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.	)	

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION FOR JUDGMENT ON THE PLEADINGS AND IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR JUDGMENT ON THE PLEADINGS

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NATURE AND STAGE OF THE PROCEEDINGS

On October 25, 2011, plaintiff Delaware Coalition for Open Government, Inc. ("DelCOG") initiated this action against the State of Delaware, the Delaware Court of Chancery and its five judges: Chancellor Leo E. Strine, Jr. and Vice Chancellors John W. Noble, Donald F. Parsons, Jr., J. Travis Laster and Sam Glasscock, III. The action challenges the constitutionality of 10 *Del. C.* § 349 and related Chancery Court Rules 96, 97, and 98.

On November 16, 2011, the defendants filed Answers to the Complaint. On November 30, 2011, the Court entered a stipulated scheduling Order, setting briefing an oral argument on an anticipated motion for judgment on the pleadings.

On December 16, 2011, defendants filed a joint motion for judgment on the pleading and a supporting opening brief.

On December 27, 2011, the Court entered an Order granting the motion of The Corporation Law Section of the Delaware State Bar Association to submit a brief as *amicus curiae* in support of defendants' motion for judgment on the pleadings.

On January 9, 2012, DelCOG filed a cross-motion for judgment on the pleadings. This is DelCOG's brief in support of its cross-motion and in opposition to defendants' motion for judgment on the pleadings.

SUMMARY OF ARGUMENT

1. Denied. Defendants have misinterpreted the law as to DelCOG's pleading obligations. There is no obligation to plead a history of access. In any event, DelCOG's Complaint alleges that (i) there is an established First Amendment right of public access to civil judicial proceedings (Complaint ¶18), and (ii) the challenged procedure is effectively a civil judicial proceeding. (Complaint ¶19). Where the "arbitrator" is not privately retained and the fee is paid into a court, where the arbitrator conducts the proceeding in a government courthouse on government time (and government salary) pursuant to procedure set forth in court rules, and where the arbitrator is a judicial officer acting pursuant to power granted by the State (and not merely by private contract) and presiding over a proceeding that resembles a bench trial, where the arbitrator functions as a judge, deciding the facts and applicable law affecting the substantive legal rights of the parties, and where the arbitral award is legally effective and enforceable without bringing an action to confirm it, then it is not an arbitration, but a trial – a judicial procedure. Calling it "arbitration" elevates form over substance.

2. Denied.

a. Defendants have not provided any evidence of non-public court-adjunct arbitration conducted by sitting judges, even under the recently enacted Alternative Dispute Resolution Act of 1998 (the "ADR Act") (which, unlike the Delaware statute, provides for trial *de novo* upon demand of any party, 28 U.S.C. §657(c)). To the contrary, the evidence indicates that both before and after adoption of the ADR Act, District Courts have used non-judicial personnel for court-adjunct arbitration. As the proceeding under the Delaware statute is analogous to a civil bench trial, that history of openness of civil trials satisfies the "experience" test.

b. As confidentiality is already available in private non-judicial mediation, that is not a compelling overriding interest justifying secrecy. Further, the State's interest in generating tax and related revenue by creating secret judicial arbitration as a vehicle to further market Delaware as an attractive place to incorporate is insufficient to overcome the public's right of access to judicial proceedings under the First Amendment. The fact that the State of Delaware and private business interests may want secret judicial proceedings is not enough to make them constitutional.

c. In a First Amendment challenge to secret court proceedings, no deference is accorded to the decision of the Legislature.

d. The individual defendants, being state judges who administer the secret arbitration program, are state actors.

3. Admitted. DelCOG concedes that the State of Delaware and the Court of Chancery should be dismissed from this action.

STATEMENT OF FACTS

A. PARTIES.

DelCOG is a non-profit corporation duly organized and existing under the laws of the State of Delaware. DelCOG is dedicated to promoting and defending the people's right to transparency and accountability in government. (Compl. ¶1).

The Hon. Leo E. Strine, Jr. is the Chancellor of the Court of Chancery of the State of Delaware, whose duties include administering the statute challenged in this action. (Compl. ¶2). The Hons. John W. Noble, Donald F. Parsons, J. Travis Laster and Sam Glasscock, III, are Vice Chancellors of the Court of Chancery of the State of Delaware, whose duties also include administering the statute challenged in this action. (Compl. ¶¶3-6).

The Delaware Court of Chancery is a judicial institution of the State of Delaware existing pursuant to Article IV of the Constitution of the State of Delaware and Chapter 3 of Title 10 of the Delaware Code. (Compl. ¶7).

The State of Delaware is a State of the United States of America. (Compl. ¶8).

B. BACKGROUND FACTS.

In or around April, 2009, the State of Delaware adopted 10 *Del. C.* §349, which states that:

> (a) The Court of Chancery shall have the power to arbitrate business disputes when the parties request a member of the Court of Chancery, or such other person as may be authorized under rules of the Court, to arbitrate a dispute. For a dispute to be eligible for arbitration under this section, the eligibility criteria set forth in § 347(a) and (b) of this title must be satisfied, except that the parties must have consented to arbitration rather than mediation.
>
> (b) Arbitration proceedings shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed

> by the parties with the Supreme Court in accordance with its rules, and to the extent applicable, the rules of the Court of Chancery.
>
> (c) Any application to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding under this section shall be filed with the Supreme Court of this State, which shall exercise its authority in conformity with the Federal Arbitration Act, and such general principles of law and equity as are not inconsistent with that Act.

(Compl. ¶12).

In furtherance of 10 *Del. C.* §349, the defendants adopted Chancery Court Rules 96, 97 and 98 on or about January 5, 2010.[1] Pursuant to Rule 96(d)(1), arbitration is defined as "the voluntary submission of a dispute to an Arbitrator for final and binding determination…." Pursuant to Rule 96(d)(2), an "Arbitrator" is defined as "a judge or master sitting permanently in the Court." Pursuant to Rule 96(d), an "Arbitration hearing" is "a proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as the parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case." (Compl. ¶13).

Pursuant to Chancery Court Rule 97(a)(4), "[t]he Register in Chancery will not include the petition [initiating the Arbitration] as part of the public docketing system. The petition and any supporting documents are considered confidential and not public record until such time, if any, as the proceedings are the subject of an appeal." (Compl. ¶14).

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[1] For the convenience of the Court, the relevant Chancery Court Rules are appended hereto as Exhibit A.

Pursuant to Chancery Court Rule 98(b), "Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise…Any communication made in or in connection with the Arbitration that relates to any controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential." (Compl. ¶15).

In late September, 2011, Advanced Analogic Technologies, Inc. disclosed publicly that it had initiated proceedings under the above-referenced statute and rules against Skyworks Solutions, Inc. Such action amounts to a secret judicial proceeding. (Compl. ¶18).

ARGUMENT

I. LEGAL STANDARDS ON CROSS-MOTIONS FOR JUDGMENT ON THE PLEADINGS.

A plaintiff is only required to plead a short statement of facts. A plaintiff is not required to give an exposition of legal argument. *Skinner v. Switzer*, 131 S.Ct. 1289, 1296 (2011).[2]

On a motion for judgment on the pleadings based on the defense that DelCOG has failed to state a claim, the Court must accept as true all of the factual allegations and construe all reasonable inferences in favor of DelCOG. *Revell v. Port Authority of New York, New Jersey*, 598 F.3d 128, 134 (3rd Cir. 2011). On such a motion, the Court may also consider matters that are properly the

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[2] Defendants argue that the Complaint is inadequate because DelCOG supposedly was required to plead the historical basis for a First Amendment right of access in this case. (Opening Brief 2, 13-14, citing *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3rd Cir. 1986)). In that case, however, the Opinion of the Court was approved by five judges, with five other judges dissenting. The tie-breaking vote in favor of the majority came in a concurring opinion by Judge Adams, who wrote: "I do not understand the Court's decision on this issue to be based solely upon a failure of *pleading* a tradition of access, as both Judges Garth and Gibbons suggest in their dissenting opinions. Even under this Court's heightened specificity requirement in civil rights complaints, the mere failure to plead a history of access would not merit dismissal of an otherwise adequate complaint." *Id.* at 1178 (Adams, J., concurring) (citation omitted, italics in original). As such, the majority of judges in that decision did not require pleading the legal argument regarding access, including the history.

It is also important to note that, subsequently, the Supreme Court disapproved a heightened pleading requirement for civil rights cases. *See Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) ("[w]e think that it is impossible to square the 'heightened pleading standard' ... with the liberal system of 'notice pleading' set up by the Federal Rules [of Civil Procedure]."); *Abbott v. Latshaw,* 164 F.3d 141, 148 (3d Cir.1998) (recognizing that *Leatherman* mandates the acceptance of a civil rights complaint that meets the standards for notice pleading); *West Penn Allegheny Health System, Inc. v. UPMC*, 627 F.3d 85, 98 (3rd Cir. 2010).

In any event, the Complaint alleges that the secret judicial arbitration challenged here is the functional equivalent of a civil trial, and that there is an established right of public access to civil trials under the First Amendment. (Complaint ¶¶18-19). This is unlike *Capital Cities Media*, which dealt with access to records of an administrative agency not acting in a judicial capacity, the right to which had not been established. 797 F.2d at 1174.

subject of judicial notice. *E.g., Oran v. Stafford*, 226 F.3d 275, 289 (3rd Cir. 2000); *Southmark Prime Plus, L.P. v. Falzone*, 776 F.Supp. 888, 891-92 (D. Del. 1998). In that regard, the Court may take judicial notice of information contained in government web sites (a number of which are cited to herein). *See Kos Pharmaceuticals, Inc. v. Andrx Corp.,* 369 F.3d 700, 705 n.5 (3d Cir. 2004); *Denius v. Dunlap*, 330 F.3d 919, 926 (7th Cir. 2003).

On cross-motions for summary judgment, the Court must determine whether any of the parties deserves judgment as a matter of law on facts that are not disputed. *Barnes v. Fleet Nat'l Bank, N.A.,* 370 F.3d 164, 170 (1st Cir. 2004).

To state a claim under 28 U.S.C. §1983, DelCOG must "allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by a person acting under color of state law." *Revell*, 598 F.3d at 134 (quoting *West v. Atkins*, 487 U.S. 42, 48 (1988)). As demonstrated below, DelCOG has easily satisfied that test.

II. THE DELAWARE STATUTE VIOLATES THE PUBLIC'S RIGHT OF ACCESS TO JUDICIAL PROCEEDINGS SECURED BY THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.[3]

A. THE ORIGIN OF, AND RATIONALE FOR, THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS TO JUDICIAL PROCEEDINGS.

The United States Supreme Court first recognized that the First Amendment grants to the public a right to attend and observe judicial proceedings in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980). Although there was no majority opinion, seven of the eight participating

[3] As a member of the general public, DelCOG has standing to challenge government action interfering with the First Amendment right of public access to judicial proceedings. *New York Civil Liberties Union v. New York City Transit Authority*, ___F.3d ___, 2012 WL 10972, WL Op. at *6-7 (2nd Cir. Jan. 4, 2012) (Ex. B hereto); *Bond v. Utreras*, 693 F.3d 1061, 1073 (7th Cir. 2009); *Brown v. Advantage Engineering, Inc.*, 960 F.2d 1013, 1016 (11th Cir. 1992).

Justices recognized that, at least in criminal proceedings, there was a long history of public access to judicial proceedings, and that public access promote public confidence in the judicial branch of government and understanding of how the system works. *Id.* at 564-581.[4] *See also New York Civil Liberties Union*, WL Op. at *8 n.6.

The First Amendment right of public access to judicial proceedings was re-affirmed by a clear majority of the Supreme Court in *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596 (1982). The Court, in declaring unconstitutional a statute withdrawing public access to a part of criminal trials involving minors, explained its rationale as follows:

> the right of access to criminal trials plays a particularly significant role in the functioning of the judicial process and the government as a whole. Public scrutiny of a criminal trial enhances the quality and safeguards the integrity of the factfinding process, with benefits to both the defendant and to society as a whole. Moreover, public access to the criminal trial fosters an appearance of fairness, thereby heightening public respect for the judicial process. And in the broadest terms, public access to criminal trials permits the public to participate in and serve as a check upon the judicial process – an essential component in our structure of self-government.

Id. at 606.

Two years later the Supreme Court again reaffirmed the principle in *Press-Enterprise Co. v. Superior Court,* 464 U.S. 501 (1984) ("*Press-Enterprise I*"). In holding that the public's right of access extends to pre-trial criminal judicial proceedings, the Court stated:

> The open trial thus plays as important a role in the administration of justice today as it did for centuries before our separation from England. The value of openness lies in the fact that people not actually attending trials can have confidence that standards of fairness are being observed; the sure knowledge that *anyone* is free to attend gives assurance that established procedures are being followed and that

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[4] Prior to *Richmond Newspapers, Inc.*, a majority of Justices writing in concurring or dissenting opinions recognized a qualified constitutional right of public access to judicial proceedings in *Gannett Co. v. DePasquale*, 443 U.S. 368 (1979).

> deviations will become known. Openness thus enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system.
>
> This openness has what is sometimes described as a "community therapeutic value." Criminal acts, especially violent crimes, often provoke public concern, even outrage and hostility; this in turn generates a community urge to retaliate and desire to have justice done. Whether this is viewed as retribution or otherwise is irrelevant. When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided for these understandable reactions and emotions. Proceedings held in secret would deny this outlet and frustrate the broad public interest; by contrast, public proceedings vindicate the concerns of the victims and the community in knowing that offenders are being brought to account for their criminal conduct by jurors fairly and openly selected.

Id. at 508 (citations omitted, italics in original). *See also Press-Enterprise Co. v. Superior Court*, 478 U.S. 1 (1986) (right of public access extends to preliminary proceedings) ("*Press-Enterprise II*"); *Presley v. Georgia*, 130 S.Ct. 721, 723-24 (2010).

B. THE RIGHT OF PUBLIC ACCESS EXTENDS TO CIVIL PROCEEDINGS.

Although the Supreme Court has not expressly ruled on the application of the right of access to civil proceedings, a footnote in the Opinion of the Court in *Richmond Newspapers* states that "[w]hether the public has a right to attend trials of civil cases is a question not raised by this case, but we note that historically both civil and criminal cases have been presumptively open." 448 U.S. at 580 n.17.

Subsequently, numerous lower courts have found that the right applies in the civil context. Most relevant here, in *Publicker Industries, Inc. v. Cohen,*733 F.2d 1059 (3rd Cir. 1984), in the context of a corporate governance dispute, the Third Circuit held that the First Amendment right of public access applies equally to civil cases. The Third Circuit found a history of public access to civil proceedings and concluded:

The explanation for and the importance of this public right of access to civil trials is that it is inherent in the nature of our democratic form of government. Thus, Justice Oliver Wendell Holmes, when he served as a justice on the Massachusetts Supreme Court, declared that public access to civil judicial proceedings was "of vast importance" because of "the security which publicity gives for the proper administration of justice." "It is desirable that the trial of [civil] causes should take place under the public eye," Holmes continued,

> not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.

