IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 11-01015-MAM
THE HON. LEO E. STRINE, JR., THE HON. JOHN W. NOBLE, THE HON. DONALD F. PARSONS, JR., THE HON. J. TRAVIS LASTER, THE HON. SAM GLASSCOCK, III, THE DELAWARE COURT OF CHANCERY, and THE STATE OF DELAWARE,	)	
Defendants.	)	

MOTION OF THE CORPORATION LAW SECTION OF THE DELAWARE STATE BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS' MOTIONS FOR JUDGMENT ON THE PLEADINGS

The Corporation Law Section (the "Section") of the Delaware State Bar Association ("DSBA"), through its undersigned attorneys, hereby moves for leave to file the attached brief as *amicus curiae* in support of defendants' motion for judgment on the pleadings. In support of its motion, the Section states as follows:

1. The Section, which counts more than 500 Delaware attorneys, judges and academics as its members, promotes the objectives of the Delaware State Bar Association within the fields of law governing corporations and alternative entities. The Section, through its governing body, annually reviews Delaware's laws governing corporations and alternative entities and if necessary, recommends amendments to those laws. The Section supports Delaware's initiative to offer confidential arbitrations and seeks to provide the Court with unique insight apart from the parties' that will be relevant to the disposition of the case.

2. Whether a party may participate as *amicus curiae* is a matter of discretion for the Court. *See, e.g., United States v. Alkaabi*, 223 F. Supp. 2d 583, 592 (D.N.J. 2002). Although there are no specific rules in District Court governing *amicus curiae*, the Court may look to the Federal Rules of Appellate Procedure for guidance. *See id.* Under Federal Rule of Appellate Procedure 29(b), a party may "seek leave to appear as *amicus curiae* by motion." Fed. R. App. P. 29(b). The motion must attach the proposed *amicus* brief and state the movant's interest and why the participation of an *amicus* is desirable and relevant to the disposition of the case. *Id.*

3. The Section seeks to participate as *amicus* because, as part of its charge, the Section works to ensure that Delaware's legal regime remains optimal for Delaware's business citizens. In that regard, the benefits Delaware's legal regime provides for its business citizens is significantly enhanced if those citizens have an optimal level of access to the Delaware judiciary, including through attractive alternative dispute resolution ("ADR") programs, such as the confidential arbitrations plaintiff challenges here ("Confidential Arbitrations"). For that reason, for over a decade, Delaware has provided an increasing menu of court-sponsored ADR alternatives for its business constituents, including forms of confidential ADR. Adopted in 2009, Confidential Arbitrations combine the Court of Chancery's expertise and alacrity with the traditional features of ADR that businesses continue to demand, including confidentiality and certain enforceability of an arbitral award in other countries. The combination of Chancery Court expertise with traditional ADR benefits provides an ideal way for Delaware's business citizens to address contract disputes quickly, fairly, and inexpensively and in a way that allows the United States to remain a favored jurisdiction for dispute resolution and entity formation. Much of the benefit of Delaware's legal regime will be lost, however, if

Delaware's business citizens are discouraged from using Delaware's courts to decide disputes that arise under Delaware's laws and instead use ADR programs in other forums, which are increasingly hosted in other countries.

4. If Confidential Arbitrations lose their confidential status, businesses will seek alternative confidential arbitration programs in other forums in order to preserve the value created by confidentiality. That in turn will deprive Delaware's business citizens of a very real benefit—efficient dispute resolution before their preferred expert. Because Confidential Arbitrations work to keep Delaware's legal regime optimal for the business citizens the state serves, the Section supports the initiative.

5. As *amicus curiae*, the Section can expound upon Delaware's long-standing public policy of offering its business citizens attractive ADR options from the perspective of the legal and business interests Confidential Arbitrations were designed to serve. To that end, the Section is uniquely situated to provide the court with insight that will be helpful and relevant to the disposition of the case. Accordingly, the Corporation Law Section respectfully requests this Court to grant its motion for leave to file a short brief, in the form attached hereto as Exhibit A, in support of defendants' motions for judgments on the pleadings.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ S. Mark Hurd
Frederick H. Alexander (#2665)
S. Mark Hurd (#3297)
John P. DiTomo (#4850)
Shannon E. German (#5172)
1201 N. Market Street
P.O. BOX 1347
Wilmington, DE 19899-1347
(302) 658-9200
falexander@mnat.com
shurd@mnat.com
jditomo@mnat.com
sgerman@mnat.com
Attorneys for Amicus Curiae The Corporation Law Section of the Delaware State Bar Association

