



COURT OF CHANCERY
OF THE
STATE OF DELAWARE

SAM GLASSCOCK III
VICE CHANCELLOR

COURT OF CHANCERY COURTHOUSE
34 THE CIRCLE
GEORGETOWN, DELAWARE 19947

Date Submitted: October 1, 2013

Date Decided: October 14, 2013

John L. Reed
Scott B. Czerwonka
Andrew H. Sauder
DLA Piper LLP
919 N. Market Street, Suite 1500
Wilmington, DE 19801

Kenneth J. Nachbar
Shannon E. German
Morris, Nichols, Arsht & Tunnell LLP
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347

Re: *Al Jazeera America, LLC v. AT&T Services, Inc.*
Civil Action No. 8823-VCG

Dear Counsel:

The parties in this contract action wish to keep the nature of their dispute confidential, for understandable business reasons. The Court of Chancery, however, like any public court, serves not only the litigants before it; it has a public function as well. Several news reporters have filed objections to the parties' redactions in the pleadings, seeking to vindicate that public function. The Court has addressed the tension created by these public and private interests, and the procedure for resolving it, in Court of Chancery Rule 5.1. This Letter Opinion applies that rule to the dispute here.

The parties, Al Jazeera America, LLC ("Al Jazeera") and AT&T Services, Inc. ("AT&T"), enmeshed in a contractual dispute, have redacted virtually all the

contract terms in dispute as well as descriptions of the nature of the dispute itself. They note that this Court traditionally has allowed redaction of discrete sensitive information, such as a price term, in contractual disputes where disclosure of such a term could disadvantage a party in dealings with customers or competitors.¹ That is because, on balance, the detriment to the parties of disclosure outweighs the public interest in such a discrete piece of information. The parties argue that disclosure of this information—the terms of their contract and how it is interpreted by the parties—is capable of causing similar harm if disclosed; giving a competitive edge to third parties in unrelated transactions, much as would a price term. This, I assume, is so. The difference here is that the public interest in the nature of matters brought in this public forum, which interest I must weigh in determining continued confidentiality under our Rule 5.1, is high. Several news organizations have objected to confidentiality designations under this Rule. The public interest in the judicial process cannot be vindicated if the nature of the litigation remains masked in a fundamental way. Indeed, it is difficult to envision a judicial opinion in this matter that could maintain the confidentiality of all the designated material and yet be comprehensible to the reading public; this Letter

¹ See, e.g. *Mitsubishi Power Sys. Americas, Inc. v. Babcock & Brown Infrastructure Grp. U.S., LLC*, C.A. No. 4499-VCL, at 2 (Del. Ch. Mar. 15, 2013) (ORDER) (holding that pricing and profit-related information qualified for continued confidential treatment under Rule 5.1).

Opinion itself is circumscribed in order to provide a decision that may be appealed without destroying the confidentiality that any appeal will seek to preserve.

This matter involves the entry of Al Jazeera into the national cable news arena, and its allegations that AT&T wrongfully terminated and breached an Affiliation Agreement between the parties. Both Al Jazeera and AT&T redacted large portions of Al Jazeera’s Verified Complaint (“the Complaint”), including information about the nature of the dispute, the parties’ contractual relationship, and inter-party negotiations and discussions. Several news reporters subsequently filed objections pursuant to Court of Chancery Rule 5.1(f), opposing both the degree and substance of the parties’ redactions. Because I find that, with minor exceptions, neither party has shown “good cause” to maintain confidential treatment of the redacted Complaint, I direct Al Jazeera to file a largely unredacted copy of the Complaint, save for the exceptions enumerated below, within five business days.²

A. Factual Background

The Al Jazeera Media Network (“AJMN”) operates over seventy television and print news bureaus throughout the world.³ Aspiring to expand into the United States market but “fac[ing] a high barrier to entry,” AJMN elected to acquire a

² Should any party appeal this Letter Opinion, the period for filing an unredacted complaint shall be stayed.

