

COURT OF CHANCERY
OF THE
STATE OF DELAWARE

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RE: *NewRadio Group LLC v. NRG Media LLC, et al.*, C.A. No. 4951-VCL

Dear Counsel:

I have reviewed the Stipulation and Proposed Order for the Production and Exchange of Confidential Information filed January 26, 2010 (the "Stipulation"). I decline to approve it.

"United States' citizens have a fundamental right . . . to an open court system." *Cantor Fitzgerald, Inc. v. Cantor*, 2001 WL 422633, at *1 (Del. Ch. Apr. 17, 2001). This principle translates into a presumption that the press and public have a common law right of access to judicial proceedings and court records. *Id.*

One manifestation of the common law right of access is Court of Chancery Rule 5(g). *Kronenberg v. Katz*, 872 A.2d 568, 607 (Del. Ch. 2004) ("In this court, for example, the tradition of open proceedings is reflected in Rule 5(g) itself, which places strict limits on parties' ability to maintain filings under seal."). "The default position of Rule 5(g) maintains public accessibility of filed documents. The Rule also provides the court flexibility in balancing the need to protect sensitive material from public disclosure and the public's right of access." *One Sky, Inc. v. Katz*, 2005 WL 1300767, at *1 (Del. Ch. May 12, 2005).

A further manifestation of the common law right of access is that Delaware judicial proceedings are open to the public, absent a specific ruling from the Court imposing a particular and limited restriction for good cause shown. *In re Nat'l City S'holders Litig.*, 2009 WL 1653536, at *1 (Del. Ch. June 5, 2009) (“all court proceedings are presumptively open to the public.”); *Nucar Consulting, Inc. v. Doyle*, 2005 WL 820706, at *8 (Del. Ch. Apr. 5, 2005) (holding that court proceedings are presumptively open to the public unless designated confidential by the court under Rule 5(g)). The Delaware Constitution of 1897 provides that “[a]ll courts shall be open.” Del. Const. Art. I, § 9. Exhibits and evidence presented at trial becomes part of the public record, absent a specific judicial ruling. *Kronenberg*, 872 A.2d at 576 (discussing the “strong presumption in favor of openness governing evidence and other filings submitted in lawsuits in Delaware courts”); *Nucar Consulting*, 2005 WL 820706, at *8 (explaining that judicial proceedings and transcripts generally become part of public record). So generally will materials relied on when rendering judicial decisions. *Nat'l City*, 2009 WL 1653536, at *1 (explaining that “the public has a strong interest in ... ascertaining what evidence the court relied upon in reaching its decision.”) (internal citations omitted).

Paragraph 13 of the Stipulation asks me to order, in advance, that the confidentiality restrictions contemplated by the Stipulation would “continue to be binding throughout and after the conclusion of the Litigation, including without limitation, any appeals therefrom.” The provision makes no exception for information that becomes part of the public record. By its terms, the Stipulation purports to have me trump the common law right of access by ordering that all materials designated by the parties as “Confidential” would remain under seal, regardless of how they were used. I take no comfort in my ability or the ability of another court to hold the Stipulation inapplicable to particular documents or to release them from seal. Absent such a ruling, public materials will ostensibly remain protected and sealed, and parties will risk contempt if they treat the public record as public. The restriction as drafted is overbroad and an invalid prior restraint.

The fact that this Court has often entered similar orders in the past does not validate this provision. *In re Louisiana-Pacific Corp. Deriv. Litig.*, 705 A.2d 238, 240 n.1 (Del. Ch. 1997) (Allen, C.). In previous rulings in other cases involving Morris Nichols and Potter Anderson, I have modified proposed confidentiality orders to address this problem. These firms are aware of the issue and know how to draft a confidentiality order to accommodate this concern.

If the parties wish to submit a revised confidentiality order, I will be happy to consider it.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor