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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: FEBRUARY 10, 2014**

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The Opening Brief of Plaintiff-Below/Appellant Al Jazeera America, LLC ("Al Jazeera") provided compelling reasons why this Court should reverse the decision below. Objectors-Below/Appellees, who objected to Confidential Treatment of the parties' sensitive business information below, have asserted that:

(A) even though the Court of Chancery viewed its ruling as the first comprehensive interpretation of Court of Chancery Rule 5.1, and certified that ruling for immediate appeal as a matter of first impression, this Court should not review the Court of Chancery's interpretation *de novo*;

(B) this Court should ignore the plain wording of Rule 5.1, and impose a heavier burden on litigants seeking to protect confidential information from disclosure than the Rule's requirement of "good cause";

(C) although there is no justification for it in Rule 5.1, the Court should provide lesser protection for confidential business information than trade secrets, and require higher proof for confidential treatment of disclosures in complaints than in other court filings;

(D) this Court should ignore the adverse public policy ramifications of affirming the decision below.

For the reasons shown in this Reply Brief and the Opening Brief, the Court should reverse the decision below.

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

A. The Court Should Review the Decision Below *De Novo*

As a threshold matter, the Objectors contend that this Court should review the Court of Chancery's interpretation of Rule 5.1 – a question of first impression – for abuse of discretion, not under a *de novo* standard, as if this was a case based on the disputed application of a well-settled court rule. The Objectors are wrong for three reasons.

First, this appeal presents several unsettled, purely legal questions. Al Jazeera has shown, and the Court of Chancery acknowledged, that it would suffer serious competitive harm if the confidential information in its complaint were disclosed. Nonetheless, the Court of Chancery ordered sweeping disclosure. A central legal question is what quantum of harm must be shown in order to obtain protection, and outweigh the general principle of public access to court proceedings. At its core, this appeal questions whether the Court of Chancery correctly construed the meaning of "good cause" under Rule 5.1, or improperly held that the Rule permanently tilts the scales in favor of disclosure. The Court of Chancery itself viewed its reasoning as not bound to this case's particular facts, but

applicable to *any* case where the "sensitive information that the parties wish to keep confidential directly impacts the public's basic knowledge of particular court proceedings. . . ." A534.

Moreover, this appeal addresses whether Rule 5.1 requires only that the public is sufficiently informed about the general nature of the dispute, or, rather, compels disclosure of every last detail that a court perceives to be of interest to the public even if such revelations would cause substantial harm to the parties. These purely legal issues are subject to *de novo* review. *Brooks v. Johnson*, 560 A.2d 1001, 1002-03 (Del. 1989).

Second, the questions presented are ones of first impression and involve interpretation of a new rule. The Court of Chancery made clear, both in its ruling and order granting Al Jazeera's motion to certify the Letter Opinion for interlocutory review, that it was interpreting the full scope of new Rule 5.1 for the first time. A528-30, 560 ("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."). This Court has traditionally applied *de novo* review to such questions of first impression, especially where a new statute or rule is implicated, in order to provide guidance to the lower courts. *See, e.g.*, *New Castle County Dept. of Land Use v. University of Delaware*, 842

A.2d 1201, 1211 (Del. 2004). This case of first impression also warrants *de novo* review.

Finally, this appeal fits squarely within the precedents cited in Al Jazeera's opening brief, where this Court applied *de novo* review to interpretations of court rules. In *State v. Kelly*, 947 A.2d 1123, 2008 WL 187945, at *3 n.4 (Del. Jan. 23, 2008), the Court stated the long-standing rule that "statutory construction rulings [are reviewed] *de novo* to determine whether the Superior Court erred as a matter of law in formulating or applying legal precepts." Likewise, in *Jackson v. State*, 654 A.2d 829, 832 (Del. 1995), the Court applied *de novo* review of a Superior Court rule as part of its "general supervisory authority . . . over the rule-making power of the trial courts." The issues presented in this case are likely to recur, and *de novo* review will provide supervisory guidance to the lower courts in future sealing cases.

Objectors' authorities (almost all of which are from outside Delaware) involve a different situation: the courts were interpreting the common-law right of access to court records, not the meaning of a new state court rule. Moreover, the determinative legal standards had been declared in prior decisions of the appellate courts, and the lower courts in those cases were called upon only to apply, rather than interpret, the law. *See, e.g., Bank of Am. Nat'l Trust & Sav. Ass'n v. Hotel Rittenhouse Assoc.*, 800 F.2d 339, 343 (3d Cir. 1986) (reversing, as an abuse of

discretion, an order denying a motion to unseal court records that failed to apply legal standards for access established in Third Circuit decisions); *Johnson v. Greater S.E. Comm. Hosp. Corp.*, 951 F.2d 1268, 1276 (D.C. Cir. 1991) (reversing district court decision to unseal record and remanding with instructions to apply factors identified in prior D.C. Circuit decision). Here, this Court has never before had the opportunity to determine how courts should interpret new Rule 5.1. *De novo* review, without deference to the lower court, is the appropriate standard.

Even in the cases cited by Objectors, the appellate courts actually gave little deference to the trial courts' rulings. *See Bank of Am. Nat'l Trust & Sav. Ass'n*, 800 F.2d at 343 (lower court rulings on sealing records are not "generally accorded the narrow review reserved for discretionary decisions based on first-hand observations"); *In re Knoxville News-Sentinel Co., Inc.*, 723 F.2d 470, 476 (6th Cir. 1983) (noting that deferential review is not given to district court's sealing decision "[i]n light of the important rights involved").

The Objectors do cite two decisions of this Court, but those cases did not involve the sealing of court records, and this Court was not being asked to rule on issues of first impression – the appropriate legal standard had already been established by prior decisions of the Court. *In re Celera Corp S'holder Litig.*, 59 A.3d 418, 428 (Del. 2012) (determination of standing and class certification under Rule 23); *MCA, Inc. v. Matsushita Elec. Indus. Co., Ltd.*, 785 A.2d 625, 633 (Del.

2001) (motion to reopen judgment based on fraud). Moreover, even in these cases, this Court reviewed *de novo* the appellant's contentions that the Court of Chancery "formulated 'incorrect legal precepts or applied those precepts incorrectly.'" *In re Celera Corp S'holder Litig.*, 59 A.3d 418, 428 (quoting *In re Philadelphia Stock Exch., Inc.*, 945 A.2d 1123, 1139 (Del. 2008)). This is precisely what Al Jazeera maintains in this appeal: the Court of Chancery misinterpreted new Rule 5.1, and devised a remedy that is at odds with the rationale for the Rule.

B. The Court Should Reject Objectors' Attempt to Rewrite Rule 5.1

In their opposing brief, Objectors essentially ignore the language of Rule 5.1. Instead, they rely on federal cases that do not interpret a written state court rule and, in some instances, impose a much heavier burden on litigants than Rule 5.1's "good cause" standard. The Court should reject Objectors' attempt to rewrite Rule 5.1.

The general operation of the Rule is clear on its face. Rule 5.1 states that any person may seek "confidential treatment" for any "Document" filed in a civil Court of Chancery action by showing that there is "'good cause' for confidential treatment." Rule 5.1(b)(2). Good cause exists where the "public interest in access to Court proceedings is outweighed by the harm that disclosure of sensitive, non-public information would cause." *Id.* The party or person seeking to obtain or maintain Confidential Treatment "always bears the burden of establishing good

cause for Confidential Treatment." Rule 5.1(b)(3). The identical "good cause" standard applies where, as Al Jazeera does here, the plaintiff seeks Confidential Treatment for a complaint or related Documents. Rule 5.1(e).

Contrary to Objectors' assertions, *see* Objectors' Br. at 20, Rule 5.1 does not state that the party seeking Confidential Treatment bears a "heavy" burden in showing "good cause." It simply says that the harm to the litigant must "outweigh" the public's interest in access. Nor does the explanatory memorandum of the drafters of the Rule, *Protecting Public Access to the Courts: Chancery Rule 5.1*, state or suggest that a party must show "compelling reasons" in order to protect its sensitive business information from disclosure. Rather, that memorandum simply states that the "the party seeking confidential treatment has the burden of showing that 'good cause' exists." *Id.* at 5. Al Jazeera has satisfied this "good cause" standard, as the Court of Chancery acknowledged that Al Jazeera would suffer substantial harm from disclosure.

Objectors' attempt to impose a heavier burden than "good cause" appears to be entirely based upon a Ninth Circuit decision, *In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d 417, 429 (9th Cir. 2011), which involved disclosing the names of non-party priests accused of molesting minors (an issue of much higher public concern than the current commercial dispute), and a district court ruling within the Ninth Circuit, *In re NVidia Corp. Deriv. Litig.*, 2008 WL

1859067 (N.D. Cal. Apr. 23, 2008). Objectors Br. at 22, 25. These citations are highly misleading, because the Ninth Circuit has chosen to impose an unusually heavy burden on litigants who seek to seal court filings. *See In re Roman Catholic Archbishop of Portland in Oregon*, 661 F.3d at 429 (where common-law public access to judicial documents is asserted, a litigant must provide "compelling reasons," not just "good cause," in order to seal pleadings and motion papers) (citing *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006)).

The Ninth Circuit's higher standard is not the law in Delaware, which has always used "good cause" as its standard for sealing court records. *See Kronenberg v. Katz*, 872 A.2d 568, 607-08 (Del. Ch. 2004); *Matter of 2 Sealed Search Warrants*, 710 A.2d 202 (Del. Super. 1997). Indeed, the Ninth Circuit appears to stand alone in requiring a litigant to offer "compelling reasons" to justify protection from disclosure. For example, *LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 222 (3d Cir. 2011) , cited at Objectors Br. 22, does not impose a burden heavier than "good cause."

Unquestionably, one reason for Rule 5.1's presumption of public access to court proceedings is to permit the public to learn how the judicial branch performs its functions. But even the cases cited by Objectors show that confidential treatment should be extended where a party makes the particularized showing of

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good cause that Al Jazeera made below. *See, e.g., Chartis Specialty Ins. Co. v. LaSalle Bank*, 2011 WL 3276369, at *3-4 (Del. Ch. July 29, 2011) (party may overcome presumption of access by showing good cause for sealing confidential documents referenced in action to vacate arbitration award).

Objectors argue that Rule 5.1 imposes a higher standard than "good cause" where confidentiality is sought for portions of a complaint. Objectors Br. at 24-25. However, Rule 5.1 draws no distinction between complaints and other court filings. Instead, the Rule creates a streamlined procedure under which a plaintiff may file a complaint under seal, redacted of Confidential Information, without first obtaining a court order. Rule 5.1(e) ("*Confidential Treatment for Complaints*"). It expressly provides that if the Confidential Treatment designation of a complaint is challenged, the plaintiff or any other party may obtain continued Confidential Treatment by showing "good cause" for the continuation. Rule 5.1(b)(3), (f)(2). The *Protecting Public Access* memorandum that accompanied Rule 5.1 likewise makes clear that "if a designation is challenged, the party seeking confidential treatment has the burden of showing that 'good cause' exists," and that no higher standard need be satisfied. B1–B16. Thus, "good cause" remains the operative standard for extending confidentiality to complaints, other pleadings, motions and any other filing by a litigant.

Objectors express concern that if portions of a complaint are sealed, the public will not understand "the nature of the dispute." Objectors Br. at 23-24. This concern is fully addressed by Rule 5.1, which requires that any confidentially-filed complaint be accompanied by a Rule 3(a)(2) cover sheet that "shall summarize the claims asserted in the complaint in sufficient detail to inform the public of the nature of the dispute." Rule 5.1(e)(1). *See also Protecting Public Access*, at B6.

The Court of Chancery overlooked or ignored Rule 5.1(e)(1), which is designed to ensure that the public will understand the "nature of the dispute" from the cover sheet. Instead of evaluating the sufficiency of the description set forth in Al Jazeera's cover sheet, the Court of Chancery directed disclosure of practically everything in and attached to the complaint, reasoning that this would inform the public of the general nature of the dispute. However, Rule 5.1 makes clear that the public's need for information is satisfied by the filing of a sufficient cover sheet. It cannot be disputed that the Court of Chancery ordered far more disclosure than was necessary to inform the public about the general nature of the dispute. If this Court believes that the redacted version of Al Jazeera's complaint does not sufficiently inform the public, the proper resolution would be to remand with

instructions that Al Jazeera amend its cover sheet to disclose enough detail "to inform the public of the nature of the dispute." Rule 5.1(e).[1]

The Court of Chancery also erred in ordering the disclosure of confidential information at the very outset of the litigation. The public's need to understand the nature of the dispute between Al Jazeera and AT&T, and its need to review the workings of the Court of Chancery, will only arise when that court rules on AT&T's pending motion to dismiss Al Jazeera's First Amended Complaint. Indeed, the Court of Chancery's primary concern was that it could not write an opinion in the case that the public could understand, without referencing and quoting confidential material from the complaint. A523-24.

Such a ruling may be close at hand. Under the Stipulation and Scheduling Order Regarding Defendant's Motion to Dismiss the Amended Complaint entered in the Court of Chancery, AT&T's motion will be fully briefed as of February 20, 2014. Al Jazeera suggested below, A484-85, and argued in its opening brief, Appellant's Br. at 31-32, that an alternative path would be to defer disclosure of confidential materials until the Court of Chancery issues its substantive ruling, accompanied by disclosure of whatever portions of the confidential filings it

[1] As noted both in Al Jazeera's opening brief and Objectors' brief, Al Jazeera has filed a First Amended Complaint, and defendant AT&T has moved to dismiss that complaint. An amended cover sheet would therefore be directed to the First Amended Complaint.

believes are necessary to inform the public of its reasoning. Objectors seemingly agree that the public's interest in understanding the dispute will not be significantly engaged until such a decision is issued. Objectors Br. at 25 n.4. Accordingly, the disclosure ordered by the Court of Chancery is not only improper, it is also premature.

C. Al Jazeera's Sensitive Business Information is Entitled to Protection from Disclosure

Objectors make three assertions about the scope of Rule 5.1 that are not supported either by the Rule's language or the "tests traditionally recognized by courts as sufficient to justify limiting the public's right of access." *Protecting Public Access*, at B4. *First*, they assert that the confidential business information of litigants is entitled to less protection from disclosure than trade secrets. Objectors Br. at 31. Rule 5.1, however, makes no such distinction. Rule 5.1 lists "Sensitive proprietary . . . financial, business, or personnel information" along with "trade secrets" as "[e]xamples of information that may qualify as Confidential Information." Rule 5.1(b)(2).

Objectors suggest that the Court should follow an ostensible rule in the Third Circuit that gives less protection to confidential business information than to trade secrets. Objectors Br. at 31. This assertion is contradicted by the text of Rule 5.1, which treats sensitive business information on an equal footing with trade secrets. Objectors' argument also ignores such Third Circuit precedent as

Leucadia, Inc. v. Applied Extrusion Technologies, Inc., 998 F.2d 157, 166 (3d Cir. 1993) ("Documents containing trade secrets *or other confidential business information* may be protected from disclosure") (emphasis added), as well as the seminal U.S. Supreme Court decision in this field of law, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978) ("[C]ourts have refused to permit their files to serve as . . . sources of information that might harm a litigant's competitive standing.").