December 21, 2011

CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2011, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

David L. Finger
FINGER & SLANINA, LLC
One Commerce Center
1201 North Orange Street, 7th Floor
Wilmington, DE 19801-1186

Thomas E. Brown
Ralph K. Durstein, III
Michael F. McTaggart
Deputy Attorneys General
STATE OF DELAWARE
DEPARTMENT OF JUSTICE
820 N. French Street, 6th Floor
Wilmington, DE 19801

Andre G. Bouchard
Joel Friedlander
BOUCHARD MARGULES &
FRIEDLANDER, P.A.
222 Delaware Avenue, Suite 1400
Wilmington, DE 19801

Lawrence A. Hamermesh
Ruby R. Vale Professor of Corporate and
Business Law
WIDENER UNIVERSITY SCHOOL OF LAW
4601 Concord Pike
Wilmington, DE 19801

/s/ Shannon E. German

Shannon E. German (#5172)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DELAWARE COALITION FOR OPEN GOVERNMENT, INC.,	)	
Plaintiff,	)	
v.	)	C.A. No. 11-01015-MAM
THE HON. LEO E. STRINE, JR. THE HON. JOHN W. NOBLE, THE HON. DONALD F. PARSONS, JR., THE HON. J. TRAVIS LASTER, THE HON. SAM GLASSCOCK, III, THE DELAWARE COURT OF CHANCERY, and THE STATE OF DELAWARE,	)	
Defendants.	)	

BRIEF OF *AMICUS CURIAE* THE CORPORATION LAW SECTION OF THE DELAWARE STATE BAR ASSOCIATION IN SUPPORT OF DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS

MORRIS, NICHOLS, ARSHT & TUNNELL LLP
Frederick H. Alexander (#2665)
S. Mark Hurd (#3297)
John P. DiTomo (#4850)
Shannon E. German (#5172)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
Attorneys for Amicus Curiae The Corporation Law Section of the Delaware State Bar Association

December 21, 2011

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

TABLE OF AUTHORITIES (Continued)

Page(s)

RULES AND STATUTES

TABLE OF AUTHORITIES (Continued)

Page(s)

STATEMENT OF INTERESTS

The Corporation Law Section of the Delaware State Bar Association ("Section") submits this brief as *amicus curiae* in support of defendants' motion for judgment on the pleadings.[1] Plaintiff Delaware Coalition for Open Government, Inc. ("DelCOG") seeks, among other things, a declaration that 10 *Del. C.* § 349, and Delaware Court of Chancery Rules 96, 97 and 98, violate the First and Fourteenth Amendments of the U.S. Constitution by authorizing members of the Court of Chancery to arbitrate confidentially certain business disputes ("Confidential Arbitrations").

The Section, which counts more than 500 Delaware attorneys, judges and academics as its members, supports Delaware's initiative to offer Confidential Arbitrations. The Section annually reviews Delaware's laws governing corporations and alternative entities to ensure that Delaware's legal regime remains optimal for Delaware's business citizens.[2] The benefits of that well-developed legal regime are significantly enhanced by businesses having access to the Delaware judiciary, which is renowned for its consistent and prompt resolution of business disputes.[3] Because of Delaware's well-developed business law and expert judiciary,

---

[1] No counsel for any party authored this brief in whole or in part. No counsel, party or person other than amicus and its members made a monetary contribution intended to fund the preparation or submission of the brief. This brief is not submitted on behalf of the Delaware State Bar Association and was authorized by the Council for the Corporation Law Section, the governing body for the Section. The Corporation Law Section's website (http://dsba.org/index.php/sections-of-the-bar/corporation-law.html) contains additional information about the Section, and identifies the Section's officers and members of the Council.

[2] Delaware is the state of incorporation for 63% of Fortune 500 companies and more than 909,000 active businesses. *See* Delaware Division of Corporations, *2010 Annual Report* (Apr. 6, 2011), *available at* http://corp.delaware.gov/10CorpAR.pdf.