Wigmore on Evidence reaffirms the beneficial effects of public access to civil judicial proceedings identified centuries ago by Hale and Blackstone. Wigmore observes that public access "plays an important part as a security for testimonial trustworthiness...." Public proceedings are the means by which this testimonial of trustworthiness is achieved. Wigmore identifies other beneficial effects of public access to civil as well as criminal trials. It enhances the quality of justice dispensed by officers of the court and thus contributes to a fairer administration of justice:

> (a) Subjectively, a wholesome effect is produced, analogous to that secured for witnesses, upon all the officers of the court, in particular, upon judge, jury, and counsel. In acting under the public gaze, they are more strongly moved to a strict conscientiousness in the performance of duty. In all experience, secret tribunals have exhibited abuses which have been wanting in courts whose procedure was public.
>
> (b) Public access to civil trials also provides information leading to a better understanding of the operation of government as well as confidence in and respect for our judicial system.
>
> (c) The educative effect of public attendance is a material advantage. Not only is respect for the law increased and intelligent acquaintance acquired with the methods of government, but a strong confidence in judicial remedies is secured which could never be inspired by a system of secrecy.

This survey of authorities identifies as features of the civil justice system many of those attributes of the criminal justice system on which the Supreme Court relied in holding that the First Amendment guarantees to the public and to the press the right

> of access to criminal trials in *Globe Newspaper Co. v. Superior Court, supra* and *Richmond Newspapers, Inc. v. Virginia, supra.* A presumption of openness inheres in civil trials as in criminal trials. We also conclude that the civil trial, like the criminal trial, "plays a particularly significant role in the functioning of the judicial process and the government as a whole." From these authorities we conclude that public access to civil trials "enhances the quality and safeguards the integrity of the factfinding process." It "fosters an appearance of fairness," and heightens "public respect for the judicial process." It "permits the public to participate in and serve as a check upon the judicial process — an essential component in our structure of self-government." Public access to civil trials, no less than criminal trials, plays an important role in the participation and the free discussion of governmental affairs. Therefore, we hold that the "First Amendment embraces a right of access to [civil] trials ... to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one."

Id. at 1069-70 (citations omitted).[5] Since then, the Third Circuit has repeatedly re-affirmed that the First Amendment right of public access applies to civil judicial proceedings and records. *E.g., In re Cendant Corp.,* 260 F.3d 183, 198 & n.13 (3rd Cir. 2001); *U.S. v. A.D.*, 28 F.3d 1353, 1356 (3rd Cir. 1994); *Leucadia, Inc. v. Applied Extrusion Technologies, Inc.*, 998 F.2d 157, 161 n.6 (3rd Cir. 1993); *Republic of Philippines v. Westinghouse Elec. Corp.*, 949 F.2d 653, 659 (3rd Cir. 1991).[6]

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[5] Other Circuit Courts of Appeal have similarly determined that the First Amendment right of public access applies to civil proceedings, and no Circuit Court of Appeal that has addressed the issue has reached a contrary conclusion. *New York Civil Liberties Union*, WL Op. at *9 (citing additional authorities). Nor has any court held that the right is in any way weaker in civil cases.

[6] Defendants rely heavily on two inapposite earlier cases addressing public access outside the adjudicative context, where such right is not as well established. *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3rd Cir. 1986), dealt with access to records of an administrative agency which were not created as part of a judicial or quasi-judicial proceeding. *First Amendment Coalition v. Judicial Inquiry & Review*, 784 F.2d 467 (3rd Cir. 1986), dealt with investigatory proceedings in judicial disciplinary hearings. By analogizing such proceedings to grand jury proceedings, the Court highlighted the fact that the proceeding in that case was investigatory, not adjudicatory, and so not equivalent to civil trials and lacking a history of openess, unlike the present case. *Id.* at 473; *Detroit Free Press Ass'n v. Ashcroft*, 303 F.3d 687, 699-700 (6th Cir. 2002) (discussing *First Amendment Coalition*).

C. ARBITRATION UNDER THE STATUTE IS A JUDICIAL PROCEEDING SUBJECT TO THE FIRST AMENDMENT RIGHT OF PUBLIC ACCESS.

Defendants argue that secret judicial arbitration proceedings fail the First Amendment "experience and logic" test because (i) historically, arbitrations have been private, and (ii) private arbitrations fulfill an important societal function.

Defendants' argument is merely semantic, relying on the designation of the procedure as "arbitration." The "experience" test, however, does not turn on the label given to the proceeding. *Press-Enterprise II*, 478 U.S. at 7. Instead, the Court must look to whether an analogous judicial proceeding has historically been open to the public. *A.D.*, 28 F.3d at 1358 (in the absence of history of openness of federal delinquency proceedings, Third Circuit finds them analogous to criminal proceedings and so subject to First Amendment right of access); *In re Boston Herald, Inc.*, 321 F.3d 174, 184 (1st Cir. 2003) ("[t]radition is not meant, we think, to be construed so narrowly; we look also to analogous proceedings and documents of the same 'type or kind'"); *El Vocero v. Puerto Rico,* 508 U.S. 147, 149-50 (1993) (finding pretrial criminal hearings in Puerto Rico analogous to other pretrial hearings to which First Amendment right applies, despite distinctions noted by the Puerto Rico Supreme Court); *Press-Enterprise II,* 478 U.S. at 10-11 (evaluating California pre-trial hearings by looking to practices of other states and to other types of hearings, including probable cause hearing in Aaron Burr's 1807 trial for treason); *Society of Professional Journalists v. Secretary of Labor*, 616 F.Supp. 569, 575-76 (D. Utah 1985) (in absence of history of open administrative fact-finding hearings, court analogizes to civil trials and finds a First Amendment right of access), *dismissed as moot and remanded*, 832 F.2d 1180 (10th Cir. 1987). *See also U.S. v. El-Sayegh*, 131

F.3d 158, 161 (D.C. Cir. 1997) ("[a] new procedure that substituted for an older one would presumably be evaluated by the tradition of access to the older procedure").

It is well-recognized that arbitration proceedings are analogous to civil trials. *E.g., In re Home Health Corp., Inc.*, 268 B.R. 74, 78 (Bankr. D. Del. 2001) (arbitration "is a trial on the merits, although before a non-judicial tribunal"); *Norton v. Midwest Airlines*, Civil No. 05-3701 (NLH), 2008 WL 89930, WL Op. at *4, Schneider, M.J. (D.N.J. Jan. 4, 2008) ("at the heart of the arbitration program is the view that arbitration is a substitute for trial before the Court...," *quoting* Allyn Z. Lite, *New Jersey Federal Practice Rules* (2008), L. Civ. R. 201.1, Comment 4) (Ex. C hereto).

Pursuant to Chancery Court Rule 96(d), an "Arbitration hearing" is "a proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as the parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case." Each side gets to present witnesses and documentary evidence. Chancery Court Rule 96(d)(4).

Perhaps the most important commonality is that the "arbitrator" interprets the law, decides the facts, applies the law to those facts, and renders a decision affecting the legal rights of the parties – in other words, performs the supreme, primary judicial function. *See Olson v. National Association of Securities Dealers*, 85 F.3d 381, 382 (8th Cir. 1996) ("an arbitrator's role is functionally equivalent to a judge's role..."); *Seldner Corp. v. W.R. Grace & Co.*, 22 F.Supp. 388, 392 (D. Md. 1938) ("[t]he function of arbitrators is judicial in nature"). Indeed, like judges, judicial arbitrators enjoy immunity from suit. Chancery Court Rule 98(c). Whether labeled arbitration or litigation, a

judge engages in adjudication, exercising power vested by the State to determine substantive legal rights. "An adjudication is a formal act of government, the basis of which should, absent exceptional circumstances, be subject to public scrutiny." *Joy v. North*, 692 F.2d 880, 893 (2nd Cir. 1982).

The mere fact that a proceeding is labeled an "arbitration" does not make it an arbitration. Where the arbitrator is not privately retained and paid and the fee is paid into a court, where the arbitrator conducts the proceeding in a government courthouse[7] on government time (and government salary) pursuant to procedure set forth in court rules, and where the arbitrator is a judicial officer acting pursuant to power granted by the State (and not merely by private contract) and presiding over a proceeding that resembles a bench trial, where the arbitrator functions as a judge, deciding the facts and applicable law, and where the arbitral award is effective and enforceable without bringing a legal action to confirm it, then it is not an arbitration, but a trial – a judicial procedure. *See Elliott v. Ten Eyck Partnership v. City of Long Beach*, 67 Cal.Rptr.2d 140, 144-45 (Cal. App. 1997). *See also Heenan v. Sobati*, 117 Cal.Rptr.2d 352, 353, 358 (Cal. App. 2002) (noting that nomenclature is not controlling, and that "[a]s a sitting judge, Judge McEachen cannot conduct a contractual arbitration. Public judging operates in the public eye, with reported proceedings and under appellate review, to both dispense justice *and* 'satisfy the appearance of justice'... These distinctions blur if sitting judges, their salaries paid by the state, conduct private, binding arbitrations in the public's courthouses – shielded from the need to follow established rules

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[7] The fact that the proceeding may take place in chambers rather than a courtroom is of no consequence, as substantive chambers proceedings are also subject to the First Amendment right of public access. *E.g.*, *NBC Subsidiary (KNBC-TV), Inc. v. Superior Court*, 980 P.2d 337, 363-64 (Cal. 1999); *In re Times-World Corp.*, 373 S.E.2d 474, 479 (Va. App. 1988), *abrogated on other grounds, Hertz v. Times-World Corp*., 528 S.E.2d 458 (Va. 2000).

of law or to justify their decisions by reason, evidence and precedent") (italics in original); *New York Civil Liberties Union*, WL Op. at *12 ("when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process," quoting *Hannah v. Larche,* 363 U.S. 420, 442 (1960)).

Defendants attempt to avoid this conclusion by pointing to certain differences in arbitration procedure.[8] However, such minor procedural differences do not alter the fact that judicial officers are engaged in judicial conduct – finding facts, interpreting and applying law, and deciding cases, empowered by and under the auspices of the State judicial system. Judicial arbitrators are deciding the substantive legal rights of the parties. That is a core basis for the First Amendment right of public access. *See Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 252 (4th Cir. 1988) (finding a right of public access to summary judgment motion papers, because a motion for summary judgment can affect the substantive legal rights of parties the same as a trial); *Republic of Philippines v. Westinghouse Elec. Corp.*, 139 F.R.D. 50, 58 (D.N.J.), *stay denied*, 949 F.2d 653 (3rd Cir. 1991) (citing *Rushford*). *See also New York Civil Liberties Union,* WL Op. at *12 (where agency acts as an adjudicatory body imposing official and practical consequences on members of society, agency is subject to rules applicable to courts, including right of public access, even with different procedures); *Fitzgerald v. Hampton*, 467 F.2d 755, 764-67 (D.C. Cir. 1972) (where agency hears testimony, receives evidence and makes findings and binding recommendations affecting individual

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[8] Defendants note that under 6 *Del. C.* §347(a), parties desiring judicial arbitration must contract for that right. (Opening Brief 4). An agreement of confidentiality is insufficient to deny the First Amendment right of access. *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567 (7th Cir. 2000); *Vassiliades v. Israely*, 714 F.Supp. 604, 606 (D. Conn. 1989).

legal rights, agency acts in a quasi-judicial capacity such that due process requires that hearing be open to the press and to the public).

As noted herein, one of the substantive societal benefits of public access is that it promotes public confidence in the judicial system by allowing the public to observe that governmental proceedings affecting private rights are essentially fair[9], and that judges are acting within the prescribed formats.

As the Second Circuit has said in the context of administrative proceedings:

> changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If ... government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined ... would make avoidance of constitutional protections all too easy.

New York Civil Liberties Union, WL Op. at *11.[10] Similarly, if legislatures can adopt a law which, by giving it another name, transforms what has historically been a public government proceeding into a private proceeding, then they are handed a tool which immunizes them from constitutional challenge, a notion repugnant to our system of checks and balances.

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[9] Chancery Court Rule 96(d)(4) requires that "each party ... [be] given a fair opportunity to present its case."

[10] *New York Civil Liberties Union* dealt with adjudicatory proceedings of an administrative agency. The Third Circuit has left open the issue of public access to adjudicatory administrative proceedings. *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 208 n.5 (3rd Cir. 2002). However, the Third Circuit has noted that "when an administrative agency acts as a quasi-judicial body, it fulfills the same function as a court...." *Chisolm v. Defense Logistics Agency*, 656 F.2d 42, 47 (3rd Cir. 1981).

Thus, minor differences in procedure are not a relevant consideration. *See id.* WL Op. at *12 ("[w]hile the TAB's relaxed procedures and administrative placement differentiate it somewhat from the Criminal Court, the jurisdictional overlap and shared function of the two forums render them in important ways the same '*type* or *kind* of hearing'") (italics in original).

D. DEFENDANTS' "EXPERIENCE AND LOGIC " ANALYSIS IS FLAWED.

As defendants note, in deciding whether a First Amendment right of access attaches to a given proceeding, courts look to "experience" (*i.e.,* whether a given government proceeding or an analogous proceeding has historically been open to the public) and "logic" (*i.e.*,whether openness serves a significant societal function). *E.g., U.S. v. Simone*, 14 F.3d 833, 837 (3rd Cir. 1994); *Publicker Industries, Inc.,*733 F.2d at 1068.

While courts look at both elements, there is no requirement that they be weighted in any particular way. *New York Civil Liberties Union*, WL Op. at *12 n.10. For example, the absence of a history of openness may be compensated for by a significant public benefit to openness. *See, e.g., Simone*, 733 F.2d at 840. *See also U.S. v. Chagra,* 701 F.2d 354, 363 (5th Cir. 1983) ("the lack of an historic tradition of open bail reduction hearings does not bar our recognizing a right of access to such hearings").

As demonstrated below, defendants' analysis is flawed in that it looks the wrong way and fails to support its assumptions.

1. Experience.

Defendants begin their "experience" analysis with an extensive look at the history of private commercial arbitration, demonstrating that such arbitration has not historically been open to the public. While this may be so, it is beside the point. It is no great revelation that the public has not

historically had a right of access to private institutions. The real question is whether the public has had a right of access to comparable proceedings in *public* institutions. In this case, the judicial system is the comparable public institution, and civil trials of commercial disputes is the analogous proceeding. As demonstrated above, the Third Circuit (among others) has recognized a long, rich tradition of openness of civil proceedings. *U.S. v. Smith*, 776 F.2d 1104, 1109 (3rd Cir. 1985) ("[w]e have also found that these societal interests and a long history of public access mandated recognition of a First Amendment right of access to civil trials"); *Publicker Industries, Inc.*, 733 F.2d at 1068-70.

Defendants first counter by arguing that, under the ADR Act, Magistrate Judges may act as arbitrators. (Opening Brief at 23). However, this example is fatally flawed. First, the "experience" prong is based on historical evidence of access. *See Richmond Newspapers, Inc.*, 448 U.S. at 590; *Press-Enterprise II,* 478 U.S. at 8. The ADR Act is of recent vintage, having been adopted in 1998. *See Simone*, 14 F.3d at 838 (history starting at 1980 too short to establish a tradition of closure).

Further, actual practice reveals a different story. Prior to the enactment of the ADR Act, District Courts with arbitration programs did not use Magistrate Judges as arbitrators (although Magistrate Judges did serve as mediators). Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts*, Tables 3 and 4 (1996) (available at the website of the Federal Judicial Center. http://www.fjc.gov/public/pdf.nsf/lookup/adrsrcbk.pdf/$File/adrsrcbk.pdf).