The Third Circuit has held that even where a protective order in federal court was initially justified, if a challenge to the continued sealing of such information is made at a later stage of litigation, the beneficiary of the order must show "current evidence [that] . . . public dissemination of the pertinent materials now would cause the competitive harm" claimed by the litigant. *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 663 (3d Cir. 1991). Here, Al Jazeera made the required showing of *current* competitive harm in the Court of Chancery, and that court acknowledged that both parties had shown they would suffer current competitive harm from disclosure. A523, 530-32.

Second, Objectors argue that damage to a party's negotiating position from disclosure can never overcome the public's right to access all court-filed information about the dispute. Nothing in Rule 5.1, its underlying rationale, or the weight of decisional law elsewhere supports this assertion. Disclosure of sensitive

business information in court filings would harm the owner's ability to negotiate with suppliers, carriers, and others in highly competitive industries. Disclosure also would give competitors an unfair advantage: instead of engaging in illegal industrial espionage to gain information, they would only need to consult court records. Businesses should not be placed in the untenable position of either exposing their most secret information to competitors or foregoing the ability to enforce their contract rights through action in the Delaware courts. *See Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1073 (3d Cir. 1984) (access may be limited where "unbridled disclosure of the nature of the controversy would deprive the litigant of his right to enforce a legal obligation.").[2]

Objectors suggest that other courts do not protect confidential business information in court filings even where disclosure poses a serious risk of harm to a party's competitive standing. Objectors Br. at 28-29. This is demonstrably false. *See, e.g.*, *IDT Corp. v. eBay, Inc.*, 709 F.3d 1220, 1224 (8th Cir. 2013) (affirming finding that "the potential harm in unsealing 'confidential and competitively sensitive information' [in a complaint] outweighs [a public interest group's] 'generalized interest in access to the complaint'") (citations omitted); *Goldenberg*

[2] The Court of Chancery's *Protecting Public Access* memorandum also shows that Rule 5.1 was never intended to cut back on protection for confidential business information, but to narrow the definition of "good cause" because litigants had been making increasing assertions of confidentiality for information that "was not truly sensitive or confidential in nature." *Id.* at 2.

v. Indel, Inc., 2012 WL 15909, at *3-4 (D.N.J. Jan. 3, 2012) ("[T]he confidentiality of business agreements, trade secrets or commercial information are a legitimate private interest and the disclosure of this information can be used for the improper purpose of causing harm to the litigant's competitive standing in the marketplace."); *Miles v. Boeing Co.*, 154 F.R.D. 112, 114 (E.D. Pa. 1994) ("The subject matter of confidential business information is broad, including a wide variety of business information . . . [I]t is clear that a court may issue a protective order restricting disclosure of discovery materials to protect a party from being put at a competitive disadvantage.").

The cases cited by Objectors for the contrary proposition are factually inapposite. In those cases, unlike this one, the parties seeking protection failed to show that they would suffer true competitive injury from disclosure and that a court rule provided protection against such an injury. *Gryphon Domestic VI, LLC v. APP Int'l Fin. Co., B.V.*, 814 N.Y.S.2d 110 (N.Y. App. Div. 1st Dept. 2006) (refusing to seal plaintiffs' pricing information from the defendants where plaintiffs failed to show that the information was a trade secret, the defendants were not plaintiffs' competitors, and sealing would prejudice the defense of the litigation); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 61-62 (D.N.J. 1991) (defendant failed to show injury from disclosure and, because

the lawsuit was about accepting bribes, "it is likely that Westinghouse is most concerned about potential embarrassment and injury to reputation.")

Third, the confidentiality provision in the Affiliation Agreement is not irrelevant as Objectors suggest. It demonstrates that in the highly competitive television network-carrier industry, AT&T and Al Jazeera's predecessor Current TV had a legitimate interest in keeping their contractual terms from being disclosed to other networks and carriers. Contrary to Objectors' claim, Al Jazeera has never conceded that the confidentiality provision deserves no consideration in the balancing analysis; rather, its counsel stated in argument that "the core business terms . . . have to remain confidential . . . regardless of the presence or absence of the confidentiality clause." A322. An "enforceable confidentiality agreement" weighs in favor of the conclusion that "unbridled disclosure of the nature of the controversy would deprive the litigant of his right to enforce a legal obligation." *Publicker Indus., Inc.*, 733 F.2d at 1073.

D. The Court of Chancery Failed to Properly Balance the Competing Interests

Objectors contend that the Court of Chancery made an item-by-item review of the complaint's allegations and contract terms, and limited disclosure to information that permitted the public to understand the general nature of the dispute. Objectors Br. at 26-30. This cannot be squared with either the reasoning of or the remedy ordered in the opinion below. For example, the complaint makes

clear that the dispute between Al Jazeera and AT&T concerns only three sections of a sixteen-section Affiliation Agreement: [redacted] A22-26. Yet the Court of Chancery ordered disclosure of the *entire* Affiliation Agreement, except for a few scattered facts that it believed were of no interest to the public. It also ordered disclosure of all of the [redacted] The Court of Chancery never explained why maintaining this other material as confidential would prevent the public from learning the "core nature of the dispute itself." A539.

Objectors cannot explain away the Court of Chancery's failure to tailor its remedy more narrowly or to consider alternative approaches such as deferring disclosure until a substantive ruling is made or amending the filing cover sheet. No case authority need be cited to explain why under Rule 5.1, it is prudent to tailor disclosure to reveal only "the core nature of the dispute," and then only where the actions of the courts themselves invite public scrutiny. Fitting the

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remedy to the need is inherent in Rule 5.1(b)(4)'s direction that the Court of Chancery should "determine the manner and extent of Confidential Treatment for any Document, category of Documents, or type of Confidential Information."

The alternatives suggested by Al Jazeera to wholesale disclosure came from the Court of Chancery's own words, not from thin air. For example, the Court of Chancery expressed concerns at oral argument, A359, and in its letter opinion that that "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." A523. In response, Al Jazeera suggested in supplemental briefing below that this concern could be fully addressed by deferring disclosure until the Court of Chancery ruled on the pending AT&T motion to dismiss. A484-85; *see also* Appellant's Opening Br. at 31-32. The Court of Chancery did not reject this suggestion because it violated a supposed right of contemporaneous public access to information. *Cf.* Objectors' Br. at 32. Rather, the court simply ignored this and all other options. Instead, it ordered the wholesale disclosure of virtually all of the parties' confidential information, notwithstanding the serious economic harm to Al Jazeera that it acknowledged would likely follow. This demonstrates that the Court of Chancery failed to perform the careful balancing of public and private interests required by Rule 5.1.

E. The Adverse Policy Consequences of the Ruling Below

Objectors have not refuted the adverse policy consequences of the decision below, as shown in Al Jazeera's opening brief. Given the novelty of Rule 5.1 and of the Court of Chancery's sweeping ruling, it should not be surprising that prior Delaware cases have not addressed similar consequences. But common sense and a litigator's experience supports the view that if the ruling below is affirmed, future Delaware business plaintiffs will reduce their complaints to the minimum notice pleading permitted by court rules. No party is likely to expose its sensitive business information to immediate public disclosure by filing a complaint or an answer that tells the full story of a dispute. Nor can there be a serious question that if all the facts of a dispute must be elicited though discovery, litigation will become a more expensive and protracted process for the parties, and Delaware courts will have to expend more time and effort to understand the cases on their dockets.

As for the likelihood that the ruling below will drive litigants out of the Delaware courts, this cannot be considered a desirable outcome. Al Jazeera casts no aspersions on arbitration. However, parties should not be *forced* to choose arbitration, and to avoid the experienced bench of the Court of Chancery, in order to maintain reasonable protection for their sensitive business information. Finally, Objectors do not contest that the new interpretation announced by the Court of

Chancery would work an injustice on parties who, in good faith, have already selected Delaware as their chosen forum for dispute resolution.

CONCLUSION

For the reasons set forth above and in Al Jazeera's opening brief, the Court of Chancery should be reversed and the case remanded for further proceedings.

DATED: January 24, 2014

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