[3] Jeff Cunningham, *The Directorship 100*, NACD Directorship (Sept. 19, 2011), *available at* http://www.directorship.com/the-directorship-100-governance-professionals-and-institutions (concluding that "Delaware courts are seen as fair and reasonable with the most efficient

(Continued . . .)

parties frequently select Delaware law to govern their commercial and business relationships, including selecting Delaware as the forum for resolution of their disputes.[4] Much of the benefit will be lost, however, if Delaware's business citizens do not have optimal access to Delaware's courts to decide disputes that arise under Delaware law. Delaware's initiative to provide alternative dispute resolution ("ADR") through the Confidential Arbitrations promotes access by businesses to the expertise of Delaware's Court of Chancery and, accordingly, the Section supports the initiative and urges the Court to grant judgment in favor of the defendants.

BACKGROUND

A. Private And Public Competition In The ADR Market Continues To Grow.

Businesses, frustrated with the costs[5] and delays[6] of traditional litigation, increasingly demand ADR options for resolving their disputes.[7] The desire for alternatives to

---

(. . . continued)

litigation practices, and their influence on corporate governance matters rivals that of the SEC or Congress"); William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 Bus. Law. 351, 354 (1992) ("The Delaware state court system has established its national preeminence in the field of corporation law due in large measure to its Court of Chancery.").

[4] *See* Matthew D. Cain & Steven M. Davidoff, *Delaware's Competitive Reach: An Empirical Analysis of Public Company Merger Agreements*, at 4 (Aug. 18, 2009) (unpublished manuscript), *available at* http://ssrn.com/abstract=1431625 (study of 1,020 public company merger agreements shows that from 2004-2008, approximately 66.4% of agreements select Delaware for their governing law and 60% of agreements select Delaware as their choice of forum).

[5] Frank Aquila, *Taming the Litigation Beast*, Bus. Wk., Apr. 6, 2010 ("each year litigation, and the threat of litigation, adds trillions in costs to businesses large and small"). *See also* Fulbright & Jaworski LLP, *Litigation Trends Survey: A Little Less Litigation; More Regulation* (Oct. 18, 2011) ("Fulbright Survey"), *available at* http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9902&site_id=286 (A 2011 survey of U.S. companies reports that "Nearly one-quarter of American businesses polled reported that their annual spend on disputes is $5 million or higher."); National Arbitration Forum, *Business-to-Business Mediation/Arbitration vs. Litigation*, at 2 (Jan. 2005), *available at* http://www.adrforum.com/users/naf/resources/

(Continued . . .)

litigation has led to robust competition among private and public ADR service providers, both nationally and internationally. By way of example, the overall caseload of the American Arbitration Association alone grew from approximately 1000 cases in 1960 to 15,800 in 2003.[8] Similarly, the International Court of Arbitration of the International Chamber of Commerce, the largest and oldest body involved with international arbitration,[9] notes that in the first 53 years of the Court's existence, from 1923 to 1975, there were 2,978 requests for arbitration. In the next eleven years, from 1976 to 1987 more than 6,000 requests were filed, and the number grew to 11,362 between 1987 and 2001.[10] These trends continue today.[11]

In recognition of the increasing demand for ADR options, court-annexed ADR has become common in federal and state courts in the United States, and in foreign countries.[12]

(. . . continued)

GeneralCommercialWP.pdf ("a reasonable expectation is that the cost of arbitration will not be in excess of half the cost of litigating").

6 *See* ABA Section of Litigation Task Force on ADR Effectiveness, *Survey on Arbitration*, at 4 (Aug. 2003), *available at* http://apps.americanbar.org/litigation/taskforces/adr/surveyreport.pdf (78% of respondents viewed arbitration to be timelier than litigation).

7 Throughout the 1980s and 1990s a significant percentage of Fortune 500 corporations signed a pledge to explore ADR before resorting to litigation in any controversy with another signer of the pledge. *See* John Lande, *Getting the Faith: Why Business Lawyers and Executives Believe in Mediation*, 5 Harv. Negotiation L. Rev. 137, 144 (2000).