Indeed, one Circuit Court of Appeals ruled, prior to the adoption of the ADR Act, that Magistrate Judges were not authorized to conduct arbitrations. *DDI Seamless Cylinder Intern., Inc. v. General Fire Extinguisher Corp.*, 14 F.3d 1163, 1165 (7th Cir. 1994). *See also Hameli v. Nazario*, 930 F.Supp. 171, 180-181 (D. Del. 1996) ("[a]rbitration is not in the job description of a federal judge, including a magistrate judge").

Further, defendants have not pointed to anything showing that Magistrate Judges are actually conducting confidential arbitrations themselves under the ADR Act, much less binding arbitrations (since any party to arbitration under the ADR Act may seek trial de novo, 28 U.S.C. §657(c)), and there is no precedent upholding that practice in the face of a First Amendment challenge.[11]

For example, although defendants point to the ADR Policies and Procedures for the U.S. District Court for the Western District of Pennsylvania (Opening Brief 24), there is no indication that the Magistrate Judges in that District serve as arbitrators. Indeed, the panel of arbitrators does not appear to include sitting Magistrate Judges, only lawyers in private practice. http://www.pawd.uscourts.gov/Applications/pawd_adr/pages/ListSelNeutral.CFM.[12]

As another example, Local Rule 201.1(b) of the Local Civil and Criminal Rules of the United States District Court for the District of New Jersey provide that a Magistrate Judge may serve as a "compliance judge," administering and monitoring the arbitration process, http://www.njd.uscourts.gov/rules/completeRulesOctober2011.pdf, but private practice attorneys are

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[11] Magistrate Judges often conduct mediations. However, contrary to defendants' suggestion (Opening Brief 25), a declaration that the Delaware statute is unconstitutional would have no effect on judicial mediations. This is because judges acting as mediators do not adjudicate parties' substantive rights, but instead work to facilitate settlement negotiations. *Sheldone v. Pennsylvania Turnpike Comm'n*, 104 F.Supp.2d 511, 513 (W.D. Pa. 2000); *In re Home Health Corp. Of America, Inc.*, 268 B.R. at 77. No one is claiming that mediation is an adjudicatory function as to which the First Amendment right of access applies. As such, the references to mediation and other non-arbitration ADR processes in the briefs of defendants and CLS are irrelevant, and merely obscure the true issue.

[12] Magistrate Judge Eddy appears on the list of available arbitrators, but is identified as being a partner in Johnson & Eddy, LLC. She was confirmed to her position on October 20, 2011, and so the reference to her on the website listing available arbitrators, while not listing any of the other Magistrate Judges in that District, appears to reflect merely that the page has not been updated. http://www.uscourts.gov/News/TheThirdBranch/11-11-01/Judicial_Milestones.aspx; http://www.pawd.uscourts.gov/pages/chamber02.htm.

appointed to serve as arbitrators. http://www.njd.uscourts.gov/arbitration.html. As one example, in the *Norton* case cited herein at p. 14, the Magistrate Judge in that opinion addressed discovery and scheduling disputes, but a private practice lawyer was appointed as arbitrator. (Ex. D hereto).

The Fourth Circuit, subsequent to the adoption of the ADR Act, has stated that "[a] magistrate judge may not serve as an arbitrator." *Small v. Dellis*, 211 F.3d 1265, 2000 WL 472873, WL Op. at *1 (4th Cir. 2000) (TABLE). Thus, the ADR Act provides little help for defendants,

Apart from the ADR Act, defendants cite to John T. Morse, Jr., *The Law of Arbitration and Award* (1872), to suggest that it was common practice historically for sitting judges to serve as private mediators. (Opening Brief 17-18). Apart from the question of the validity of the general claim based on the authorities cited by the author[13], and the lack of evidence of how common any such practice actually was, this reference is inapposite because the author's statement refers to the ability of judges to be employed as private mediators outside the judicial system. By contrast, the statute at issue authorizes judges to act as "arbitrators" as part of a public judicial system, sponsored and administered by the judicial system, performed in a courthouse, with the result binding as a judgment

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[13] None of the four cases cited by the author addressed court-adjunct arbitration. In *Dinsmore v. Smith*, 17 Wis. 20, 1863 WL 1095 (Wis. 1863), *overruled in part by Hills v. Passage*, 21 Wis. 294, 1867 WL 1693 (Wis. 1867), there is no reference to arbitration at all. The issue was whether the parties stipulated to having the judge act as a referee (akin to a special master) and the effect of that action. In *Walworth County Bank v. Farmers' Loan and Trust Company*, 22 Wis. 231, 1867 WL 1759 (Wis. 1867), the Wisconsin Supreme Court added that an improper reference to a judge acts as a discontinuance of the legal action and a submission to private arbitration. There was no discussion of court-adjunct arbitration or whether it was confidential. In *Davis v. Forshee*, 34 Ala. 107, 1859 WL 657 (Ala. 1859), there was no reference to a judge acting as arbitrator, only that five arbitrators were selected by the Clerk of the Court. In *Galloway's Heirs v. Webb*, 3 Ky. 318, 1808 WL 744 (Ky. App. 1808), a statute authorizing "any person, or persons" was interpreted as permitting judges to serve as private arbitrators. That statute applied to extrajudicial arbitrations. Carli N. Conklin, *Transformed, Not Transcended: The Use of Extrajudicial Dispute Resolution in Antebellum Kentucky and New Jersey*, 48 American Journal of Legal History 39, 48 (Jan. 2006).

of a court without the need for court confirmation. Thus, the cited authority does not help establish a history of government-sponsored judge-as-arbitrator secret litigation/arbitration.

In the absence of any such history, and in the presence of a clear, judicially-established history of comparable open governmental proceedings in the form of civil trials, the "experience" prong falls heavily on the side of requiring these proceedings to be open to the public.

2. Logic.

The case law establishes that public access to our judicial system is essential to several fundamental constitutional interests:

(1) Public access to courts promotes free discussion of governmental affairs by imparting a more complete public understanding of and respect for the judicial system. *Richmond Newspapers, Inc.*, 448 U.S. at 571-73, 577 n.12; *Publicker Industries, Inc.*,733 F.2d at 1070.

(2) Public access gives the assurance that the proceedings are conducted fairly to all concerned. *Richmond Newspapers, Inc.*, 448 U.S. at 569-70; *Publicker Industries, Inc.*,733 F.2d at 1069-70;

(3) Public access serves as a check on corrupt practices by exposing the judicial process (including the conduct of judges, lawyers and witnesses) to public scrutiny. *Richmond Newspapers, Inc.*, 448 U.S. at 570; *Publicker Industries, Inc.*,733 F.2d at 1069-70.

In addition to damaging those interests, secret judicial arbitration for businesses can foster suspicion that the law and justice apply differently, with one set of rules (substantive and procedural) and secret justice for wealthy companies, and another set of rules for the rest. This can lead to diminished respect for our judicial system.

The Second Circuit, in addressing the right of access to an adjudicatory administrative proceeding, summed it up thusly:

> Court trials, which serve both as a "mechanism for judicial factfinding, [and] as the initial forum for legal decision making," have been held to depend on publicity as a check that "enhance[s] the fairness of the trial itself," TAB proceedings similarly serve an adjudicatory function that determines respondents' rights. As a proceeding that, like a trial, involves both factfinding and legal decision making, the TAB hearing is subject to the same dangers – whether willful or accidental – as a trial, dangers that can be reduced significantly by the kind of "[p]ublic scrutiny ... [that] enhances the quality and safeguards the integrity of the factfinding process."
>
> Furthermore, in a TAB proceeding, individuals confront the power of their government to judge and penalize their actions; like a trial, it is a part of the "general administration of justice" that is central to government authority. In this sense, like a trial, one of the TAB's functions is to maintain the public perception of government as a legitimate authority that satisfies "the appearance of fairness so essential to public confidence in the system." And it is this "appearance of fairness" that has been held to be "enhance[d]" by open access.
>
> Finally, because the TAB, like other administrative agencies, forms a part, albeit small, of a larger web of government authority, "[f]ree access [to it] ... informs the populace of the workings of government and fosters more robust democratic debate," thereby "serv[ing] to insure that the individual citizen can effectively participate in and contribute to our republican system of self-government."

New York Civil Liberties Union, WL Op. at *13-14 (citations omitted). It is no less true here.

Defendants first respond by arguing that the Court must also consider the positive societal benefits from confidentiality, and whether those benefits outweigh the benefits of openness. Defendants appear to recognize that confidentiality of the judicial arbitration process cannot of itself constitute an overriding societal benefit, because that benefit is already provided by private arbitration services.[14] (*See* Opening Brief 26). So the question then becomes what is the societal

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[14] Even under the First Amendment right of access, portions of trials may be withdrawn from public view on a case-by-case basis when there is a compelling governmental interest justifying (continued...)

benefit of having confidential arbitrations *conducted by sitting judges as part of the state judicial system*?

Defendants first make the argument that absent this law the public would suffer because, if such proceedings had to be public, it would discourage parties from using the service and lead them to use private commercial arbitration services instead. (Opening Brief 26). Why is this a public detriment? Such a response would result in increased use of private arbitration services, thereby promoting the economy and reducing the demand on the limited resources of the judiciary, freeing it up to attend to the public's business for which the judicial system was established.

Relatedly, defendants argue that "Delaware entities would lose the opportunity to have their disputes arbitrated in a nationally renowned forum." (Opening Brief 26). This is an opportunity they never had before. Moreover, Delaware is home to several highly-regarded former Delaware judges (including esteemed former members of the Court of Chancery) now in private practice who are available to conduct arbitrations, in addition to other well-qualified and respected members of the Delaware corporate bar (such as counsel for the defendants and *amici* in this action, for example). It is an insult to them to suggest that they could not provide services of comparable insight and quality.

Moreover, there is no basis to conclude that non-judicial arbitration would be any less practicable or efficient. Nor is there any basis to presume that an arbitral award issued by a member

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[14](...continued)
confidentiality, and the withdrawal from public scrutiny is strictly limited to the extent necessary to satisfy the compelling governmental interest. *Globe Newspaper Co.*, 457 U.S. at 606-09; *Publicker Indus., Inc.*, 733 F.2d at 1070. The challenged statute removes the entire procedure from public scrutiny with no showing of a compelling need. "[A] mandatory rule [prohibiting public access], requiring no particularized determinations in individual cases, is unconstitutional." *Globe Newspaper Co.*, 457 U.S. at 611 n.27.

of the Court of Chancery will be any more enforceable, locally, nationally or internationally, than an award by a private arbitrator. *See New York Civil Liberties Union*, WL Op. at *14 ("'we do not believe speculation should form the basis for...a...restriction of the public's First Amendment rights,'" quoting *Detroit Free Press,* 303 F.3d at 709).

Defendants point out that more and more it is important to be able to enforce arbitration awards internationally. (Opening Brief 27). This concern is already addressed by federal law, which is designed to unify the standards by which arbitral awards are enforced. *Vimar Seguros y Reaseguros S.A. v. M/V Sky Reefer*, 515 U.S. 528, 538 (1995). *See also The Convention on the Recognition and Enforcement of Foreign Arbitral Awards*. (CLS' Compendium of Other Authorities, Tab 26).

Defendants make no effort to demonstrate why or how the Delaware statute is in any way a necessary adjunct to those laws, or how judicial arbitration awards will be meaningfully more easily enforceable than private arbitration awards.

Although they do not say it directly, the briefs of defendants and *amici* reveal the true reasons for the statute. First, on page 6 of their brief, defendants quote the synopsis for House Bill No. 49, which states, in part, that the bill is designed so "the Court of Chancery can remain at the cutting-edge in dispute resolution." Second, on page 29 of their brief, defendants speculate that "[a]doption of DelCOG's position would deprive Delaware and the United States of the potential competitive advantage arising from the arbitration of disputes in the Court of Chancery, and provide a reason for entities to arbitrate their disputes in other countries."

Similarly, CLS, in its amicus brief, describes the value of a judicial arbitration as being a vehicle for "Delaware's business citizens" to "have optimal access to Delaware's courts to decide

disputes that arise under Delaware law" (CLS Brief at 2), which they already have through the public courts; the desire to avoid "the public airing of disputes that may result in reputational harm or undermine the prospects for future business dealings"[15] (*id.* at 5); and the desire to allow entities to "take advantage of one of the chief benefits of choosing Delaware as a jurisdiction of formation – the speed and expertise of the Delaware judiciary." (*Id.* at 12).

These statements show that Delaware adopted this statute for economic reasons – to market secret judicial proceedings for Delaware entities which avoid public airing of disputes and potential bad publicity as a new enticement to keep Delaware attractive as a state of incorporation, so that Delaware may benefit from entity franchise tax revenue (and related revenue from increased employment of its legal community).

While this might be a desirable political and/or economic goal, the Court should "not confuse what is 'good,' 'desirable,' or 'expedient' with what is constitutionally commanded by the First Amendment. To do so is to trivialize constitutional adjudication." *Houchins v. KQED, Inc.,* 438 U.S. 1, 13 (1978).

Delaware's economic interest in using secret judicial arbitration to generate revenue does not outweigh the public's rights under the First Amendment. *See Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue*, 460 U.S. 573, 586 (1983) (raising tax revenue is not sufficient ground for impairing First Amendment rights); *Villejo v. City of San Antonio*, 485 F.Supp.2d 777, 783 (W.D. Tex. 2007) ("[t]he desire to secure a city's funding is, of course, not a compelling interest

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[15] Injury to reputation is not sufficient grounds for denying the right of public access. *Republic of Philippines*, 949 F.2d at 653; *Littlejohn v. Bic Corp.*, 851 F.2d 673, 685 (3rd Cir. 1988); *Joint Stock Soc. v. UDV North America, Inc.*, 104 F.Supp.2d 390, 403-04 (D. Del. 2000).

that would justify the suppression of its employees' First Amendment speech and associational rights"); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1237, 1280 (10th Cir. 1986) ("[a] city or state's desire for federal funds is not a compelling government interest" justifying restriction of First Amendment rights); *Bock v. Westminster Mall Co.*, 819 P.2d 55, 61 (Colo. 1991) ("[e]conomic necessity, however, cannot provide the cover for government-supported infringements of speech").

Similarly, the fact that business interests might want such procedures is not a relevant, much less overriding interest. "[A]dmirable, even desirable goals are not always consistent with constitutional limitations; in such cases, we are bound to follow the constraints of the Constitution." *Popovich v. Cuyahoga County Court of Common Pleas, Domestic Relations Div.*, 227 F.3d 627, 642 (6th Cir. 2000), *modified on other grounds on rehearing en banc*, 276 F.3d 808 (6th Cir. 2002).

No court has held that public rights under the First Amendment may as a blanket rule be extinguished by commercial and/or economic interests. This Court should not be the first to do so.

E. THE COURT SHOULD NOT DEFER TO THE LEGISLATURE IN DECIDING WHETHER THE FIRST AMENDMENT RIGHT OF ACCESS APPLIES.

Defendants, relying on *First Amendment Coalition*, argue that the Court should defer to the Delaware Legislature's determination as to whether secret judicial arbitration proceedings should be open to the public. (Opening Brief 28-32).

"Deference to legislative findings cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 436 U.S. 829, 843 (1978). Indeed, deference to the Legislature is inconsistent with the fact that the burden is on the party seeking confidentiality to justify it. *A.D.*, 28 F.3d at 1357 ("the proponent of a legislatively imposed denial of access in a stipulated category of cases, where the trial judge is not free to weigh the competing

interests on a case-by-case basis, has a difficult burden to carry"); *Publicker Industries, Inc.*, 733 F.2d at 1071.

There are no cases holding that, if a First Amendment right of access applies to a judicial proceeding, such right can be deferred by legislative enactment. *First Amendment Coalition* involved a case where the Third Circuit found there was no First Amendment right of action at the point requested, as it was investigative and not adjudicatory, and assuming, but not deciding, that access was required at some later point in the proceeding, deferred to the determination of the Pennsylvania Legislature as to the proper point, given the overriding interests justifying secrecy.

Here, there are no overriding interests justifying secrecy. Moreover, civil adjudicatory proceedings (which were not involved in *First Amendment Coalition*) are presumptively open from the beginning. There is no history of secrecy of civil proceedings at any stage.

III. THE INDIVIDUAL DEFENDANTS ARE STATE ACTORS.

"The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'" *West*, 487 U.S. at 49 (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)). Accordingly, acts of a state or local employee in her official capacity will generally be found to have occurred under color of state law. *Id.; Flagg Bros. v. Brooks,* 436 U.S. 149, 157 n.5 (1978).

DelCOG alleges in its Complaint, and the defendants admit in their answers, that the Chancellor and the Vice Chancellors are state judges and administrators of the secret state-sponsored judicial arbitration program. (Complaint ¶¶2-6; Answers ¶¶2-6). As such, this element is satisfied.

IV. THE STATE OF DELAWARE AND THE COURT OF CHANCERY SHOULD BE DISMISSED FROM THIS ACTION.

DelCOG concedes that the State of Delaware and the Court of Chancery should be dismissed from this action.

CONCLUSION

> Many a litigant would prefer that the subject of the case - how much it agreed to pay for the construction of a pipeline, how many tons of coal its plant uses per day, and so on - be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing. People who want secrecy should opt for [private] arbitration. When they call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials. Judicial proceedings are public rather than private property, and the third-party effects that justify the subsidy of the judicial system also justify making records and decisions as open as possible. What happens in the halls of government is presumptively public business. Judges deliberate in private but issue public decisions after public arguments based on public records. The political branches of government claim legitimacy by election, judges by reason. Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.

Union Oil Co. of California, 220 F.3d at 567-68.

WHEREFORE, for the foregoing reasons, plaintiff Delaware Coalition for Open Government respectfully requests that the Court deny the individual defendants' motion for judgment on the pleadings, grant its motion for judgment on the pleadings, declare that 10 *Del. C.* §349 and related Chancery Court Rules 96, 97 and 98 violate the First Amendment to the Constitution of the United States, and permanently enjoin defendants from undertaking any further proceedings authorized by that statute.[16]

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[16] DelCOG reserves the right to make an application for an award of attorney's fees pursuant to 42 U.S.C. §1988 in the event it is successful. Fed. R. Civ. P. 54(d)(2)(B).

Respectfully submitted,

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Dated: January 9, 2011

Exhibit A

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN RE: COURT OF CHANCERY RULES 96, 97 AND 98

This 5th day of January, 2010, IT IS HEREBY ORDERED that the Court of Chancery adopts Rules 96, 97 and 98 effective February 1, 2010.

Rule 96. Scope Of Rules

(a) These rules shall govern the procedure in arbitration proceedings for business disputes pursuant to 10 Del. C. § 349.

(b) In the case of business disputes involving solely a claim for monetary damages, a matter will be eligible for arbitration only if the amount in controversy exceeds one million dollars.

(c) The parties with the consent of the Arbitrator may change any of these arbitration rules by agreement and/or adopt additional arbitration rules. Except to the extent inconsistent with these rules, or as modified by the Arbitrator or the parties, Court of Chancery Rules 26 through 37 shall apply to the Arbitration proceeding.

(d) *Definitions*. (1) "Arbitration" means the voluntary submission of a dispute to an Arbitrator for final and binding determination and includes all contacts between the Arbitrator and any party or parties, until such time as a final decision is rendered or the parties discharge the Arbitrator.

(2) "Arbitrator" means a judge or master sitting permanently in the Court. Absent agreement of the parties, the Arbitrator shall not have served as the Mediator in a mediation of the dispute under Court of Chancery Rules.

(3) "Preliminary conference" means a telephonic conference with the parties and/or their attorneys or other representatives (i) to obtain additional information about the nature of the dispute and the anticipated length of hearing and scheduling, (ii) to obtain conflicts statements from the parties, and (iii) to consider with the parties whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

(4) "Preliminary hearing" means a telephonic conference with the parties and/or their attorneys or other representatives to consider, without limitation: (i) service of statements of claims, damages and defenses, a statement of the issues asserted by each party and positions with respect thereto, and any legal authorities upon which the parties rely, (ii) stipulations of fact, (iii) the scope of discovery, (iv) exchanging and premarking of exhibits for the hearing, (v) the identification and availability of witnesses, including experts, and such matters with respect to witnesses, including their qualifications and expected testimony as may be appropriate, (vi) whether, and to what extent, any sworn statements and/or depositions may be introduced, (vii) the length of hearing, (viii) whether a stenographic or other official record of the proceedings shall be maintained, (ix) the possibility of mediation or other non-adjudicative methods of dispute resolution, and (x) the procedure for the issuance of subpoenas.

(5) "Scheduling order" means the order of the Arbitrator setting forth the pre-hearing activities and the hearing procedures that will govern the arbitration.

(6) "Arbitration hearing" means the proceeding, which may take place over a number of days, pursuant to which the petitioner presents evidence to support its claim and the respondent presents evidence to support its defense, and witnesses for each party shall submit to questions from the Arbitrator and the adverse party, subject to the discretion of the Arbitrator to vary this procedure so long as parties are treated equally and each party has the right to be heard and is given a fair opportunity to present its case.

(7) "Consent to Arbitrate," means a written or oral agreement to engage in arbitration in the Court of Chancery and shall constitute consent to these rules. Provided that the parties and the amount in controversy meet the eligibility requirements in 10 Del. C. § 347, which apply to the arbitration of business disputes under 10 Del. C. § 349, a consent to arbitrate is acceptable if it contains the following language: "The parties agree that any dispute arising under this agreement shall be arbitrated in the Court of Chancery of the State of Delaware, pursuant to 10 Del. C. § 349."

Rule 97. Commencement Of Arbitration

(a) *Petition.* (1) Arbitration is commenced by submitting to the Register in Chancery a petition for arbitration (hereinafter a "petition") and the filing fee specified by the Register in Chancery. The petition must be signed by Delaware counsel, as defined in Rule 170(b). Sufficient copies shall be submitted so that one

copy is available for delivery to each party as hereafter provided, unless the Court directs otherwise.

(2) The petition shall be sent by the Register in Chancery, via next business-day delivery, to either a person specified in the applicable agreement between the parties to receive notice of the petition or, absent such specification, to each party's principal place of business or residence. The petitioning party shall provide the Register in Chancery with addresses of each party.

(3) The petition shall contain a statement setting forth the nature of the dispute, the names and addresses of all other parties, the claims and the remedy sought. The petition must also contain a statement that all parties have consented to arbitration by agreement or stipulation, that at least one party is a business entity, that at least one party is a business entity formed or organized under the laws of Delaware or having its principal place of business in Delaware, and that no party is a consumer with respect to the dispute. In the case of business disputes involving solely a claim for monetary damages, the petition must contain a statement of the amount in controversy.

(4) *Confidentiality.* The Register in Chancery will not include the petition as part of the public docketing system. The petition and any supporting documents are considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal. In the case of an appeal, the record shall be filed by the parties with the Supreme Court in accordance with its Rules, and to the extent applicable, the Rules of this Court.

(b) *Appointment of the Arbitrator.* Upon receipt of a petition, the Chancellor will appoint an Arbitrator.

(c) *Preliminary Conference.* The Arbitrator will contact the parties' counsel to set the date and time of the preliminary conference, which shall occur within 10 days after the commencement of the arbitration, unless the parties and the Arbitrator agree, pursuant to Rule 96(c), to extend that time.

(d) *Preliminary Hearing.* The preliminary hearing shall take place as soon as practicable after the preliminary conference. The Arbitrator shall issue a scheduling order promptly after the preliminary hearing.

(e) *Date, Time, and Place of Arbitration.* The Arbitrator will set the date, time, and place of the arbitration hearing at the preliminary hearing. The arbitration hearing generally will occur no later than 90 days following receipt of the petition.

(f) *Exchange of Information.* There shall be prehearing exchange of information necessary and appropriate for the parties to prepare for the arbitration hearing and to enable the Arbitrator to understand the dispute, unless the parties agree, with the approval of the Arbitrator, to forego prehearing exchange of information. The parties shall, in the first instance, attempt to agree on prehearing exchange of information, which may include depositions, and shall present any agreement to the Arbitrator for approval at the preliminary hearing or as soon thereafter as possible. The Arbitrator may require additional exchange of information between and among the parties, or additional submission of information to the Arbitrator. If the parties are unable to agree, they shall present the dispute to the Arbitrator who shall direct such prehearing exchange of information as he/she deems necessary and appropriate.

Rule 98. Arbitration Hearing

(a) *Participation.* At least one representative of each party with an interest in the issue or issues to be arbitrated and with authority to resolve the matter must participate in the arbitration hearing. Delaware counsel, as defined in Rule 170(b), shall also attend the arbitration hearing on behalf of each party.

(b) *Confidentiality.* Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise. An Arbitrator may not be compelled to testify in any judicial or administrative proceeding concerning any matter relating to service as an Arbitrator. All memoranda and work product contained in the case files of an Arbitrator are confidential. Any communication made in or in connection with the arbitration that relates to the controversy being arbitrated, whether made to the Arbitrator or a party, or to any person if made at an arbitration hearing, is confidential. Such confidential materials and communications are not subject to disclosure in any judicial or administrative proceeding with the following exceptions: (1) where all parties to the arbitration agree in writing to waive the confidentiality, or (2) where the confidential materials and communications consist of statements, memoranda, materials, and other tangible evidence otherwise subject to discovery, which were not prepared specifically for use in the arbitration hearing.

(c) *Civil Immunity.* Arbitrators shall be immune from civil liability for or resulting from any act or omission done or made in connection with the Arbitration, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety, or property of another.

(d) *Mediation Option.* The parties may agree at any stage of the arbitration process to submit the dispute to the Court for mediation. The judge or master assigned to mediate the dispute may not be the Arbitrator unless the parties agree.

(e) *Settlement Option.* The parties may agree, at any stage of the arbitration process, to seek the assistance of the Arbitrator in reaching settlement with regard to the issues identified in the petition prior to a final decision from the Arbitrator. Any settlement agreement shall be reduced to writing and signed by the parties and the Arbitrator. The agreement shall set forth the terms of the resolution of the issues and the future responsibility of each party.

(f) *Award.* (1) The Arbitrator may grant any remedy or relief that the Arbitrator deems just and equitable and within the scope of any applicable agreement of the parties.

(2) In addition to a final award, the Arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders and awards.

(3) Upon the granting of a final award, a final judgment or decree shall be entered in conformity therewith and be enforced as any other judgment or decree.

(4) The Arbitrator is ineligible to adjudicate any subsequent litigation arising from the issues identified in the petition.

(g) *Costs for Arbitration.* Costs for filing and per-day (or partial day) fees shall be assessed in accordance with a schedule to be maintained by the Register in Chancery.

William B. Chandler III

Respectfully advised:

Leo E. Strine, Jr.

John W. Noble

Donald F. Parsons, Jr.

J. Travis Laster

Exhibit B

--- F.3d ----, 2012 WL 10972 (C.A.2 (N.Y.))
(Cite as: 2012 WL 10972 (C.A.2 (N.Y.)))

United States Court of Appeals,
Second Circuit.
NEW YORK CIVIL LIBERTIES UNION, Plaintiff–Appellee,
v.
NEW YORK CITY TRANSIT AUTHORITY, Defendant–Appellant,
H. Dale Hemmerdinger, Elliot G. Sander, Defendants.

Docket No. 10–0372–cv.
Argued: Dec. 16, 2010.
Decided: July 20, 2011.
Amended: Jan. 4, 2012.

The New York City Transit Authority ("NYCTA") appeals from an order of the district court for the Southern District of New York (Sullivan, J.) enjoining the enforcement of an NYCTA policy requiring third parties to obtain the consent of those contesting notices of violation before NYCTA's Transit Adjudication Bureau in order to observe such hearings. We hold that the First Amendment guarantees the public a presumptive right of access to the NYCTA's adjudicatory proceedings, and that the NYCTA has not overcome that presumption. Affirmed.

Christopher Dunn, New York Civil Liberties Union Foundation, (Arthur Eisenberg, on the brief), New York, N.Y., for Plaintiff–Appellee.

Richard Schoolman, Office of the General Counsel, New York City Transit Authority, (Valerie K. Ferrier, on the brief), New York, N.Y. for Defendant–Appellant.

David A. Schulz, Jacob P. Goldstein, Levine Sullivan Koch & Schulz, LLP, New York, N.Y., for Amici Curiae The New York Times Company, et al., in support of Plaintiff–Appellee.

Brian Kreiswirth, Committee on Civil Rights, The Association of the Bar of the City of New York, Marjorie Lindblom, Evan Saucier, Kirkland & Ellis LLP, New York, N.Y. for Amicus Curiae The Association of the Bar of the City of New York.

Before LEVAL, CALABRESI, LYNCH, Circuit Judges.

CALABRESI, Circuit Judge:

***1** Defendant–Appellant New York City Transit Authority ("NYCTA") promulgates Rules of Conduct ("Rules") for those who use the city's public transportation and its associated facilities. N.Y. Pub. Auth. Law § 1204(5–a); *see* N.Y. Comp.Codes R. & Regs. § 1050 *et seq.*[FN1] All New York City police officers are authorized to issue citations for violations of the Rules. *New York Civil Liberties Union v. New York City Transit Authority*, 675 F.Supp.2d 411, 414 (S.D.N.Y.2009) ("*NYCLU* "); *see* N.Y. Comp.Codes R. & Regs. § 1050.12. A police officer has discretion to issue either a summons to New York Criminal Court ("Criminal Court") or a notice of violation for the Transit Adjudication Bureau ("TAB"), a department in the NYCTA where an alleged Rule-breaker may contest the citation in an in-person hearing. *NYCLU*, 675 F.Supp.2d at 414; *see* N.Y. Pub. Auth. L. § 1209–a(3). In each forum, a neutral decisionmaker determines whether the alleged violator has broken a Rule and imposes a penalty for such violations.

> FN1. The NYCTA is "municipal board and public-benefit corporation established by the laws of New York state," empowered to operate, maintain, and control public transit facilities in New York City. *New York Civil Liberties Union v. New York City Transit Authority*, 675 F.Supp.2d 411, 413 & n. 1, 2 (S.D.N.Y.2009).

When a person who is issued a summons contests the citation in court, that hearing is, by statute, open to the public. N.Y. Judiciary Law § 4 (stating that, absent exceptions not relevant here, "[t]he sittings of every court within this state shall be public, and every citizen may freely attend the same...."). NYCTA policy, in contrast, excludes from a TAB proceeding any observer to whose presence the person contesting the notice of violation, or "respondent," objects.

Plaintiff–Appellee New York Civil Liberties

Union ("NYCLU") brought suit under 42 U.S.C. § 1983 to enjoin this policy, claiming, *inter alia*, that the policy violated the NYCLU's First Amendment right of access to government proceedings.[FN2] The district court (Sullivan, *J.*) granted a preliminary, and then a permanent, injunction. *NYCLU*, 675 F.Supp.2d at 439; *New York Civil Liberties Union v. New York City Transit Authority*, No. 1:09–cv–3595 (RJS) Doc. 39 (January 22, 2010), Doc. 40 (January 29, 2010). On appeal, the NYCTA claims that the public has no right of access to administrative adjudicatory proceedings generally and that, even if such a right exists, it should not apply to TAB hearings. We disagree.

> FN2. Although the NYCLU argued below for a "federal common law" right of access, *see* 675 F.Supp.2d at 423 n. 20, it does not advance that theory on appeal as an alternative basis for affirming the district court's judgment. We accordingly deem the theory abandoned.

The public's right of access to an adjudicatory proceeding does not depend on which branch of government houses that proceeding. To determine whether a particular adjudicatory forum should be presumptively open to the public, courts ask whether the forum has historically been open and whether openness enables its proper functioning. In the present case, both lines of inquiry lead squarely to the same answer. We reach no broad conclusions about the openness required of administrative proceedings generally. But we conclude that the First Amendment guarantees the public a qualified right of access to the administrative adjudicatory forum at issue in this case, and that no grounds have been adduced by the NYCTA supporting its rules limiting that right. We therefore affirm.

BACKGROUND

I. The Transit Adjudication Bureau

***2** From 1966, when the Rules were first enacted, until 1986, when the TAB first began operating, the New York Criminal Court ("Criminal Court") had exclusive jurisdiction over citations for Rules violations. *NYCLU*, 675 F.Supp.2d at 415. A 1984 statute created the TAB to lessen the burden on the Criminal Court and to increase the rate at which fines were collected from Rules violators. *See* N.Y. Pub. Auth. Law § 1209–a. The statute also increased the fine that could be imposed: while the Criminal Court is limited to a fine of no more than $25 for a violation of an NYCTA Rule, the TAB may fine a violator up to $100, with an additional penalty of up to $50 for failing to respond to a notice of violation. N.Y. Pub. Auth. Law § 1204(5–a); *see also* *NYCLU*, 675 F.Supp.2d at 414. (The Criminal Court may also sentence a violator to a maximum of 10 days' imprisonment, *NYCLU*, 675 F.Supp.2d at 414, but the record suggests that this penalty is rarely, if ever, imposed.)

The police officer citing the violation has discretion to choose whether to issue a citation to Criminal Court or a notice of violation to the TAB. As the district court observed, "no violation appears to be, by definition, only returnable to one of the venues." *NYCLU*, 675 F.Supp.2d at 415; *see* N.Y. Pub. Auth. Law § 1209–a(3) (giving the TAB "non-exclusive jurisdiction over violations of" the Rules).

A person who receives a TAB notice of violation may pay the fine without contesting it, contest it by mail, or contest it at an in-person hearing. In 2008, officers issued 125,155 notices of violation returnable to the TAB. That same year, 88,236 notices of violation were paid without contest, and 19,028 were contested at in-person TAB hearings. Attorneys appointed by the NYCTA President and paid on a per-diem basis preside over TAB hearings as TAB hearing officers. N.Y. Pub. Auth. Law § 1209–a(2).

The TAB can issue subpoenas, "accept pleas[,] ... hear and determine ... charges of transit infractions[,] ... impose civil penalties[,] ... [and] enter judgments and enforce them, without court proceedings, in the same manner as the enforcement of money judgments in civil actions." N.Y. Pub. Auth. Law § 1209–a(4)(a)–(e), (g). A final order issued by the TAB serves as a "bar to ... criminal prosecution" for the same conduct. *Id.* 1209–a(9)(b). TAB guidelines provide that respondents may be represented by counsel. *NYCLU*, 675 F.Supp.2d at 417; *see Guidelines Governing Proceedings Before the Transit Adjudication Bureau* § 1.7 ("*TAB Guidelines* ").[FN3] Respondents may show up at the TAB office any time during the period stated on their notices of violation and receive a hearing on a first-come, first-served basis.[FN4] But if a hearing is scheduled by the TAB (as is sometimes done to facilitate the production of witnesses or evidence), the respondent must be told its date and location. *NYCLU*, 675 F.Supp.2d at 417. Hearing officers identify the parties and issues in the case; advise res-

pondents of their rights to a hearing, representation, cross-examination, document production, and appeal; and oversee the presentation of motions, cases in chief, and rebuttals. *Id.* at 417–18. TAB guidelines govern the timing, formats, and procedures for filing documents, *id.* at 418, and specify that a Rules infraction must be established by clear and convincing evidence, with any affirmative defenses to be established by a preponderance of the evidence, *id.* Witnesses are sworn and exhibits may be introduced. *Id.* Respondents may appeal a hearing officer's decision to an internal appeals board and, from there, to state court. *Id.* at 419. The TAB is required by statute to "compile ... complete and accurate records relating to all charges and dispositions." N.Y. Pub. Auth. Law § 1209–a(4)(f). In other words, in these and many other particulars, the TAB acts very much like a court of first instance.

FN3. The NYCTA promulgates guidelines governing TAB proceedings pursuant to statutory authority. N.Y. Pub. Auth. Law § 1209–a(4)(d); *see NYCLU*, 675 F.Supp.2d at 416 & n. 7.

FN4. The accusing officer's written notice serves as *prima facie* evidence of a violation. *TAB Guidelines* § 2.1.

***3** At the same time, the TAB's powers and procedures are not the same as a court's. To enforce a subpoena that is not obeyed, the TAB "may make application to the [New York] supreme court." *Id.* § 1209–a(7)(e). Although a TAB final order "may be enforced without court proceedings in the same manner as ... money judgments entered in civil actions," *id.* § 1209–a(9)(b), the TAB may need to "apply to a court of competent jurisdiction for enforcement of" such a decision, *id.* § 1209–a(4)(g). Most of the rules of evidence do not apply to TAB hearings, *id.* § 1209–a(7)(e), and no pre-hearing motions or discovery are permitted, *TAB Guidelines* §§ 2.3, 2.8. The notice of violation itself, without additional corroboration, is deemed *prima facie* evidence of a violation. *Id.* § 2.1. And, significantly, the records the TAB compiles on charges and dispositions are, by statute, exempt from disclosure under New York's Freedom of Information Law. N.Y. Pub. Auth. Law § 1209–a(4)(f); *see* N.Y. Pub. Officers Law § 87.[FN5]

FN5. By statute, these records "shall be deemed exempt from disclosure under the [New York State] freedom of information law as records compiled for law enforcement purposes." N.Y. Pub. Auth. Law § 1209–a(4)(f). New York's Freedom of Information Law exempts records "compiled for law enforcement purposes" if their disclosure would lead to specific consequences, including interfering with law enforcement investigations, judicial proceedings, or the right to a fair trial; or revealing a confidential source, confidential criminal investigation information, or non-routine criminal investigative techniques or procedures. N.Y. Pub. Officers Law § 87(2)(e). The TAB statute does not specify which of these consequences TAB records implicate. New York's Freedom of Information Law also insulates records that "are specifically exempted from disclosure by state or federal statute." *Id.* § 87(2)(a). Whether the statutory exemption of TAB records from the Freedom of Information Law violates a presumptive right of access to government proceedings is not before us, and we do not address that question here.

II. The TAB's Access Policy

The NYCTA describes its long-term access policy as one of presumptive openness to the public. Under that policy, a person who wishes to observe a TAB hearing must twice obtain the consent of the respondent whose case is being heard. If the respondent objects either time, the observer must be excluded from the hearing. A prospective observer must give TAB security personnel her name and inform them of her wish to observe a hearing. When the respondent is called, TAB officials are supposed to call the observer as well. The hearing officer, who meets respondents at the door leading to the hearing rooms, then asks the respondent if he objects to the observer's presence at the hearing. If the respondent objects, the observer may not enter. If the respondent does not object, the three proceed to a hearing room. There, the observer must state her name for the record, and the hearing officer again asks whether the respondent objects to the observer's presence. If he does not, the hearing can proceed. If the respondent does object to the observer's presence, the observer must leave before the hearing begins. TAB personnel do not ask why a respondent objects to an observer's presence and do not attempt to evaluate the reason, significance,

or propriety of the observer's presence. A respondent's objection by itself conclusively bars an observer from a hearing.

Although this policy was only put in writing in March 2009, after the NYCLU complained to the NYCTA about access to TAB hearings, Martin Schnabel, the NYCTA's vice president and general counsel, testified that the policy had been in place for many years as an unwritten practice. Mr. Schnabel also stated that the NYCTA Board and the Metropolitan Transit Authority played no role in adopting the access policy, which has not been formally promulgated as a rule. Instead, he testified, "the matter was discussed among ... TAB personnel and Transit Authority legal personnel." But, he continued, the "ultimate judgment as to what the policy should be at this juncture is mine."

***4** Mr. Schnabel stated his belief that "allow[ing] people to attend regardless of the wishes of the respondent may well have the effect of chilling the appearance of some percentage of respondents," who would feel their privacy so invaded by an open hearing as to lead them to decline to have a hearing at all. Mr. Schnabel explained that the rationale underlying the policy was preventing such a "chilling" effect on respondents who might otherwise avail themselves of the opportunity to contest their notices of violation, but who would do so in person only if they had the power to exclude third parties from their hearings.

Mr. Schnabel further testified that he had collected no evidence and conducted no studies on which he based his conclusion that open access would discourage respondents from seeking TAB hearings. The NYCTA did submit a declaration from Debra Siedman DeWan, a long-time TAB hearing officer, who listed reasons respondents might "wish to maintain [their] privacy when testifying." These included the existence of embarrassing medical conditions or other physical or mental illnesses; an inability to pay the fines; and the fear that a parent or a parole or probation officer would learn of the hearing.

III. The NYCLU's Allegations

According to its complaint, the NYCLU is an organization that advocates for "open governmental and judicial proceedings." As an example, the NYCLU submitted materials indicating that it had worked successfully to open hearings at the New York City Taxi and Limousine Commission to the public.

The NYCLU further asserts that it is "involved in advocacy about [New York City Police Department] policies and practices." For instance, the NYCLU has urged the New York City Police Department to ensure that officers know that bystanders are entitled to film and photograph police activity in public transit areas and advocated changes in the police department's public transit sting operations. The NYCLU has also investigated the demographic characteristics of those stopped and frisked by New York City Police Department officers on public transit, and concluded that minorities receive a disproportionate number of citations for Rule violations. These investigative and advocacy activities, the NYCLU alleges, give it "a particular interest in observing TAB hearings in which [New York City Police Department] officers testify."

The NYCLU also represents clients issued notices of violation. The NYCLU alleges that the inability to observe TAB hearing freely leaves it "seriously hampered in its ability to advise clients" about their own hearings. Finally, the NYCLU has asserted that it "plan[s] to promptly start monitoring TAB hearings" if the access policy is enjoined.

According to the NYCLU's complaint, law students working under the direction of an NYCLU attorney attempted to observe TAB hearings on several occasions. Some would-be observers were simply denied access to hearings without more. Security guards or hearing officers told them that observation was against the law, that the hearings are not open to the public, or just that they could not enter. Others were told they had to obtain a respondent's consent. On one occasion, on January 14, 2009, "[t]he head hearing officer denied the law student's request to observe a hearing *unless she could identify a consenting respondent*. This requirement prevented her from observing a hearing." On another occasion, on January 29, 2009, after having been told that observers were not permitted, a law student spoke to the head hearing officer who, recognizing the student, "offered to request a random individual's permission to let the student sit in on a hearing," which the student was allowed to do "[o]nce someone consented."

IV. Proceedings Below

***5** The district court determined that TAB hearings are presumptively open under the First Amend-

ment, and that therefore limits to access are subject to strict scrutiny. Since a respondent's objection conclusively bars a third party from observing a hearing and "respondents may object for any reason at all" to the presence of an observer, the district court held that the policy was not strictly tailored to a compelling governmental purpose, and specifically is not tailored to the NYCTA's stated purpose of preventing the chilling of respondents' willingness to contest their notices of violation in person. *NYCLU*, 675 F.Supp.2d at 438–39.

Accordingly, the court granted the NYCLU's motion for a preliminary, and ultimately a permanent, injunction requiring the NYCTA to open TAB hearings to the public absent "specific, on-the-record findings that closure of a proceeding is narrowly tailored to meet a higher governmental value." *Id.* at 439. The NYCTA appeals this decision, claiming that no presumptive right of access adheres to administrative adjudicatory proceedings. In the alternative, the NYCTA argues that, even if such a right attached to some administrative adjudicatory proceedings, it should not apply to the TAB. The NYCTA also challenges the NYCLU's standing to sue. For the reasons that follow, we affirm the district court.

DISCUSSION

I. Standards of Review

We review a district court's grant of a preliminary injunction for abuse of discretion, which "occurs when the district court bases its ruling on an incorrect legal standard or on a clearly erroneous assessment of the facts." *Bronx Household of Faith v. Bd. of Educ.*, 331 F.3d 342, 348 (2d Cir.2003). "To obtain a preliminary injunction a party must demonstrate ... that it will be irreparably harmed if an injunction is not granted." *Id.* at 348–49. For mandatory injunctions, which "alter rather than maintain the status quo," such as the one at issue here, "the movant must show a 'clear' or 'substantial' likelihood of success" on the merits. *Id.* at 349. The requirements for a permanent injunction are "essentially the same" as for a preliminary injunction, except that the moving party must demonstrate "actual success" on the merits. The district court is authorized to determine, as it did here, that the evidence before it suffices for that purpose. *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 546 n. 12 (1987). Our standard of review remains the same.

Whether a plaintiff has standing to sue is a question of law that we review *de novo*. *Shain v. Ellison*, 356 F.3d 211, 214 (2d Cir.2004).

II. Standing

To have standing, a plaintiff must demonstrate an "actual and imminent, not conjectural or hypothetical" threat of a "concrete and particularized" injury in fact that is "fairly traceable to the challenged action of the defendant" and that "a favorable judicial decision will [likely] prevent or redress." *Summers v. Earth Island Inst.*, 129 S.Ct. 1142, 1149 (2009) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 180–81 (2000)).

***6** An organization can have standing to sue in one of two ways. It may sue on behalf of its members, in which case it must show, *inter alia*, that some particular member of the organization would have had standing to bring the suit individually. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 511 (1975) (calling this approach "representational" standing); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir.1998) (calling it "associational" standing). In addition, an organization can "have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy." *Warth*, 422 U.S. at 511; *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n. 19 (1982) ("[O]rganizations are entitled to sue on their own behalf...."). Under this theory of "organizational" standing, the organization is just another person—albeit a legal person—seeking to vindicate a right. To qualify, the organization itself "must 'meet[ ] the same standing test that applies to individuals.' " *Irish Lesbian & Gay Org.*, 143 F.3d at 649 (quoting *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 27 (D.C.Cir.1990)) (alteration in the original); *see also Nnebe v. Daus*, No. 09–4305–cv, 644 F.3d 147, 2011 WL 2149924, at *6–*7 (2d Cir. March 25, 2011, revised May 31, 2011) (confirming that "nothing prevents an organization from bringing a § 1983 suit on its own behalf so long as it can independently satisfy the requirements of Article III standing," and that "only a perceptible impairment of an organization's activities is necessary for there to be an injury in fact" satisfying the requirements of standing (internal quotation marks omitted)).

