

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

J. TRAVIS LASTER
VICE CHANCELLOR

New Castle County Courthouse
500 N. King Street, Suite 11400
Wilmington, Delaware 19801-3734

Date Submitted: March 18, 2013

Date Decided: March 27, 2013

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RE: *Horres v. Chick-fil-A, Inc.*, C.A. No. 5530-VCL

Dear Counsel:

This case was dismissed in June 2010. Under Rule 5.1(g), documents previously afforded “Confidential Treatment” will become public unless a party moves for continued Confidential Treatment and demonstrates that “the particularized harm from public disclosure of the Confidential Information in the Confidential Filing clearly outweighs the public interest in access to Court records.” *See* Ct. Ch. R. 5.1(g). Chick-fil-A, Inc. has moved for continued Confidential Treatment for an Affidavit of Brian Skinner (the “Affidavit”) and its supporting exhibits (the “Exhibits”). The motion is granted in part for the Affidavit, but otherwise denied.

FACTUAL BACKGROUND

Skinner was Chick-fil-A’s primary liaison with franchisees in the Delaware area. In April 2010, Chick-fil-A sent Skinner to investigate allegations of misconduct by Joseph A. Horres, Jr., the operator of a franchise in Camden, Delaware. By letter dated May 31, 2010, Chick-fil-A terminated its franchise agreement with Horres.

Horres responded by filing suit against Chick-fil-A. He alleged that Chick-fil-A failed to provide notice of the termination and acted in bad faith in terminating his franchise. Horres sought a temporary retaining order against the termination. Chick-fil-A opposed the temporary retaining order and filed the Affidavit and Exhibits in support of its position. The Affidavit described allegations of sexual harassment that certain employees had made against Horres. The Exhibits consisted of (i) the franchise agreement and related documentation and (ii) the letter terminating the franchise agreement.

The franchise agreement selected courts in the State of Georgia as the exclusive forum for any disputes. After I indicated that the clause was likely to be enforced, Horres filed a notice dismissing the Delaware action without prejudice. This Court never made any determination with respect to either Horres's allegations against Chick-fil-A or the Affidavit's allegations against Horres.

LEGAL ANALYSIS

“The public's right of access to judicial records has been characterized as fundamental to a democratic state.” *Matter of Cont'l Ill. Sec. Litig.*, 732 F.2d 1302, 1308 (7th Cir. 1984) (internal quotation marks omitted). “Publicity of such records . . . is necessary in the long run so that the public can judge the product of the courts in a given case.” *Va. Dept. of State Police v. Wash. Post*, 386 F.3d 567, 575 (4th Cir. 2004). This monitoring function helps ensure “quality, honesty and respect for our legal system.” *Cont'l Ill.*, 732 F.2d at 1308 (footnote omitted).

The public right of access has two foundations: the First Amendment and the common law. See *Gannett Co. v. State*, 571 A.2d 735, 742 (Del. 1989) (considering whether the First Amendment right of access requires disclosure of jurors' names); *C. v. C.*, 320 A.2d 717, 723 (Del. 1974) (discussing the common law right of access to judicial records). “Denial of access to litigation material must be approached from the premise that [judicial] restraint should not be imposed unless strong justification exists for such action.” *Ramada Inns, Inc. v. Drinkhall*, 490 A.2d 593, 598 (Del. Super. 1985). When determining whether to support or maintain a restriction on access, a Delaware court balances “the magnitude and imminence of harm to the litigants” with “the interests of the government and public in disclosure” *Id.* at 599. Even if restraint is justified, “[it] should be so restricted to impose no greater restraint than is necessary to afford the [rule's] protection” *Id.*

Rule 5.1 reflects the Court of Chancery's commitment to these principles. Rule 5.1(a) implements the powerful presumption of public access by providing that “[e]xcept as otherwise provided in this Rule, proceedings in a civil action are a matter of public record.” Ct. Ch. R. 5.1(a). Rule 5.1(b) specifies procedures for obtaining permission to file documents confidentially, defined as “Confidential Treatment.” *Id.* 5.1(b). Even when Confidential Treatment has been granted, Rule 5.1(g) places a presumptive time limit on Confidential Treatment. The three year limit recognizes that over time, information typically grows stale and its sensitivity fades.

The Delaware Supreme Court has recognized that although “[i]t is generally held that judicial records are subject to inspection after completion of the proceedings . . . this

rule too is subject to the discretionary power of the court to impound and deny inspection when justice so requires.” *C. v. C.*, 320 A.2d at 724. Rule 5.1(g) incorporates this holding by providing that a party can obtain continuing Confidential Treatment beyond the presumptive three year period by showing that continuing Confidential Treatment is warranted under the circumstances.

Any person seeking continued Confidential Treatment must move for continued Confidential Treatment within 30 days after the filing of the Register in Chancery’s notice [specified in Rule 5.1(g)(1)]. The motion for continued Confidential Treatment must demonstrate that the *particularized harm from public disclosure* of the Confidential Information in the Confidential Filing *clearly outweighs the public interest* in access to Court records. The movant must . . . provid[e] an evidentiary basis for the particularized harm on which the movant relies for *each Document* for which continued Confidential Treatment is sought.

Ct. Ch. R. 5.1(g)(2) (emphases added). The Court then determines “whether or to what extent” Confidential Treatment shall continue. *Id.*

Chick-fil-A argues that the Affidavit contains confidential information that, if disclosed, will cause harm to (i) “alleged victims and witnesses” and (ii) Chick-fil-A itself. The Affidavit describes allegations of sexual harassment that were made against Horres and Chick-fil-A’s response to the allegations. The Affidavit includes the names of individuals who are said to have made the allegations, as well as the names of witnesses with whom Chick-fil-A representatives spoke. Much of the affidavit consists of hearsay. The allegations of inappropriate conduct involving Horres and his employees were the subject of news coverage. *See* Dkt. 25.

Except for the names of the victims and witnesses, the contents of the Affidavit do not rise to the level of sensitive information warranting continued Confidential Treatment. There is nothing exceptional or prejudicial about the allegations that would risk harm to Chick-fil-A. 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. The fact that the news media already covered these events substantially undercuts any claim of harm.

The public does not have the same interest in knowing the names of the individuals identified in the Affidavit as either victims or witnesses. Those individuals did not enter into a franchise agreement that provided for resolving any disputes in a public court, nor did they take action that would likely lead to suit in a public forum. Particularly with respect to the alleged victims, there are good reasons to respect the privacy of these individuals. *Cf. Allen v. State*, 644 A.2d 982, 983 n.1 (Del. 1994) (noting the Delaware Supreme Court’s “[c]onsistent . . . practice of not identifying alleged victims of sexual assaults in [their] opinions”).

To balance the right of public access against the individuals’ interests in privacy, Chick-fil-A shall file a public version of the Affidavit within five days that redacts only the names of the alleged victims and witnesses. The original Affidavit will continue to receive Confidential Treatment.

With respect to the Exhibits, Chick-fil-A argues that they contain “proprietary information that is not readily available to the general public.” Br. at 2. That information is nonpublic does not automatically make it sensitive or entitle it to Confidential Treatment. *See* Ct. Ch. R. 5.1(b)(2). The Exhibits do not appear to contain any commercially sensitive information. The franchise agreement looks like a relatively standard commercial agreement. The termination letter is a relatively non-descript letter, framed in legalese and shorn of particulars, that identifies the sections of the franchise agreement being invoked by Chick-fil-A as grounds for termination. Chick-fil-A has not made any particularized showing of harm necessary to obtain continued Confidential Treatment for the Exhibits. The public version of the Affidavit will attach the Exhibits in unredacted form.

IT IS SO ORDERED.

Very truly yours,

/s/ J. Travis Laster

J. Travis Laster
Vice Chancellor