentiality designations, "the nature of the litigation remains masked in a fundamental way." Ltr. Op. at 2. Yet the remedy that the court ordered was not tailored to permit the public to obtain a general

understanding of the dispute. Instead, the Court of Chancery required disclosure of the full Affiliation Agreement, which is an Exhibit to the Verified Complaint, even though most of the contract's provisions are not in issue. The court also required disclosure of the contract terms quoted in the body of the Verified Complaint, [REDACTED], and the parties' correspondence, also attached as Exhibits, without any evidence that access to this information was essential to the public knowing the "nature of the litigation." *Id.* at 19.

Moreover, the Court of Chancery erred because it did not consider alternatives that would mitigate the damage from disclosure. The Court of Chancery expressed a concern that it could not write a judicial opinion on the merits without disclosing the subject matter of the dispute – [REDACTED]. *Id.* at 2; A359. Al Jazeera suggested in supplemental briefing that it was not essential to the public interest that the disclosure be made now, at the earliest stages of briefing, as AT&T's allegation [REDACTED] was only an allegation and, in Al Jazeera's view, merely a pretext to cover up AT&T's true motive: avoiding subscriber backlash if AT&T distributed Al Jazeera America.

Al Jazeera asked the court to consider the alternative path of deferring any disclosure until the court issued a substantive ruling, as this would give Al Jazeera time to establish its relationships with other carriers. A484-485. This deferral would still allow the court to write a full opinion that would be "comprehensible to

the reading public,” Ltr. Op. at 2, and allow the public to learn the full nature of the dispute and to evaluate the performance of the judicial branch when it matters – that is, when the court actually decides the dispute. The Court of Chancery did not even consider this alternative, which suggests that it did not engage in the balancing required both by the Rule and the “traditional tests.”

**4. The Decision Below Fails To Consider the Adverse Policy Consequences of An Interpretation of Rule 5.1 That Requires Virtually Total Disclosure of Sensitive Business Information in Court Filings**

This Court’s decision of this appeal will serve as a guidepost for future decisions on the protection of sensitive business information in the Court of Chancery and, one must assume, in other Delaware courts. The Court should consider several additional policy reasons that favor reversal.

To start, the reading of Rule 5.1 below requires virtually total disclosure of sensitive business information in any court filing unless the party seeking confidentiality can show that the public has no or low interest in that information. Because almost anything in a filing will interest some segment of the public or press, this will be a very difficult burden to carry. If this Court affirms the interpretation applied below, future business litigants in the Court of Chancery will carefully avoid inclusion of confidential information in their pleadings and filings. Informative complaints such as Al Jazeera’s, which attempt to tell the full story of

a dispute, attach the agreements and correspondence at issue, and quote from contract language in order to establish a cause of action, will be a thing of the past. Pleadings will be reduced to the bare minimum necessary to give notice. The courts will know little about the true nature of disputes until they reach a dispositive motion or trial, and adversaries will have to engage in additional discovery to learn the nature of the claim against them. The result will be to make the judicial process longer and more expensive for all concerned. This cannot have been the intent of the drafters of Rule 5.1.

Second, the Court of Chancery suggested that if contracting parties want confidentiality for their sensitive business information in the event of a dispute, they can opt for private arbitration. Ltr. Op. at 14. Indeed, if the ruling below stands, many contracting parties may decide that it is too dangerous to litigate business cases in the Delaware courts. They may provide for arbitration in their agreements or in the courts of other states that do not take the same unbalanced view of sensitive business information. Creating incentives for parties to avoid the courts of this State is not a desirable consequence. As Chief Justice Steele noted in his Message as part of the 2012 Annual Report of the Delaware Judiciary, Delaware courts are “recognized for their vital roles and contributions on a national and international level.” In fact, the U.S. Chamber of Commerce, for nine years in a row, has recognized the Delaware courts as the best in the country.

2012 Annual Report of the Delaware Judiciary at 2. The Court of Chancery is well-known as the leading business court in the country. This leadership role will be jeopardized if the unbalanced approach to Rule 5.1 confidentiality applied below is adopted by this Court and becomes controlling.

Finally, this Court should consider the injustice that an affirmance would impose on parties who have already selected Delaware as their chosen forum. For the reasons that Chief Judge Steele pointed out, Delaware judges are considered to be the most impartial and competent in the country. As a result, many contracts provide that if a dispute arises under the contract, the parties must litigate the dispute exclusively in the Delaware courts.<sup>5</sup> At the time of contracting, these parties would have had no reason to suspect that Delaware courts would adopt a rule that requires public disclosure of almost all confidential information contained in court filings, regardless of the economic damage to the parties. It is true that changes to rules are remedial in nature and are thus not strictly subject to the principle that new laws should not be applied retroactively. Nonetheless, there would be great unfairness in applying the Court of Chancery's new interpretation of "good cause" to commercial parties who, in good faith and for good reasons, have already chosen Delaware as their dispute resolution forum.

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<sup>5</sup> There is no forum selection clause in the Al Jazeera-AT&T Affiliation Agreement.

**CONCLUSION**

For the reasons set forth above, the Court of Chancery should be reversed and the case remanded for further proceedings.

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