The NYCTA claims that the NYCLU lacks standing because it failed to identify any individual member of the NYCLU who currently has standing to

challenge the TAB access policy. But as the district court explained in its lucid opinion, the NYCLU does not bring its challenge under an associational/representational theory of standing. Rather, it sues to vindicate its own rights as an organization with goals and projects of its own. *NYCLU*, 675 F.Supp.2d at 425–26. As it does not sue on behalf of injured members, it need not identify any that have standing. The individuals described in the NYCLU's submissions as having attempted to observe TAB hearings are not listed because they are injured members of the organization. They are, instead, its agents or representatives, and it is the organization itself that claims injury.

The NYCTA also claims that the district court was wrong to conclude that the NYCLU's attempts to observe TAB hearings "have been frustrated in the past." *Id.* at 427. According to the NYCTA, NYCLU attempts to observe TAB hearings were blocked by misinformed individual employees acting "in violation of long-standing TAB policy." The NYCTA suggests that this problem was resolved once the access policy was written down and distributed.

***7** The NYCTA is correct that, in order to have standing to challenge the TAB access policy, the NYCLU must establish that it (through its agents) suffered a concrete injury as a result of the policy. The NYCLU has done so. As discussed above, the NYCLU's complaint detailed an incident on January 29, 2009, during which the head hearing officer correctly applied the policy as written and excluded an NYCLU observer from a hearing until TAB personnel found a respondent who assented to the observer's presence. In addition, during an earlier visit on January 14, 2009, TAB personnel excluded an NYCLU representative from a hearing, telling the NYCLU representative (incorrectly) that it was her responsibility to find and identify a consenting respondent.

Although the NYCTA's official policy was misapplied during that January 14, 2009 visit, the deviation was so slight as to be immaterial for standing purposes. What NYCLU seeks to challenge is a policy by which respondents are permitted, for any reason or no reason at all, to exclude members of the public from TAB hearings. During the NYCLU's January 14, 2009 visit, TAB officials may have misconstrued the precise *manner* in which the respondent veto provision of the access policy was supposed to function. The constitutionally relevant point, however, is that the respondent was in fact given a veto over the observer's attendance. In any event, the exclusion caused by this misapplication of the policy was fairly traceable to the policy itself, which required TAB personnel to monitor the public's access to the hearing room on an ongoing basis. Accordingly, NYCLU has established that it suffered an actual injury—exclusion from at least some TAB hearings—as a result of the NYCTA's access policy.

This injury, in turn, is to a cognizable interest. The NYCLU has alleged an interest in open access to TAB hearings as a matter of professional responsibility to clients. In order to represent clients before the TAB, NYCLU must prepare, in part, by observing TAB hearings. The NYCLU has shown that the access policy has impeded, and will continue to impede, the organization's ability to carry out this aforementioned responsibility.

Since the NYCLU has alleged a cognizable interest and both past and imminent injuries to it, we determine that the district court correctly found that the NYCLU has standing to bring its challenge. We therefore turn to the putative right of access on which that standing is based.

III. The First Amendment Right of Access to Government Proceedings

Courts and commentators have long recognized the centrality of openness to adjudicatory proceedings: " 'Without publicity, all other checks are insufficient: in comparison of publicity, all other checks are of small account.' " *In re Oliver*, 333 U.S. 257, 271 (1948) (quoting 1 Jeremy Bentham, Rationale of Judicial Evidence 524 (1827)). While the Sixth Amendment guarantees "the right to a ... public trial" to "the accused," U.S. Const. amend. VI, the value of openness for the defendant has not always been strictly distinguished from its value to the public and to the adjudicatory proceeding itself. "The knowledge that every criminal trial is subject to contemporaneous review in the forum of public opinion is an effective restraint on possible abuse of judicial power." *In re Oliver*, 333 U.S. at 270. In *Oliver*, seemingly Sixth Amendment public access was seen as a guarantor of fairness, accuracy, and correct procedure-as much because these further democratic values and help adjudicators reach correct results as because they protect defendants.

***8** The distinction in protected values was drawn clearly in *Gannett Co., Inc. v. DePasquale*, 443 U.S. 368 (1979), which held that the Sixth Amendment guaranteed only the right of the accused to have his trial held before the public and did not protect the right of the public to observe the proceeding. A year later, however, a plurality of the Court found this *public* right to be "implicit in the guarantees of the First Amendment." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) (plurality opinion). It stated that "without the freedom to attend such trials, ... important aspects of freedom of speech and of the press could be eviscerated." *Id.* (internal quotation marks and footnote omitted).[FN6] "Free speech," the plurality opinion noted, "carries with it some freedom to listen." *Id.* at 576.

> FN6. *Richmond Newspapers* did not produce a majority opinion, but seven of the eight Justices who participated agreed that the First Amendment, together with the Fourteenth, guaranteed a right of public access to criminal trials. Justice Powell, who did not participate in the decision in *Richmond*, had previously expressed this same view. *Gannett Co.*, 443 U.S. at 397 (Powell, *J.*, concurring); *see also Saxbe v. Washington Post Co.*, 417 U.S. 843, 850 (1974) (Powell, *J.*, dissenting).

The First Amendment's guarantees of freedom of speech and the press entail that " 'the government [be prohibited] from limiting the stock of information from which members of the public may draw.' " *Id.* (quoting *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 783 (1978)). Public access to trials helps "give meaning to those explicit guarantees" of freedom of speech and the press—guarantees that protect the right "to speak and to publish concerning what takes place at a trial," and that "would lose much meaning if access to observe the trial could ... be foreclosed arbitrarily." *Id.* at 575, 576–77.

As this implies, the First Amendment right of access to criminal trials is not absolute. It does not foreclose the possibility of *ever* excluding the public. What offends the First Amendment is the attempt to do so without sufficient justification.

This right, incidentally, is also consistent with the rights of the accused. As *Gannett* "made clear[,] ... although the Sixth Amendment guarantees the accused a right to a public trial, it does not give [her] a right to a private trial." *Id.* at 580 (citing *Gannett*, 443 U.S. at 382). And the presumptive First Amendment right of access precludes a judge or a defendant, or both together, from *arbitrarily* closing a criminal proceeding.[FN7]

> FN7. Open access also serves larger purposes of accountability, legitimation, and democratic governance. Because "court rulings impose official and practical consequences upon members of society at large," a trial is "a genuine governmental proceeding" that is "pre-eminently a matter of public interest." *Id.* at 595–96. Public access "serves to ensure that the individual citizen can effectively participate in and contribute to our republican system of self-government." *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). In doing so, it has systemic effects not only on government proceedings but on perceptions of their legitimacy. Because public access allows "people not actually attending trials [to] have confidence that standards of fairness are being observed[,] .... [o]penness ... enhances both the basic fairness of the criminal trial and the appearance of fairness so essential to public confidence in the system." *Press–Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984).

Justice Brennan's concurrence in *Richmond Newspapers* offered "two helpful principles" to guide courts in determining whether a qualified right of access attaches to a given government proceeding. *Id.* at 589 (Brennan, *J.*, concurring). First, courts should inquire into "experience" (history) and "consider[ ] whether the place and process have historically been open to the ... public." *Press–Enterprise v. Superior Court*, 478 U.S. 1, 8 (1986) ("*Press–Enterprise II* ") (internal quotation marks omitted). Second, courts should consider "logic" (functionality) and ask whether public access "plays a significant positive role in the functioning of the particular process in question." *Id.* Courts apply this experience and logic test to determine whether a qualified right of public access attaches to a given government forum. *See, e.g., Globe Newspaper*, 457 U.S. at 605; *Hartford*

Courant Co. v. Pellegrino, 380 F.3d 83, 94–95 (2d Cir.2004).

***9** Reading *Richmond Newspapers* broadly, the Supreme Court has subsequently held that the First Amendment safeguards a qualified right of access not only to criminal trials but to related proceedings such as witness testimony, *Globe Newspaper*, 457 U.S. at 608–10; the transcripts of *voir dire* proceedings, *Press–Enterprise v. Superior Court*, 464 U.S. 501, 505–10 (1984) *("Press–Enterprise I");* and preliminary hearings, *Press–Enterprise II*, 478 U.S. at 13–15.

Our circuit has further held that the presumption of access applies to other aspects of criminal trials as well, including judicial records such as videotapes of defendants, *In re Application of Nat'l Broad. Co. (United States v. Myers)*, 635 F.2d 945, 952 (2d Cir.1980); pretrial suppression hearings, *In re Application of the Herald Co. (United States v. Klepfer)*, 734 F.2d 93, 99 (2d Cir.1984); plea agreements and plea hearings, *United States v. Haller*, 837 F.2d 84, 86–87 (2d Cir.1988); information on the payment of court-appointed counsel, *United States v. Suarez*, 880 F.2d 626, 630–31 (2d Cir.1989); bail hearings, *United States v. Abuhamra*, 389 F.3d 309, 323–24 (2d Cir.2004); live *voir dire* proceedings, *ABC, Inc. v. Stewart*, 360 F.3d 90, 100 (2d Cir.2004); and sentencing hearings, *United States v. Alcantara*, 396 F.3d 189, 191–92 (2d Cir.2005). We have also held that the public's right implies that particular individuals may not be summarily excluded from court. *Huminski v. Corsones*, 396 F.3d 53, 83–84 (2d Cir.2005).[FN8]

> FN8. There is nothing to the contrary in the brief mention of this issue in *Posr v. Court Officer Shield # 207*, 180 F.3d 409, 414 (2d Cir.1999), where the complainant sought to assert the right to bring into the courtroom a bicycle pump, which was reasonably prohibited with the kind of time, place, and manner restrictions explicitly allowed in *Richmond Newspapers* and its progeny. *Richmond Newspapers*, 448 U.S. at 578.

Most relevant for the present case, we have concluded that the First Amendment guarantees a qualified right of access not only to criminal but also to civil trials and to their related proceedings and records. *Westmoreland v. Columbia Broad. Sys., Inc.*, 752 F.2d 16, 22 (2d Cir.1984); *see also Hartford Courant*, 380 F.3d at 93 (civil and criminal docket sheets). Significantly, all the other circuits that have considered the issue have come to the same conclusion. *See, e.g., Rushford v. New Yorker Magazine, Inc.*, 846 F.2d 249, 253–54 (4th Cir.1988); *In re Continental Ill. Secs. Litig.*, 732 F.2d 1302, 1308 (7th Cir.1984); *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1070 (3d Cir.1984); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 661 (8th Cir.1983); *Newman v. Graddick*, 696 F.2d 796, 801 (11th Cir.1983).[FN9]

> FN9. The Supreme Court has not yet considered whether the public right of access applies to civil trials, but "six of the eight sitting Justices" in *Richmond Newspapers* "clearly implied that the right applies to civil cases as well as criminal ones." *Huminski*, 396 F.3d at 82 n. 30.

This recognition of the right to attend civil trials derives from the fact that the First Amendment, unlike the Sixth, does not distinguish between criminal and civil proceedings; nor does it distinguish among branches of government. Rather, it protects the public against the government's "arbitrary interference with access to important information." *Richmond Newspapers*, 448 U.S. at 583 (Stevens, *J.*, concurring). As the district court below aptly noted, "[o]nce unmoored from the Sixth Amendment, there is no principle that limits the First Amendment right of access to any one particular type of government process." *NYCLU*, 675 F.Supp.2d at 431 (internal quotation marks omitted).

***10** However, neither our Court nor the Supreme Court has had occasion to consider under what conditions, if at all, a qualified right of access attaches to non-trial civil proceedings like the administrative adjudication at issue here. It is to that question that we now turn.

A. Applicability of the Experience and Logic Test

The NYCTA would have us forgo the *Richmond Newspapers* test: it argues that administrative proceedings are *never* subject to a presumption of public access and that *Richmond Newspapers* and its progeny apply only to courts. The NYCTA argues that, since administrative proceedings were rare, if not nonexistent, in the early Republic, they are totally different from either criminal or civil trials, which enjoyed centuries of open access, dating back before the Founding. The First Amendment, the NYCTA claims,

could not possibly guarantee a right to access something that barely existed at the time of the Founding. Instead, the NYCTA suggests, the issue of public access to administrative proceedings is one for the legislature or the administrative agency itself to decide, free from judicial supervision. This argument fails for several reasons.

The Supreme Court has not specified how courts should determine whether the experience and logic test applies to administrative proceedings. But we have good reason to think that this determination does not involve asking whether the proceedings in question have a history of openness dating back to the Founding. As the Sixth Circuit has stated, the "Supreme Court effectively silenced this argument in *Press–Enterprise II*, where the Court relied on exclusively post-Bill of Rights history in determining that preliminary hearings in criminal cases were historically open." *Detroit Free Press v. Ashcroft*, 303 F.3d 681, 700 (6th Cir.2002) (citing *Press–Enterprise II*, 478 U.S. at 10–12).

More importantly, the NYCTA's claim is refuted by the reasoning of the public access cases themselves. These focus not on formalistic descriptions of the government proceeding but on the kind of work the proceeding actually does and on the First Amendment principles at stake. "[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise, particularly where the [proceeding] functions much like a full-scale trial." *Press–Enterprise II*, 478 U.S. at 7. In extending the right of public access from the criminal trial to its components and on to civil trials, the Supreme Court and the circuits have emphasized the importance of access to public participation and to government accountability—values, the courts have emphasized, that are central to democracy. "[T]he First Amendment ... has a *structural* role to play in securing and fostering our republican system of self-government," *Richmond Newspapers*, 448 U.S. at 587 (Brennan, *J.*, concurring). And public access "serves to ensure that the individual citizen can effectively participate in and contribute to" self-government. *Globe Newspaper*, 457 U.S. at 604. There is little cause to think that this reasoning has significantly less force in the administrative context. And this is especially so when the administrative process at issue so closely resembles that of the courts. *See Detroit Free Press*, 303 F.3d at 710 ("A government operating in the shadow of secrecy stands in complete opposition to the society envisioned by the Framers of our Constitution.").

***11** Of course, widespread administrative adjudication is a relatively new phenomenon. *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 755 (2002) (noting that "formalized administrative adjudications were all but unheard of in the late 18th century and early 19th century"). But changes in the organization of government do not exempt new institutions from the purview of old rules. Rather, they lead us to ask how the new institutions fit into existing legal structures. If, as the NYCTA suggests, government institutions that did not exist at the time of the Framers were insulated from the principles of accountability and public participation that the Framers inscribed in the First Amendment, legislatures could easily avoid constitutional strictures by moving an old governmental function to a new institutional location. Immunizing government proceedings from public scrutiny by placing them in institutions the Framers could not have imagined, as the NYCTA urges, would make avoidance of constitutional protections all too easy.

Two other circuits have considered a similar question, and they have likewise concluded that "*Richmond Newspapers* is a test broadly applicable to issues of access to government proceedings," *North Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 208–09 (3d Cir.2002), and especially to "quasi-judicial" administrative proceedings, because "there is a limited First Amendment right of access to certain aspects of the executive and legislative branches," *Detroit Free Press*, 303 F.3d at 695. As a result, these circuits have each applied the experience and logic test in the administrative context. *See id.* at 705 (holding that the experience and logic test applies to removal proceedings and that the public has a qualified right of access to those proceedings); *North Jersey Media Group*, 308 F.3d 198 (holding that the experience and logic test applies to removal proceedings and that the public lacks a qualified right of access to those proceedings). The fact that, in applying this test, the circuits differed on how the test played out in no way counters their holdings, with which we agree, that the test applies to administrative trials.

Similarly, albeit in a different line of cases, the Supreme Court has recognized that the adjudicatory

work of administrative agencies can be sufficiently like that of the courts to warrant requiring the agencies to follow principles that apply to courts. For instance, *Butz v. Economou*, 438 U.S. 478 (1978), which extended the absolute immunity enjoyed by Article III judges to administrative law judges, noted that judicial immunity "stems from the characteristics of the judicial process rather than its location" within one or another branch of government. *Id.* at 512. And, the Court determined, "adjudication within a federal administrative agency shares enough of the characteristics of the judicial process" to render the work of "the modern federal hearing examiner or administrative law judge within this framework ... functionally comparable to that of a judge." *Id.* at 512–13 (internal quotation marks omitted). More recently, *Federal Maritime Commission v. South Carolina State Ports Authority* concluded that states retained the sovereign immunity they enjoyed in court when they were subject to an administrative adjudicatory proceeding that " 'walks, talks, and squawks very much like a lawsuit.' " *Fed. Mar. Comm'n*, 535 U.S. at 757 (quoting *South Carolina State Ports Authority v. Fed. Mar. Comm'n*, 243 F.3d 165, 174 (4th Cir.2001)).

***12** Such cases recognize that the principles governing adjudication do not lose validity when the adjudication moves to another branch of government. Indeed, as the Supreme Court has stated, "when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process." *Hannah v. Larche*, 363 U.S. 420, 442 (1960).

In the present case, the TAB acts as an adjudicatory body, operates under procedures modeled on those of the courts, and "impose[s] official and practical consequences upon members of society." *Richmond Newspapers*, 448 U.S. at 595 (Brennan, *J.*, concurring). When a neutral adjudicator determines whether public transit users have violated a Rule, that determination has the force of law and, like the criminal trial for which it substitutes, it is "a genuine governmental proceeding." *Id.* at 506. The TAB and the court serve similar functions, in similar ways, and have a similar effect on the parties before them.

In so holding, we need not, and should not, make any broad pronouncement about the right of access to administrative processes generally. Given the wide variety of proceedings that characterize the administrative state, that would be as foolhardy as it is unnecessary. But we have no trouble concluding that the First Amendment guarantees a presumptive right of access at least to this administrative forum. We therefore proceed to examine the experience and logic of open access to the TAB's proceedings.[FN10]

> FN10. The Supreme Court has called the experience and logic prongs of the *Richmond Newspapers* test "complementary," *Press–Enterprise II*, 478 U.S. at 8, but it has not specified how much weight courts should give each prong. We need not determine the issue in this case, because both experience and logic lead clearly to the conclusion that the TAB is subject to a First Amendment right of access.

B. The Experience of Public Access to TAB Hearings

Our inquiry is considerably simplified by the jurisdiction the TAB shares with the Criminal Court. The fact that an alleged violator may be subject either to a court or to a TAB proceeding at the total discretion of the police officer, rather than by reference to any alleged conduct, suggests that the two forums are "functionally comparable." *Butz*, 438 U.S. at 513 (internal quotation marks omitted). The *Richmond Newspapers* test looks not to the formal description of the forum but to the historical "experience in that *type* or *kind* of hearing throughout the United States." *El Vocero de Puerto Rico v. Puerto Rico*, 508 U .S. 147, 150 (1993) (internal quotation marks omitted) (emphasis in the original).

While the TAB's relaxed procedures and administrative placement differentiate it somewhat from the Criminal Court, the jurisdictional overlap and shared function of the two forums render them in important ways the same "*type* or *kind* of hearing." *Id.* Because of this, how the experience and logic inquiry comes out with respect to the Criminal Court largely determines how it comes out for the TAB as well. And, since access to criminal court hearings is the core of the entire *Richmond Newspaper* line of cases, a similar result for the TAB seems almost foreordained. The government cannot simply dress up a criminal trial in the guise of an administrative hearing and thereby evade the well-established requirement that criminal proceedings be open to the public.

***13** Even without the functionally equivalent Criminal Court as a guide, however, we would come to the same conclusion. The NYCTA argues that because there is no history of open access to the TAB dating back to the First Amendment, TAB proceedings cannot be presumptively open under that amendment. But the Supreme Court has instructed us to ask not whether the First Amendment was formulated with some particular forum in mind, but whether "the place and process have historically been open." *Press–Enterprise II*, 478 U.S. at 8. If we understood this instruction to require us to look to the physical location and institutional proceeding at issue, we might conclude, as the NYCTA urges, that the offices of the TAB and its hearings have been subject to the current access policy for the TAB's entire brief history. To take this view, however, would be to rely on precisely the kind of formalism that the *Richmond Newspapers* line of cases eschews.[FN11] The *process* that goes on at TAB hearings is *a determination of whether a respondent has violated a Transit Authority Rule.* And *that* process was presumptively open from the inception of the Rules system in 1966, when such proceedings were heard only in open criminal courts.[FN12]

FN11. The Supreme Court has not stated how long a history of openness the experience prong of the *Richmond Newspapers* test requires, and we need not resolve this issue here. "[W]e are mindful that '[a] historical tradition of at least some duration is obviously necessary, ... [or] nothing would separate the judicial task of constitutional interpretation from the political task of enacting laws currently deemed essential.' " *Detroit Free Press*, 303 F.3d at 701 (quoting *In re The Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1332 (D.C.Cir.1985)) (alterations in original). At the same time, we note that it makes less sense to assume that First Amendment principles require centuries of openness for validation than to evaluate the length of a tradition by reference to the kind of institution and proceeding involved in the particular case. As a result, the fact that the Rules governing behavior on New York public transit are themselves less than half a century old is less relevant to our inquiry than that their violation was prosecuted exclusively in open court for the first two decades of their existence, and that it continues to be so prosecuted when the citing police officer, in his or her discretion, issues a summons to Criminal Court rather than a notice of violation returnable to the TAB. *Cf. Suarez*, 880 F.2d at 631 (holding Criminal Justice Act, 18 U.S.C. § 3006A, forms presumptively accessible even though the statute was enacted only in 1964).

FN12. We are inclined to think that treating TAB hearings not as substitutes for Criminal Court hearings but as administrative proceedings in their own right might well yield the same result. The tradition of openness in formal administrative adjudicatory proceedings generally has amply demonstrated the "favorable judgment of experience." *Richmond Newspapers*, 448 U.S. at 589 (Brennan, *J.*, concurring). As *amici* New York Times *et al.* point out, administrative hearings at which individual rights are adjudicated have traditionally been open. Already in 1933, the District of Columbia Circuit noted that a "number of ... acts of Congress creating [administrative] bodies ... provi[de] ... that all proceedings *shall* be public." *Hughes, Inc. v. FTC*, 63 F.2d 362, 363 (D.C.Cir.1933); *see id.* at 363–64 (finding that "public hearings" serve the same purposes "whether in courts or bureaus" and are "wholly consonant with the modern view of functions of government").

The Supreme Court sounded a similar note when it required a few years later "that the inexorable safeguard of a fair and open hearing be maintained" in administrative adjudication. *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304 (1937) (internal quotation marks and citations omitted). Contemporaneously, the Court described "a fair and open hearing" as one of "the rudimentary requirements of fair play," and found it "essential alike to the legal validity of ... administrative regulation and to the maintenance of public confidence." *Morgan v. United States*, 304 U.S. 1, 15 (1938). That

> these values are essentially the same as those *Richmond Newspapers* ascribed to open *court* proceedings suggests that the history of quasi-judicial administrative proceedings includes an analogously strong tradition of public access. Mindful of the Supreme Court's injunction not to make unnecessary constitutional adjudications, *see* Ashwander v. TVA, 297 U.S. 288, 346–47 (1936) (Brandeis, *J .*, concurring), we make clear that the discussion in this footnote is not an alternative holding.

C. The Logic of Public Access to TAB Hearings

Our answer to the logic part of the inquiry is, again, guided by the logic of access to the Criminal Court, which has been well established. As with the experience prong, however, looking just to the TAB itself yields the same result. The logic prong of the inquiry essentially asks whether openness enhances the ability of the government proceeding to work properly and to fulfill its function. *Press–Enterprise II*, 478 U.S. at 8. This inquiry requires an understanding of what the function of a particular process is and an evaluation of the role of openness in it.[FN13]

> FN13. The Third Circuit has posited that this inquiry "perforce must take account of the flip side—the extent to which openness impairs the public good," because, "were the logic prong only to determine whether openness serves some good, it is difficult to conceive of a government proceeding to which the public would not have a ... right of access." *North Jersey Media*, 308 F.3d at 217. Of course, the test has never been "whether openness serves some good," *id.*, but "whether [it] plays a significant positive role in the functioning of the particular process in question." *Press–Enterprise II*, 478 U.S. at 8. We think this phrasing already encompasses "the flip side." *North Jersey Media*, 308 F.3d at 217.

Court trials, which serve both as a "mechanism for judicial factfinding, [and] as the initial forum for legal decision making," *Richmond Newspapers*, 448 U.S. at 596 (Brennan, *J.*, concurring), have been held to depend on publicity as a check that "enhance[s] the fairness of the trial itself," *United States v. Doe*, 63 F.3d 121, 126 (2d Cir.1995). TAB proceedings similarly serve an adjudicatory function that determines respondents' rights. As a proceeding that, like a trial, involves both factfinding and legal decision making, the TAB hearing is subject to the same dangers—whether willful or accidental—as a trial, dangers that can be reduced significantly by the kind of "[p]ublic scrutiny ... [that] enhances the quality and safeguards the integrity of the factfinding process." *Globe Newspaper*, 457 U.S. at 606.

Furthermore, in a TAB proceeding, individuals confront the power of their government to judge and penalize their actions; like a trial, it is a part of the "general administration of justice" that is central to government authority. *Doe*, 63 F.3d at 126. In this sense, like a trial, one of the TAB's functions is to maintain the public perception of government as a legitimate authority that satisfies "the appearance of fairness so essential to public confidence in the system." *Press–Enterprise I*, 464 U.S. at 508. And it is this "appearance of fairness" that has been held to be "enhance[d]" by open access. *Id.* at 508, 509.

***14** Finally, because the TAB, like other administrative agencies, forms a part, albeit small, of a larger web of government authority, "[f]ree access [to it] ... informs the populace of the workings of government and fosters more robust democratic debate," *Doe*, 63 F.3d at 126, thereby "serv[ing] to insure that the individual citizen can effectively participate in and contribute to our republican system of self-government," *Globe Newspaper*, 457 U.S. at 604.

The NYCTA has not argued that public access would not enhance the TAB's functioning in these ways. Rather, it suggests that the possibility that some respondents would be dissuaded from contesting their notices of violation in person suffices to outweigh any potential benefits of publicity. But far from showing that this danger is real, the NYCTA has "offered no empirical support for th[is] claim." *Id.* at 609. Like the Sixth Circuit, "we do not believe speculation should form the basis for ... a ... restriction of the public's First Amendment rights." *Detroit Free Press*, 303 F.3d at 709. To the extent that a particular defendant or witness has a legitimate interest in excluding the public from a specific proceeding before the TAB, the NYCTA retains the authority to close the hearing room on an *ad hoc* basis, provided that its decision complies with the requirements set out in *Williams v.*

Artuz, 237 F.3d 147 (2d Cir.2001), and delineated below. Accordingly, because public access "plays a significant positive role in the functioning of the [TAB] process," *Press–Enterprise II*, 478 U.S. at 8, we hold that TAB proceedings are subject to a public right of access under the First Amendment.

D. Requirements for Closing Hearings and the TAB Policy

The First Amendment right of access is always qualified. "Just as a government may impose reasonable time, place, and manner restrictions upon the use of its streets in the interest of such objectives as the free flow of traffic, so may a trial judge, in the interest of the fair administration of justice, impose reasonable limitations on access to a trial." *Richmond Newspapers*, 448 U.S. at 581 n. 18 (plurality opinion) (internal citation omitted). The same, of course, applies as to other government proceedings subject to the right of access. The Supreme Court has stated, however, that "the State's justification in denying access must be a weighty one," *Globe Newspaper*, 457 U.S. at 606, and that "[c]losed proceedings, although not absolutely precluded, must be rare and only for cause shown," *Press–Enterprise I*, 464 U.S. at 509. The *Globe Newspaper* Court, for instance, held that even the State's interest in shielding minor victims of alleged sex crimes "from further trauma and embarrassment" and "encourag[ing] ... such victims to come forward and testify," 457 U.S. at 607, was insufficient to justify a statute requiring an across-the-board, mandatory closure of a court whenever such minors testified. Rather, *Globe Newspaper* made the trial court determine the necessity and propriety of closure on a "case-by-case basis." *Id.* at 608.

***15** The standard for exclusion, as stated by the High Court, is that there be "an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered." *Press–Enterprise I*, 464 U.S. at 510; *see also Globe Newspaper*, 457 U.S. at 606–07 ("Where, as in the present case, the [government] attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is necessitated by a compelling governmental interest, and is narrowly tailored to serve that interest."). The "same standard applies whether the defendant is seeking or objecting to closure," and whether the motion is made under the Sixth Amendment or the First. *Doe*, 63 F.3d at 128.

In our circuit, a government proceeding subject to a qualified First Amendment right of access may be closed if four factors are satisfied: " '[1] the party seeking to close the hearing must advance an overriding interest that is likely to be prejudiced, [2] the closure must be no broader than necessary to protect that interest, [3] the trial court must consider reasonable alternatives to closing the proceeding, and [4] it must make findings adequate to support the closure.' " *Williams*, 237 F.3d at 152 (quoting *Waller v. Georgia*, 467 U.S. 39, 48 (1984)); [FN14] *see also Doe*, 63 F.3d at 127 ("Given the presumption of openness, 'proceedings cannot be closed unless specific, on the record findings are made demonstrating that closure is essential to preserve higher values and is narrowly tailored to serve that interest.' ") (quoting *Press–Enterprise II*, 478 U.S. at 13–14) (internal quotation marks and citation omitted).

> FN14. *Waller* dealt the closure of a criminal suppression hearing under the Sixth Amendment, but, as previously noted, although the interests at stake in Sixth Amendment and First Amendment publicity of government proceedings differ, the standards for closure are the same. *Doe*, 63 F.3d at 128. Indeed, *Waller* cites *Press–Enterprise I* on this point. *Waller*, 467 U.S. at 48.