8 Theodore Eiseneberg and Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*, 56 DePaul L. Rev. 335, 346 (2007).

9 Michael Pryles, *The Growth Of International Arbitration, available at* http://www.ag.gov.au/agd/www/rwpattach.nsf/viewasattachmentPersonal/0417185A03AF31B7CA256C8A00025187/$file/GrowthINtArb.pdf.

10 *Id.*

11 *See* http://www.iccwbo.org/court/arbitration/index.html?id=41190.

12 Other countries are embracing court-annexed ADR. The civil justice reform program adopted in the United Kingdom, for example, adopts ADR as a key element. *See* Loukas

(Continued . . .)

The Alternative Dispute Resolution Act of 1998, for example, requires federal district courts to "devise and implement" procedures for using ADR in all civil cases. As observed by the United States Congress:

> [A]lternative dispute resolution, when supported by the bench and bar, and utilizing properly trained neutrals in a program adequately administered by the court, has the potential to provide a variety of benefits, including greater satisfaction of the parties, innovative methods of resolving disputes, and greater efficiency in achieving settlements.[13]

The ADR Act of 1998 identifies magistrate judges as qualified arbitrators, and requires that the proceedings be kept confidential.[14] All 50 states have implemented court rules providing for some form of ADR,[15] and many jurisdictions have made ADR mandatory.[16] The ADR procedures offered by courts outside of Delaware have expanded to include a variety of other ADR methods, "including med-arb, the mini-trial, the summary jury trial, early neutral evaluation, case valuation, and the settlement conference."[17]

(. . . continued)

Mistelis, *ADR in England and Wales: A Successful Case of Public Private Partnership*, 6 ADR Bulletin No. 3, Article 6 (2003), *available at* epublications.bond.edu.au/cgi/viewcontent.cgi?article=1244...adr.

[13] Alternative Dispute Resolution Act of 1998, 28 USC §§ 651-658 (2006), *amended by* Pub. L. 105-315, Sec. 2, Oct. 30, 1998, 112 Stat. 2993.

[14] *See* 28 U.S.C. §§ 651(a), 652(d) (2006).

[15] Mary Dunnewold, *What Every Law Student Should Know*, 38 Student Lawyer 2 (Oct. 2009); *see also* State Court Rules For ADR Programs (compiling list), *available at* http://www.ilr.cornell.edu/alliance/resources/Legal/state_court_rules_adr.html.

[16] *Id.*

[17] Eric Ordway, *The Increasing Use of ADR by Federal and State Courts*, Metropolitan Corporate Counsel (Aug. 1998).

B. Confidentiality Is Essential To ADR.

Given the complex inter-relationships of today's business entities, they place a premium on avoiding the public airing of disputes that may result in reputational harm or undermine the prospects for future business dealings.[18] Accordingly, "confidentiality is generally considered a bedrock principle for most ADR procedures."[19]

Arbitration rules reflect this demand for confidentiality. The American Arbitration Association ("AAA") Commercial Rules, for example, provide that "[t]he arbitrator and the AAA shall maintain the privacy of the hearings" and that the arbitrator has the authority to exclude any person from the arbitration proceedings who is not essential to the proceedings.[20] Likewise, the AAA's International Arbitration Rules ("IAR") require that "[c]onfidential information disclosed during the proceedings . . . shall not be divulged by an arbitrator or by the [AAA]" and that the arbitration tribunal or the AAA must keep confidential all matters relating to the arbitration or the award.[21] Arbitration hearings under the AAA's International rules also "are private unless the parties agree otherwise or the law provides to the contrary."[22] The Arbitration Rules of the London Court of International Arbitration similarly provide for

---

[18] *See* Randy J. Aliment, *Alternative Dispute Resolution in International Business Transactions*, The Metropolitan Corporate Counsel 26 (Nov. 17, 2009) ("[T]he confidential nature of arbitration may take at least some of the sting out of a public business conflict."); White & Case, *2010 International Arbitration Survey: Choices In International Arbitration*, (2010), *available at* http://www.whitecase.com/press-10052010/ (reporting 62% of respondents said confidentiality is "very important" to them in international arbitration and 24% said confidentiality was "quite important").

[19] *See* Robert J. Niemic et al., *Guide to Judicial Management of Cases in ADR*, at 93-94 (2001), *available at* http://www.fjc.gov/public/pdf.nsf/lookup/ADRGuide.pdf/$file/ADRGuide.pdf.

[20] AAA, Commercial Arbitration Rules, R-23.

[21] AAA International Rules, Art. 34.

[22] *Id.* at Art. 20(4).

confidentiality of arbitrations and require the parties to keep confidential "proceedings created for the purpose of the arbitration and all other documents produced by another party in the proceedings not otherwise in the public domain."[23]

C. Arbitration Awards Are Preferred In International Disputes.

A critical advantage of arbitrations is that arbitral awards are enforced more easily than a foreign judgment. There is no bilateral treaty or multilateral international convention in force between the United States and any other country on reciprocal recognition and enforcement of judgments.[24] Thus, whether the courts of a foreign country would enforce a judgment issued by a court in the United States depends entirely upon the internal laws of the foreign country and international comity, which in turn creates a great deal of uncertainty.

In contrast, over 140 countries are signatories to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention"), including the U.S. and all of its major trading partners.[25] Under the New York Convention, signatories agree to give effect to an arbitration agreement and enforce an arbitral award made in

---

[23] London Court of International Arbitration, Rules, Art. 30.1. Moreover, English courts generally recognize that arbitrations are confidential. *See, e.g.*, Frank H. Menaker, Jr., Stephen E. Smith, Louis B. Kimmelman, Claudia E. Ray, and Dana C. MacGrath, *Successful Partnering Between Inside and Outside Counsel*, § 58.26 (Apr. 2011). In fact, "[a] duty of confidentiality is implied in every arbitration agreement." *Id*. at n.2 (*citing Dolling-Baker v. Merrett*, 2 All E.R. 891 (A.C. 1991) (holding that there is an implied duty of confidentiality on the parties to arbitration), and *Ali Shipping Corp. v. Shipyard Trogir*, 2 All E.R. 136 (A.C. 1998)).

[24] *Enforcement of Judgments*, http://travel.state.gov/ law/judicial/judicial_691.html (last visited Dec. 20, 2011); *see also* Samuel P. Baumgartner, *How Well Do U.S. Judgments Fair in Europe?*, 40 Geo. Wash. Int'l L. Rev. 173-231 (2008).

[25] *See* United Nations Conference on International Commercial Arbitration, "Status: 1958 – Convention on the Recognition and Enforcement of Foreign Arbitral Awards," *available at* http://www.uncitral.org/.

any signatory country, except in limited circumstances.[26] For this reason, arbitration is a preferred means for resolving business disputes between global businesses. A 2006 study revealed that 73 percent of global corporations surveyed preferred to use international arbitration rather than transnational litigation to resolve cross-border disputes.[27] Two years later, 86 percent of the corporations surveyed indicated that they were satisfied with international arbitration.[28] For businesses that transact business internationally, as is true for many Delaware entities, the increased certainty of the enforceability of Confidential Arbitrations is a significant benefit.

D. To Meet The Evolving Needs Of Its Business Citizens, Delaware Has Provided An Increasing Menu Of ADR Options.

Neither ADR nor confidential ADR is new to Delaware. In 1998, the Delaware Court of Chancery adopted Rule 174 providing mediation in any case pending before the Court of Chancery.[29] The Rule provides litigants with "convenient access to dispute resolution

---

[26] *See* United Nations Conference on International Commercial Arbitration, Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art. III (1958) ("Each Contracting State shall recognize arbitral awards as binding and enforce them in accordance with the rules of procedure of the territory where the award is relied upon, under the conditions laid down in the following articles."); *see also id*. at Arts III, V.

[27] School of International Arbitration, Queen Mary, University of London, University of London, *International Arbitration Study: Corporate Attitudes and Practices*, (2006), *available at* http://www.arbitrationonline.org/research/Corpattitempirical/ index.html.

[28] School of International Arbitration, Queen Mary, University of London, *Corporate Attitudes and Practices: Recognition and Enforcement of Foreign Awards*, (2008), *available at* http://www.arbitrationonline.org/ research/Corpattitempirical/2008.html.

[29] The Delaware Superior Court also has offered ADR for business and commercial disputes, including mandatory ADR where the amount in controversy is less than $100,000 or where the Court has designated a case for mandatory mediation. Del. Super. Ct. R. 16. The Superior Court's ADR offerings are part of that court's efforts to accommodate business litigants, recognizing that "it is the legal system's responsibility to seek the most agreeable solution for both parties" and that the legal system should "provide mechanisms that can produce an acceptable result in the shortest possible time with the least possible expense and with a minimum of stress on the participants." Delaware Superior Court, *Alternative Dispute Resolution,* http://courts.delaware.gov/Superior/ADR/index.stm (last visited Dec. 20, 2011).

(Continued . . .)

proceedings that are fair, confidential, effective, inexpensive, and expeditious."[30] In Rule 174 mediations, the judge presiding over a case may, with the consent of the parties, refer the entire case or a particular issue for voluntary mediation before any other judge or master of the Court of Chancery or to any other person if agreed upon by the parties. Mediations pursuant to Rule 174 are confidential.[31]

In 2003, the Delaware General Assembly enacted title 10, sections 346 and 347 of the Delaware Code, which empowered the Court of Chancery to conduct mediations concerning certain technology[32] and business disputes without a party first having to bring litigation ("Mediation-Only Program"). Parties can avail themselves of the Mediation-Only Program if (1) the parties have an agreement to mediate their disputes in the Court of Chancery, (2) at least

---

(. . . continued)

"The Superior Court has adopted rules and procedures specifically designed to allow major commercial litigation to be resolved expeditiously and cost effectively." Delaware Superior Court, *Summary Proceedings For Commercial Disputes*, http://courts.delaware.gov/Superior/ADR/summary_proc.stm (last visited Dec. 20, 2011). These rules provide that an experienced judge will preside over such proceedings. *Id.* Thus, the Delaware Superior Court's approach to dispute resolution for commercial disputes mirrors that of the Court of Chancery.

30 Del. Ct. Ch. R. 174.

31 Del. Ct. Ch. R. 174; *TCMP3 Ptnrs. LLP v. Centerpoint Corp.*, 2006 Del. Ch. LEXIS 90 (Del. Ch. May 10, 2006).

32 A "technology" dispute arising out of an agreement relating primarily to: the purchase or lease of computer hardware; the development, use, licensing or transfer of computer software; information, biological, pharmaceutical, agricultural or other technology of a complex or scientific nature that has commercial value, or the intellectual property rights pertaining thereto; the creation or operation of Internet web sites; rights or electronic access to electronic, digital or similar information; or support or maintenance of the above. The term does not include a dispute arising out of an agreement (i) that is primarily a financing transaction, or (ii) merely because the parties' agreement is formed by, or contemplates that communications about the transaction will be by the transmission of electronic, digital or similar information. 10 *Del. C.* § 346(c).

$1 million is at stake, and (3) one of the parties is a Delaware business entity.[33] The Synopsis to the bill enacting sections 346 and 347 explains that technology disputes often involve "important commercial relationships" that require "a rapid decision on issues of great complexity" and mediation is beneficial for technology businesses that wish to have their disputes "resolved in a less expensive and litigious way."[34]

Apart from technology disputes, the Synopsis explains that the Delaware legislature "intended to encourage the Court of Chancery to include complex corporate and business disputes . . . within the ambit of the business dispute mediation rules"[35] and conferred upon the Court broad "rule-making authority" to give effect to that intent. The Synopsis also explains that the Delaware legislature enacted sections 346 and 347 because:

> Delaware wishes to remain preeminent in its ability to meet the needs of its business community . . . by providing a new type of service to Delaware businesses, at a time when businesses are more interested than ever in cost-effective and confidential methods to resolve litigable controversies consensually.[36]

Together, sections 346 and 347 permit parties to "request mediation in order to resolve high-stakes, complex business disputes" and "the Court would be asked to assist parties in reaching voluntary settlements of business disputes." Mediations pursuant to sections 346 and 347 are

---

[33] 10 *Del. C.* §§ 346(a), 347.

[34] Synopsis, 2003 Del. Laws Ch. 36 (formerly Senate Bill No. 58 of the 142nd General Assembly (2003)).