³ Compl. ¶ 1.

company with an existing cable and satellite presence.⁴ AJMN set its sights on Current TV, LLC (“Current”), a company which had an existing news cable channel and “distribution contracts with a number of cable and satellite television operators,” including AT&T.⁵ As a result of AJMN’s acquisition, Current “merged into a new entity that became Al Jazeera,”⁶ and Al Jazeera became Current’s successor to an Affiliation Agreement with AT&T.⁷ Al Jazeera planned to launch its new service “Al Jazeera America” on August 20, 2013, and anticipated that it “would reach approximately 48 million U.S. households on its first day.”⁸ However, AT&T purportedly refused to carry Al Jazeera’s signal, leading to this action.⁹

On August 20, 2013, Al Jazeera filed its Complaint, alleging that AT&T wrongfully terminated the Affiliation Agreement between the parties for pretextual reasons that attempted to mask its true bad-faith motivation, and thus breached its contractual duties to Al Jazeera.¹⁰ Al Jazeera seeks declaratory relief, specific performance of the parties’ obligations under the Affiliation Agreement, and

⁴ *Id.* at ¶¶ 3-4.

⁵ *Id.* at ¶ 5.

⁶ *Id.*

⁷ Pl.’s Mot. to Maintain Confidential Treatment of Information Redacted by Pl. from the Verified Compl. at 3-4 [hereinafter Pl.’s Mot.]; Murano Aff. ¶ 5 (redacted version).

⁸ Compl. ¶ 7.

⁹ Pl.’s Mot. at 1.

¹⁰ Compl. ¶¶ 11-27.

compensatory damages.¹¹ Al Jazeera promptly notified AT&T that it was filing the Complaint confidentially in accordance with Court of Chancery Rule 5.1(e), and provided AT&T with a proposed public version containing Al Jazeera's redactions.¹² AT&T subsequently added its own redactions to the Complaint and filed a public version on August 23.¹³

Al Jazeera has redacted information such as the nature of the dispute and information about the parties' contractual relationship, including the terms of the Affiliation Agreement underlying this dispute and the parties' dealings under this agreement.¹⁴ AT&T similarly redacted information related to the parties' negotiations and discussions about the terms of the Affiliation Agreement, their alleged contractual breaches, and "quotes and descriptions of key terms of the Affiliation Agreement, including the rights and obligations of the parties (such as payment obligations), pricing, subscribers to the network, and other commercially sensitive provisions."¹⁵

Between August 26 and 29, Jef Feeley of Bloomberg News; Kyle Wagner Compton and Sharon Bradley of The Chancery Daily; Peg Brickley of Dow Jones; Randall Chase of The Associated Press; and Rita Farrell, a freelance reporter filed

¹¹ *Id.* at ¶ 28.

¹² Pl.'s Mot. at 2; Mot. of Def. AT&T Servs., Inc. for Continued Confidential Treatment of Redactions to Verified Compl. ¶ 1 [hereinafter Def.'s Mot.].

¹³ Pl.'s Mot. at 2.

¹⁴ *Id.* at 4.

¹⁵ Def.'s Mot. ¶ 8.

objections to the confidential designations under Rule 5.1(f). On September 3, in accordance with Rule 5.1(f)(2), AT&T and Al Jazeera separately filed Motions to Maintain Confidential Treatment. AT&T, in addition to its Motion, submitted a version of the Complaint containing fewer redactions. On September 9, Peg Brickley of Dow Jones filed a Joint Opposition to the Motions to Maintain Confidential Treatment on behalf of herself, Kyle Wagner Compton, Randall Chase, Rita Farrell, and Sharon Bradley. On September 11, Randy Shapiro, Global Media Counsel for Bloomberg News, filed a letter in opposition to the parties' Motions.

I heard oral argument on September 24, 2013. In addition to argument by Plaintiff's and Defendant's counsel, Andre Bouchard, representing Bloomberg News, and Kyle Compton Wagner, a Delaware attorney and 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.¹⁶

During oral argument, Al Jazeera noted that certain information was redacted from the Complaint solely in order to avoid breaching the confidentiality provision in the Affiliation Agreement.¹⁷ Accordingly, I requested that Al Jazeera amend and resubmit its redactions, disregarding the confidentiality provision and

¹⁶ Citations to the transcript herein reference the public portion of the September 24 hearing.

¹⁷ Oral Arg. Tr. 18:13-24, 19:13-18, 20:11-19.

using only Rule 5.1 as guidance. Additionally, I requested that Al Jazeera submit information to clarify the effect that disclosure of certain redacted information would have. Al Jazeera submitted the requested supplemental material on October 1. This Letter Opinion considers AT&T's modified redactions of September 3, 2013 and Al Jazeera's modified redactions of October 1, 2013.

B. Discussion

This matter involves the critical balance between “the public’s right of access to information about judicial proceedings” and “the legitimate needs of the litigating parties to have certain information treated confidentially.”¹⁸ While weighing this sensitive balance is not new, this Court recently revised the rule governing the confidentiality of court filings, replacing Court of Chancery Rule 5(g) with Court of Chancery Rule 5.1. This change became effective on January 1, 2013.

The Court was motivated to revise Rule 5(g) in part because too much information was being deemed confidential, including information which “did not fall within any recognized exception to the public’s right of access and was not truly sensitive or confidential in nature.”¹⁹ Additionally, litigating parties were relying on “broad and often boilerplate confidentiality clauses in commercial

¹⁸ *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>.

¹⁹ *Id.* at 2.

contracts and agreements to justify filing under seal.”²⁰ As a result, the public was often left “with an improperly narrow view into the case[s]” before this Court.²¹ Rule 5.1 was thus adopted to clarify—and narrow—the information deemed confidential in order to protect the public’s right of access to court documents,²² which is “considered fundamental to a democratic state and necessary in the long run so that the public can judge the product of the courts in a given case.”²³

In line with these principles, “Rule 5.1 makes clear that most information *presented to the Court* should be made available to the public.”²⁴ To facilitate this objective, Rule 5.1(f) provides that “[a]ny person may challenge the Confidential Treatment of a Confidential Filing by filing a notice raising the challenge with the Register in Chancery.”²⁵ When an objection is filed, the party endeavoring to maintain confidential treatment bears the burden of convincing this Court that “good cause” exists.²⁶ Good cause exists “only if the public interest in access to Court proceedings is outweighed by the harm that public disclosure of sensitive,

²⁰ *Id.*

²¹ *Id.* at 3.

²² *Id.* at 1, 3-4.

²³ *Sequoia Presidential Yacht Grp. LLC v. FE Partners LLC*, 2013 WL 3724946, at *2 (Del. Ch. July 15, 2013) (footnote omitted) (internal quotation marks omitted).

²⁴ *Protecting Public Access to the Courts: Chancery Rule 5.1*, at 4 (emphasis in original).

²⁵ Ct. Ch. R. 5.1(f).

²⁶ *Id.* 5.1(b)(3).

non-public information would cause.”²⁷ Rule 5.1 provides examples of information that *may* qualify for confidential treatment:

trade secrets; sensitive proprietary information; sensitive financial, business or personnel information; sensitive personal information such as medical records; and personally identifying information such as social security numbers, financial account numbers, and the names of minor children.²⁸

The fact that information “may be embarrassing or previously undisclosed does not alone warrant confidential treatment.”²⁹ Additionally, a confidentiality provision, even when carefully negotiated, cannot form the basis for this Court to treat contractual provisions as confidential under Rule 5.1, assuming that the Rule itself does not provide such a basis.

Here, both parties, in attempting to establish that “good cause” exists for continued confidential treatment, describe the collateral damage that could result if the redacted information—which the parties characterize as proprietary and/or sensitive commercial information—was made public, including an economic disadvantage with respect to competitors and others within the industry, such as those parties with whom Al Jazeera is currently negotiating.³⁰ Further, both Al

²⁷ *Id.* 5.1(b)(2).

²⁸ *Id.*

²⁹ *Sequoia*, 2013 WL 3724946, at *2; *see also Horres v. Chick-fil-A, Inc.*, 2013 WL 1223605, at *2 (Del. Ch. Mar. 27, 2013).