[35] *Id.*

[36] *Id.*

"confidential and not of public record." From 2004 to 2008, Chancery mediations had a success rate exceeding 70 percent.[37]

In 2009, the Delaware legislature authorized Confidential Arbitrations.[38] Under 10 *Del. C.* § 349, parties may voluntarily agree to have a member of the Court of Chancery arbitrate a dispute if they meet the pre-existing requirements for using the confidential mediation provisions. The Synopsis for the bill enacting section 349 explains that, consistent with Delaware's earlier ADR programs, Confidential Arbitrations are intended to provide "cost-effective options for resolving disputes, particularly those involving commercial, corporate, and technology matters."[39] Parties may not be compelled to participate in Confidential Arbitrations without their consent, and consumer disputes are specifically excluded.

---

[37] Donald F. Parsons Jr. & Joseph R. Slights III, *The History of Delaware's Business Courts: Their Rise To Preeminence*, 17 Business Law Today No. 4 (Mar./Apr. 2008).

[38] The Delaware Superior Court also may mediate or arbitrate business disputes. *See* 10 *Del. C.* § 546. Arbitrations and mediations pursuant to section 546 are "considered confidential and not of public record." *Id.* §§ 546(b), (c).

[39] Synopsis, 2009 Del. Laws Ch. 8 (formerly House Bill No. 49 of the 145th General Assembly (2009)).

ARGUMENT

I. CONFIDENTIAL ARBITRATIONS PROVIDE AN OPTIMAL SOLUTION FOR RESOLVING BUSINESS DISPUTES UNDER DELAWARE LAW.

Confidential Arbitrations offer businesses an ADR option that combines the Court of Chancery's expertise and alacrity with the traditional features of ADR that businesses continue to demand. This combination of Chancery Court expertise with ADR benefits provides an ideal way to address contract disputes of Delaware's business citizens. In a recent survey, corporate counsel identified contract disputes "at the top of the list"[40] in terms of frequency, and the Court of Chancery has extensive experience in resolving such matters.[41] The costs of Confidential Arbitration are attractive when compared to litigation, and its procedures contemplate a prompt resolution within "90 days following receipt of the petition."[42] Confidential Arbitration procedures also are flexible, permitting parties to design them to be less adversarial, which in turn may help resolve disputes that arise in the context of broader, ongoing

---

[40] Fulbright & Jaworski LLP, *Litigation Trends Survey: A Little Less Litigation; More Regulation* (Oct. 18, 2011) ("Fulbright Survey"), *available at* http://www.fulbright.com/index.cfm?fuseaction=news.detail&article_id=9902&site_id=286.

[41] *See, e.g.*, *Pharmathene, Inc. v. Siga Technologies, Inc.*, 2011 WL 4390726 (Del. Ch., Sept. 22, 2011) (enforcing the implied obligation to negotiate in good faith); *WaveDivision Holdings, LLC v. Millennium Digital Media Systems, L.L.*C, 2010 WL 3706624 (Del. Ch. Sept. 17, 2010) (awarding damages for breach of a non-solicitation clause); *Hexion Specialty Chems., Inc. v. Huntsman Corp.*, 965 A.2d 715, 739 (Del. Ch. 2008) (interpreting material adverse effect and reasonable best efforts clauses); *United Rentals, Inc. v. RAM Hldgs., Inc.*, 937 A.2d 810, 830 (Del. Ch. 2007) (interpreting merger agreement and specific performance clause); *FleetBoston Financial Corp. v. Advanta Corp.*, 2003 WL 240885 (Del. Ch. Jan. 22, 2003) (finding that the failure to disclose known miscoding problems prior to a major financial service provider's acquisition of a consumer credit card business violated duties under contract and tort law); *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14 (Del. Ch. 2001) (enforcing a merger agreement and related contracts between two of the nation's leading distributors of meat products).

[42] Del. Ch. Ct. R. 97(e).

relationships more amicably than litigation.[43] In addition, appeal of an arbitration award may be waived by agreement of the parties, and if not waived, appeals are confined to the bases provided under the Federal Arbitration Act.[44]

Thus, Confidential Arbitration allows Delaware business entities (and their counter parties) to choose, in advance, to resolve disputes through a process with all the traditional advantages of arbitration—confidentiality, international enforceability, and reduced costs. At the same time, they can take advantage of one of the chief benefits of choosing Delaware as a jurisdiction of formation—the speed and expertise of the Delaware judiciary. This combination of benefits provides value to the contracting parties because of the increased confidence that disputes can be resolved quickly, fairly, and inexpensively, and does so in a way that allows a United States jurisdiction to remain favored for entity formation and dispute resolution.

---

[43] *U.S. Corporations Now Widely Use Alternative Dispute Resolution over Litigation to Solve Disputes*, Cornell Business News, May 21, 1997, *available at* http://www.news.cornell.edu/releases/May97/ADRstudy.html (59% of respondents to a 1997 survey of 530 of the Fortune 1,000 companies said ADR "preserves good relationships"); *see also* Eric M. Runesson and Marie-Laurence Guy, *Forward to Mediating Corporate Governance Conflicts and Disputes*, International Finance Corporation, at 5-8 (2007), *available at* http://www.ifc.org/ifcext/cgf.nsf/AttachmentsByTitle/Focus+Mediation/$FILE/Focus4_Mediation_12.pdf (ADR mechanisms as a management tool can help resolve disputes efficiently and effectively, thereby preserving relationships with important stakeholders); Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, 24 J. Legal Stud. 1, 5-6 (1995) (ADR "may induce a change in behavior that benefits both parties by increasing the joint value that their relationship produces").

[44] Under the Federal Arbitration Act, U.S. District Courts may vacate an arbitration award only if: (i) the award was procured by corruption, fraud, or undue means; (ii) there was evident partiality or corruption in the arbitrators; (iii) the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy, or of any other misbehavior by which the rights of any party have been prejudiced; or (iv) the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made. 9 U.S.C. § 10(a) (2006).

II. BECAUSE BUSINESSES PLACE A PREMIUM ON CONFIDENTIALITY WHEN RESOLVING THEIR DISPUTES, THE ABSENCE OF CONFIDENTIALITY WILL CAUSE THEM TO CHOOSE ARBITRATION SERVICES OFFERED IN OTHER FORUMS.

As noted, *see supra* pp. 5-6, businesses value confidentiality in the resolution of their disputes. If Confidential Arbitrations lose their confidential status, businesses will seek alternative confidential arbitration programs in order to preserve the value created by confidentiality. This outcome will deprive Delaware's business citizens of a very real benefit—efficient dispute resolution before their preferred expert. Moreover, as the incidence of disputes between global businesses continues to rise, forums chosen for arbitration may be increasingly located overseas.[45]

As a consequence, a decision granting DelCOG the relief it seeks will not result in public access to Delaware's Confidential Arbitrations. Instead, local and national interests will be harmed and major business enterprises will lose the ability to resolve business disputes efficiently and cost effectively in their preferred forum. In the event of such a decision, businesses that wish to take advantage of Delaware's Confidential Arbitrations will be discouraged from doing so, and businesses that already have included a provision for Confidential Arbitration in their contracts will be stripped of the benefit of their bargain.

---

[45] *See, e.g.*, Thomas J. Stipanowich, *Arbitration: The "New Litigation,"* 2010 U. Ill. L. Rev. 1, 6 n.22 (2010) (citing a 2006 survey of international corporate counsel suggesting that companies expect to continue using arbitration as a preferred method of international dispute resolution, and that the expansion of international trade will produce a commensurate increase in the volume of arbitration).

CONCLUSION

Without confidentiality, Delaware arbitrations will be used by significantly fewer entities with national and international business relationships. Delaware entities will be discouraged from availing themselves of the expertise of the Court of Chancery to resolve many disputes, access to which is a substantial benefit of choosing Delaware. Without the benefit of confidentiality, entities are more likely to choose non-Delaware, non-U.S. venues to resolve their commercial disputes and as their jurisdiction of formation. Accordingly, the Corporation Law Section respectfully urges the Court grant judgment in favor of defendants.

MORRIS, NICHOLS, ARSHT & TUNNELL LLP

/s/ S. Mark Hurd

Frederick H. Alexander (#2665)
S. Mark Hurd (#3297)
John P. DiTomo (#4850)
Shannon E. German (#5172)
1201 N. Market Street
P.O. Box 1347
Wilmington, DE 19899-1347
(302) 658-9200
falexander@mnat.com
shurd@mnat.com
jditomo@mnat.com
sgerman@mnat.com
Attorneys for Amicus Curiae The Corporation Law Section of the Delaware State Bar Association

December 21, 2011