³⁰ *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

Jazeera and AT&T emphasize the unique features of the industry, including widespread industry practice of preserving the confidentiality of negotiations and contract terms—all of which are unique to those parties³¹—in order to establish that the likely harm caused by disclosure outweighs the public’s interest in accessing the redacted information under the Rule 5.1 standard.³² Al Jazeera notes that:

“[T]he Confidential Information that Al Jazeera designated, if publicly disclosed, would provide competitors to Al Jazeera with confidential, business-sensitive information that would give those competitors a substantial advantage over Al Jazeera, for example in competing to be a network carried on other cable and satellite systems. It is very difficult today for a new network, such as Al Jazeera America, to obtain carriage, because cable and satellite operators are very resistant to agreeing to carry new channels. We are in competition with other new networks for the few slots that distributors make available. Competitor networks could well exploit this situation, and make it more difficult for Al Jazeera to obtain carriage, if they were to have access to the Affiliation Agreements or the details of our disputes with AT&T.”³³

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.”).

³¹ See, e.g. Oral Arg. Tr. 12:16-13:7, 16:1-12 (Al Jazeera); Oral Arg. Tr. 30:16-20 (AT&T) (“It’s critically important to the business model of carriers to be able to operate or negotiate seriatim and individually . . .”); Murano Aff. ¶ 10.

³² See, e.g. Oral Arg. Tr. 26:17-27:5 (AT&T) (“We have hundreds of content providers. Each of them is paying keen attention to the marketplace. This is an ever present search for the marginal advantage. . . . So that’s why these things are so sensitive, because we don’t want to be put in a posture where someone can argue, ‘Well, you gave this here,’ or ‘you negotiated in a way on an outcome there, and we want the same treatment.’”).

³³ Murano Aff. ¶ 13.

Similarly, AT&T highlights that:

[I]f another network carried by AT&T obtained access to the confidential information in the Complaint regarding the terms of the Affiliation Agreement, it could attempt to demand different terms from AT&T than the terms it had negotiated. Disclosure of the terms of the Affiliation Agreement also could cause a strain on the relationship between AT&T and other networks to the extent the terms of the Affiliation Agreement differ from the terms of the agreements AT&T has with other networks. Finally, if other networks become privy to AT&T's business motives or negotiation strategies with Al Jazeera, it could advantage the bargaining posture of other networks to the disadvantage of AT&T. If this proprietary information is publicly revealed, other networks could use it to their advantage in negotiations with AT&T.³⁴

While I am not insensitive to the business ramifications that a largely unredacted Complaint may have for these parties, I must balance this potential harm against the public's right of access to documents filed in this Court. For the reasons outlined below, I find that neither Al Jazeera nor AT&T has met its burden of establishing that "good cause" exists to continue the confidential treatment of the Complaint except for those instances where the Complaint contains information that can be characterized as sensitive proprietary or business information, and the public interest in accessing this information is outweighed by the potential harm of public disclosure. For example, the parties may maintain the confidentiality of the per-subscriber fee in Paragraph 38; the number of subscribers noted in Paragraphs 11 and 35; and similar proprietary information.

³⁴ Def.'s Mot. ¶ 17 (citation omitted).

Rule 5.1 protects sensitive business information like price terms, account numbers, and the names of companies that place non-winning bids during corporate reorganizations. Both Al Jazeera and AT&T insist that the information redacted from the Complaint, which includes information about the nature of the dispute before this Court and the parties' contractual relationship, should be kept confidential because the potential economic impact of disclosure mirrors that of disclosing sensitive information like price terms. In effect, both parties characterize sensitive business and financial information under Rule 5.1 as information that the Court treats confidentially because disclosure of such information could cause the litigating parties significant economic and competitive harm.

However, Rule 5.1 does not envision a scenario where information in court documents, such as the nature of the dispute, is kept confidential merely because disclosure has the potential for collateral economic consequences. The parties' characterization of sensitive business and financial information fails to take into consideration the public's interest in accessing court documents, and the Court's responsibility—as a public forum—to carefully weigh these respective interests. While the potential economic harm that disclosure could have on litigating parties certainly enters into the Court's calculus, I must also consider the public's interest in accessing this information. For a price term, the potential economic harm

caused by disclosure outweighs the public's interest in accessing that information, largely because knowledge about price terms does not impinge on the public's understanding of the disputes before this Court. However, when sensitive information that the parties wish to keep confidential directly impacts the public's basic knowledge of particular court proceedings—where, as here, the supposedly-confidential information represents the nature of the dispute itself—the interest of the public in accessing this information outweighs the economic harm to the parties that disclosure may cause.

The parties suggest that I should view the redacted material as similar to a routinely-redacted price term. Here, despite the alleged uniquely competitive nature of the cable news industry, the information that the parties want to keep confidential, such as the nature of the dispute, cannot be viewed as analogous to a price term because of the public's significant interest in being able to access this information. Al Jazeera America is “the first major news channel to debut on television in many years.”³⁵ The objections filed by notable news organizations and reporters demonstrate the public's interest in this litigation—the public has the right to be informed of the “circumstances under which a journalistic enterprise can be denied entry to the American broadcast market by a provider with millions

³⁵ Compl. ¶ 8.

of viewers.”³⁶ In fact, if information such as the nature of the dispute before this Court, negotiations and discussions between the parties, and the parties’ contractual dealings, could be redacted merely because its disclosure could cause the parties economic harm, then this Court would no longer act as a public court but as something akin to a private arbitrator, replicating an option—private arbitration—that the parties could have, but did not, choose for themselves.

Also redacted is what Al-Jazeera argues is the extra-contractual true motive for AT&T’s termination of the agreement. AT&T denies this motive, and seeks to cloak it from public view. Potential embarrassment, however, is not sufficient reason to keep allegations of a public pleading confidential.³⁷

A few examples from the Complaint—taken solely from the “Introduction” section of that pleading—should suffice to demonstrate the problem the public faces in understanding these proceedings in their current public iteration. The public, seeking to understand the allegations regarding AT&T’s attempts to terminate the agreement, would read this:

13. Initially, AT&T sought to exploit a provision of the Affiliation Agreement allowing it to terminate if [REDACTED]. It began to assert that [REDACTED].

³⁶ Joint Opposition to the Mots. to Maintain Confidential Treatment at 2.

³⁷ See *Horres*, 2013 WL 1223605, at *2 (“Although it may be embarrassing to Chick-fil-A to have one of its franchises identified as the site where alleged misbehavior took place three years ago, that type of embarrassment will not suffice for continued Confidential Treatment. The public has an interest in understanding the nature of the Chick-fil-A dispute that was litigated in a court of this State.”).

[REDACTED]. However, Al Jazeera provided [REDACTED].
[REDACTED]. AT&T realized that this excuse was doomed to failure.

14. The pretext that AT&T ultimately chose was to claim that Al Jazeera [REDACTED]
[REDACTED] of the Affiliation Agreement.

15. [REDACTED]
[REDACTED]

16. [REDACTED]
[REDACTED]

17. AT&T began its pretextual scheme to terminate the Affiliation Agreement by [REDACTED]
[REDACTED].

18. [REDACTED]
[REDACTED]

19. [REDACTED]

20. On July 19, 2013, AT&T unilaterally announced that Al Jazeera was in breach of [REDACTED] in the Affiliation Agreement, that AT&T was terminating that Agreement effective immediately, and that it may cease to carry the Al Jazeera signal on August 19, 2013 – one day before the Launch of Al Jazeera America.³⁸

As to the purported true motive for AT&T's desire to cancel:

11. AT&T is contractually obligated to carry the Al Jazeera America service to approximately [REDACTED] U.S. households [REDACTED]. However, upon information and belief, AT&T [REDACTED].

23. On August 15, 2013, Mr. Slator met with Al Jazeera executives in New York. He said that the main reason for AT&T's unilateral termination of the Affiliation Agreement was that [REDACTED].

[REDACTED]. Mr. Slator explained that AT&T's concerns were [REDACTED].

[REDACTED]. He said that the only basis on which AT&T might carry Al Jazeera America was if [REDACTED].

³⁸ Pl.'s Supplemental Mem. in Further Support of its Mot. for Confidential Treatment Ex. 1 (Redacted Complaint) ¶¶ 13-20 [hereinafter Pl.'s Supplemental Mem.]; Def.'s Mot. Ex. A (Redacted Complaint) ¶¶ 13-20.

[REDACTED]

26. Al Jazeera is in full compliance with the Affiliation Agreement and/or has offered [REDACTED] alleged by AT&T, and AT&T's excuse for terminate the Affiliation Agreement is a bad faith pretext. AT&T's real motivation is [REDACTED]

[REDACTED]³⁹

For a recapitulation of the nature of the dispute, the redacted Complaint provides:

27. AT&T is in breach of, and has repudiated the Affiliation Agreement because (a) its assertion that Al Jazeera has failed to comply with the [REDACTED] is false and is asserted in bad faith, (b) it unilaterally terminated the Affiliation Agreement without a contractual right to do so; (c) it refused in bad faith to follow the Affiliation Agreement's [REDACTED], (d) it refused to negotiate in good faith Al Jazeera's disputes over the [REDACTED]; (e) it purported to terminate the Affiliation Agreement for material breach without permitting Al Jazeera its contractual right to [REDACTED]; (f) its asserted basis for terminating the Affiliation Agreement was a bad faith pretext, as its true reason for termination was [REDACTED], and the Affiliation Agreement did not allow termination on that basis; and (g) it refused to carry the Al Jazeera service at Launch, although it was contractually required to do so, and such refusal is a material breach of the Affiliation Agreement.⁴⁰

The substantive sections of the Complaint are even more heavily redacted.

³⁹ Pl.'s Supplemental Mem. Ex. 1 (Redacted Complaint) ¶¶ 11, 23, 26; Def.'s Mot. Ex. A (Redacted Complaint) ¶¶ 11, 23, 26.

⁴⁰ Pl.'s Supplemental Mem. Ex. 1 (Redacted Complaint) ¶ 27; Def.'s Mot. Ex. A (Redacted Complaint) ¶ 27.

The parties in this matter seek the benefits of litigating in a public court. Consequently, they have assumed accompanying responsibilities, including the need to disclose previously non-public information in order to satisfy the public's right of access to court documents. That obligation extends to information necessary to understand the nature of the dispute they litigate, including information that could have unfavorable economic or reputational consequences, such as a weakened negotiating position or public embarrassment. Although Rule 5.1 permits litigating parties to maintain confidentiality over sensitive proprietary and commercial information when confidentiality does not greatly disadvantage the public's ability to understand the nature of the dispute before this Court, this Rule does not permit litigating parties to withhold information from the public merely based on the potential economic or reputational impact that disclosure may have where the public's interest in this information is substantial and outweighs the potential impact on the parties' respective business interests.

C. Conclusion

Those who decide to litigate in a public forum (rather than pursue a private dispute-resolution procedure) must do so in a manner consistent with the right of the public to follow and monitor the proceedings and result of their dispute. While the confidentiality of discrete information of low interest to the public, disclosure of which would impose significant costs on a litigant, may be maintained, the core

nature of the dispute itself is not information of that type. For the reasons above, I find that Al Jazeera and AT&T have failed to demonstrate “good cause” under Rule 5.1 to maintain the confidentiality of information they characterize as “sensitive business and financial information.” I thus direct that Al Jazeera file a largely unredacted version of the Complaint within five business days, with only that information exempted above remaining confidential. For the same reason, and on the same timetable, the portion of the transcript of the hearing in this matter held September 24, currently under seal, shall be made public. To the extent the forgoing requires an Order to take effect, IT IS SO ORDERED. The preceding order shall be stayed without further action of this Court should either party take an interlocutory appeal from this decision.

Sincerely,

/s/ Sam Glasscock III

Sam Glasscock III