Accordingly, we have recognized that "a person's physical safety" as well as "the privacy interests of individuals" such as witnesses, third parties, and those investigated in connection with a legal violation, may "warrant closure." *Doe*, 63 F.3d at 127. Thus, we have allowed a court to exclude the public from proceedings during the testimony of police officers whose undercover work was ongoing, *Ayala v. Speckard*, 131 F.3d 62, 72 (2d Cir.1997) (en banc); to exclude the public from part of *voir dire*, where the trial judge had made on-the-record findings that the risk of juror dishonesty about racial bias in a highly publicized case sufficed to warrant keeping *in camera voir dire* transcripts sealed until after a jury had been impaneled, *United States v. King*, 140 F.3d 76 (2d Cir.1998); and to limit the entrance of new observers to a trial during the testimony of a key witness in order not to distract the jury, *Williams*, 237 F.3d at 152.

The TAB's access policy, however, does not come close to meeting our standard for justifying closure. A respondent need not articulate any interest prejudiced by public access; the closure is total for that respondent's hearing; and the hearing officer neither considers alternatives nor makes any findings regarding the relative weight of the interests at stake. *See* *Williams*, 237 F.3d at 152. Indeed, the TAB's policy resembles one explicitly addressed by the Supreme Court in a case that struck down a local court rule "allowing [preliminary criminal] hearings to be closed upon the request of the defendant, without more." *El Vocero de Puerto Rico*, 508 U.S. at 150. That case and others have made clear that the government may not arbitrarily close its proceedings to the public when, as in the case before us, it does so by allowing private parties to wield the arbitrary power.

CONCLUSION

***16** We conclude that the TAB's current access policy violates the public's First Amendment right of access to government proceedings. We further conclude that the NYCLU's ability to carry out its mission would be irreparably harmed through the continued violation of this right.

We have considered all of the NYCTA's arguments and find them to be without merit. We therefore AFFIRM the district court's order permanently enjoining the NYCTA from enforcing the TAB's current access policy and requiring any future closure of TAB hearings to the public to comport with the narrow tailoring and on-the-record factfinding required by the First Amendment.

C.A.2 (N.Y.),2012.
New York Civil Liberties Union v. New York City Transit Authority
--- F.3d ----, 2012 WL 10972 (C.A.2 (N.Y.))

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Exhibit C

Not Reported in F.Supp.2d, 2008 WL 89930 (D.N.J.)
(Cite as: 2008 WL 89930 (D.N.J.))

United States District Court, D. New Jersey.
John H. NORTON, et al., Plaintiffs,
v.
MIDWEST AIRLINES, et al., Defendants.

Civil No. 05-3701 (NLH).
Jan. 4, 2008.

Mark S. Guralnick, Marlton, NJ, for Plaintiffs.

Timothy G. Hourican, Brown Gavalas & Fromm LLP, Clifton, NJ, for Defendants.

OPINION AND ORDER

JOEL SCHNEIDER, United States Magistrate Judge.

***1** This matter is before the Court on plaintiffs' "Motion for Limited Extension of Discovery, for Expert Discovery, to Compel Deposition of Pilot and for Appointment of Mediator" [Doc. No. 33], filed by Mark S. Guralnick, Esquire, counsel for plaintiff. In response to the motion defendants filed the Certification [Doc. No. 34] of Timothy Hourican, Esquire, of Brown Gavalas & Fromm LLP, attorneys for defendants, Midwest Airlines, Inc., Midwest Express Airlines, Inc. d/b/a Astral Aviation, Inc. and/or Skyway Airlines, Inc., Midwest Connect, Skyway Airlines, Inc., Atral Aviation, Inc., Midwest Express Holdings, Inc. and James Rankin. (Hereinafter collectively referred to as "defendants" or "Midwest"). The Court has exercised its discretion pursuant to Fed. R. Civ. 78 and L. Civ. R. 7.1(b)(4) to decide plaintiffs' motion without oral argument. For the reasons to be discussed, plaintiffs' motion is DENIED.

Background

Plaintiffs filed their Complaint on July 20, 2005 [Doc. No. 1]. Plaintiffs allege that on July 23, 2003, John H. Norton ("Norton") was a passenger on an airplane owned and operated by Midwest. *See* Complaint at ¶ 20, Doc. No. 1. Plaintiffs contend that when the flight was en route between Milwaukee and Philadelphia, "it severely decreased altitude in such precipitous and sudden manner that Plaintiff John H. Norton was caused to be thrown about violently sustaining ... injuries...." *Id.* at ¶ 22. Plaintiffs allege Norton "suffered severe head trauma and brain injury, resulting in memory loss and other neurological deficits, severe migraine headaches, spinal trauma, including disc herniations ... [and] other severe, lasting and permanent injuries of a physical, mental and psychological character." *Id.* at ¶ 24.

In order to put plaintiffs' motion in context, it is helpful to understand the scheduling history in this case. After the Complaint was filed on July 20, 2005, the case was referred to arbitration on July 28, 2005. *See* Docket Entries. At the Fed.R.Civ.P. 16 Scheduling Conference held on February 21, 2006, the Court established a fact discovery deadline of September 30, 2006. [Doc. No. 13]. Subsequent to the conference, defendants experienced difficulty obtaining relevant discovery from plaintiffs. This resulted in an August 21, 2006 Order compelling plaintiffs to respond to defendants' written discovery and to appear for deposition or their complaint would be dismissed. [Doc. No. 17]. Plaintiffs did not comply with the Court's Order compelling discovery. However, after plaintiffs alleged they did not receive the Court's August 21, 2006 Order, the Court denied defendants' request to dismiss the Complaint. [Doc. No. 20].[FN1] Notwithstanding these events, plaintiffs still did not comply with the applicable discovery rules. This resulted in an Order compelling plaintiffs to answer defendants' written discovery by November 22, 2006. *See* Doc. 21 at ¶ 1. The Court also set a fact discovery deadline of February 28, 2007. *Id.* at ¶ 2. When the parties next appeared before the Court on March 20, 2007 for a status conference, they informed the Court they did not complete discovery in compliance with the Court's deadlines. Thereafter, on March 22, 2007 [Doc. No. 24], the Court Ordered, *inter alia*, that the depositions of Agnar Fjordholm (pilot) and Lorie O'Connor (flight attendant) shall be taken on April 4 and 5, 2007. The Court's Order provided that "[i]f plaintiffs do not take the depositions of Mr. Fjordholm and Ms. O' Connor as scheduled, they will be barred from taking the depositions." At the parties' request, on April 23, 2007, the Court extended the fact discovery deadline to May 31, 2007. *See* Doc. No. 27. The Order also required plaintiffs to serve their expert reports by June 15, 2007. *Id.* On September 26, 2007, an arbitration award

was filed under seal. On November 16, 2007, plaintiffs requested a trial *de novo* pursuant to L. Civ. R. 201.1(h). [Doc. No. 30]. On November 1, 2007, the Court entered a final Scheduling Order setting the Final Pretrial Conference for January 28, 2008. [Doc. No. 32].

> FN1. This Court undertook responsibility for the management of the case on November 3, 2006.

***2** Plaintiffs filed the instant motion on November 9, 2007. [Doc. No. 33]. Plaintiffs' motion seeks leave of court to conduct the following post-arbitration discovery:

> 1. Service of an expert report from Jonathan Furrow, C.P.A., C.V .A., C.F.P., "an accounting expert to access [Norton's] ... reduced earnings and earning capacity as a result of the injuries he suffered in the aircraft accident";
>
> 2. Service of an expert report of Erik Rigler, President of G Force, Inc., an "aviation expert and aircraft accident deconstructionist";
>
> 3. Additional "follow-up discovery" which includes a request for additional maintenance records, passenger lists and downloaded data from the "black box"; and
>
> 4. Deposition of Midwest's "Captain (pilot)" (presumably Agnar Fjordholm).

Plaintiff also asks the Court to Order the parties to mediation pursuant to L. Civ. R. 301.1.

Discussion

Although not cited in plaintiffs' motion, the Court's decision is framed by L. Civ. R. 201.1(h)(2), which provides:

> Upon the filing a demand for a trial *de novo,* the action shall be placed on the calendar of the Court and treated for all purposes as if it had not been referred to arbitration, *except that no additional pretrial discovery shall be permitted without leave of Court, for good cause shown.* (Emphasis supplied).

The mandate of Local Rule 201.1(h)(2) is clear and certain-no discovery shall be permitted after a demand for a trial *de novo* unless leave of court is obtained upon a demonstration of good cause. *See RLA Marketing, Inc. v. Wham-O, Inc.*, C.A. No. 04-3442(HAA), 2007 WL 766351, at *6 (D.N.J. March 7, 2007)*("according to this Court's local rules, all pretrial matters must be completed prior to arbitration as if arbitration itself were the trial"). Plaintiffs' request for additional discovery is denied because plaintiffs cannot establish good cause to take discovery that should have been completed before the parties' arbitration in September 2007.

The foregoing discussion plainly demonstrates that plaintiffs had more than a fair opportunity to complete discovery. Plaintiffs' complaint was filed on July 20, 2005, and the arbitration was not held until more than two (2) years later. Further, nineteen (19) months elapsed between the Rule 16 conference in February 2006 and the arbitration in 2007. Moreover, on several occasions the Court extended the fact and expert discovery deadlines to accommodate plaintiffs' requests. At all relevant times plaintiffs were or should have been on notice of this Court's scheduling deadlines and the provisions of the applicable Local Rules. No justification exists to excuse plaintiffs' failure to complete discovery in compliance with the Court's deadlines. It is noteworthy that plaintiffs are not simply asking the Court for leave to conduct what they refer to as "limited" discovery. Plaintiffs are asking for substantial additional discovery which includes, *inter alia,* the service of liability and damage expert reports and the deposition of the pilot of the aircraft in question.

***3** Defendants will be substantially prejudiced if plaintiffs' motion is granted. Defendants complied with the Court's Orders and the Local Rules and already completed their discovery. If plaintiffs' motion is granted, defendants will be compelled to retain their own experts, prepare and produce responsive expert reports, depose plaintiffs' experts and defend the depositions of their own experts. Defendants may also need to conduct additional fact discovery to rebut plaintiffs' new claims. This will not only delay the ultimate resolution of the case, but it will also force defendants to incur substantial transaction costs they did not anticipate. As for the deposition of Mr. Fjordholm, it could not be clearer that plaintiffs' request must be denied. This Court's March 22, 2007 Order unequivocally indicated that plaintiffs were

barred from taking the deposition if it was not completed on April 4, 2007.[FN2]

> FN2. The Court is aware that due to unforeseen difficulties Mr. Fjordholm was not available on April 4, 2007. However, defendants provided plaintiffs with his address and informed plaintiffs and the Court they no longer employed Fjordholm. Thereafter plaintiffs never attempted to take the deposition.

Plaintiffs "good cause" arguments are meritless. Plaintiffs argue, *inter alia*, "[t]he necessity for an aviation expert is now manifest" because "Defendants have placed liability in issue...." *See* Guralnick Certification at ¶ 5, Doc. No. 33. This statement is incredulous since defendants always vigorously contested liability in the case. In addition, plaintiffs admit that during the deposition of Mr. Norton, "it became evident that Defendants were taking issue with Plaintiff's assessment of his wage loss, reduced commissions and other financial setbacks." *See* Certification of Mark S. Guralnick, Esquire at ¶ 3. Plaintiffs acknowledge, therefore, they were on notice that an expert may be needed.

Plaintiffs' attempt to excuse their failure to retain an expert by arguing that "Defendants' counsel has dangled the possibility of a forthcoming settlement offer for at least six months, and then immediately following the arbitration decision, has declined to make any settlement offer." *Id.* However, plaintiffs acknowledge they were not misled in any respect. Further, the fact that plaintiffs hoped to settle the case is not a justification for their failure to comply with the Court's Scheduling Orders and the applicable Local Rules. Indeed, plaintiffs' argument carries even less weight in light of defense counsel's recent representation that after Norton's deposition in April 2007, he requested that plaintiffs' counsel speak to his client and make a settlement demand. No demand was conveyed until the eve of the arbitration conducted on September 20, 2007. *See* Certification of Timothy Hourican, Esquire at ¶ 11. If plaintiffs were genuinely interested in settling the case before the arbitration, they would not have waited until the last minute to make a settlement demand.

Plaintiffs also argue "[t]he cost of this [Mr. Furrow] expert and the other expert ... represent the other main reason that Plaintiff delayed retaining these experts earlier." *See* Guralnick Certification at ¶ 4. Plaintiffs did not submit any evidence that they lacked the financial resources to retain an expert before their arbitration. The fact that plaintiffs now are prepared to retain experts or, in fact, they already retained experts, belies their argument that cost considerations justified their delay in complying with the Court's Orders.[FN3] Defendants also take issue with what plaintiffs refer to as "follow-up discovery." Defendants note that "plaintiff has not served a single discovery demand on defendants." Hourican Certification at ¶ 4. Quite simply, plaintiffs are not requesting follow-up discovery but are essentially attempting to start discovery anew.

> FN3. Plaintiffs recently sent the Court a copy of a letter indicating they served defendants with their "financial" expert report. The report is a nullity since it was served after the June 15, 2007 deadline to serve expert reports. [Doc. No. 27]. This Opinion and Order denies plaintiffs' request to conduct post-arbitration discovery.

***4** In addition to denying plaintiffs' request to take late discovery because they have not established "good cause" to take the discovery, and the discovery will substantially prejudice defendants, there are other compelling reasons why plaintiffs' motion must be denied. The arbitration program is an essential element of the court's efforts to effectively and efficiently manage its cases. The program handles and resolves numerous cases that would otherwise tie up the court's already overcrowded docket. "The purposes of the arbitration program are to provide the parties with a quick and inexpensive means of resolving their dispute while, at the same time, reducing the Court's caseload." *Gilling v. Eastern Airlines, Inc.* 680 F.Supp. 169 (D.N.J.1988). As set forth in the comments to the Local Rules, "at the heart of the arbitration program is the view that arbitration is a substitute for trial before the Court and is not merely a mediation process or step along the route toward trial." *See* Lite, *New Jersey Federal Practice Rules (Gann 2008 ed.)*, L. Civ. R. 201.1, Comment 4. Further, "[i]f the program is to work, then, counsel must treat and approach the arbitration hearing with the same diligence and seriousness that they would any bench trial." *Id.* It is essential, therefore, that parties strictly comply with the applicable arbitration rules. If plaintiffs' motion is

granted it would effectively eviscerate the good cause standard for post-arbitration discovery in L. Civ. R. 201.1(h)(2). Plaintiffs had more than a fair opportunity to conduct the relevant discovery they needed to prepare their case for trial. "In order for the compulsory arbitration program to function properly, it is essential that the parties participate in a meaningful manner." *Gilling, supra.* "Meaningful" participation requires parties to comply with the applicable Local Rules and complete all fact discovery before an arbitration is held. An arbitration in this court is not "a meaningless interlude in the judicial process." *Id.* at 172. In order for the arbitration program to remain viable, the Court must insist that the applicable rules be followed.

The Court also rejects plaintiffs' request to Order the parties to mediate. Pursuant to L. Civ. R. 301.1(d), this Court has the discretion to refer the case to mediation. The Court declines to exercise this discretion. The Final Pretrial Conference is scheduled for January 28, 2008. The Court will address settlement at that time. Further, there is no impediment to the parties discussing settlement amongst themselves.

Conclusion

In view of the foregoing, and for all the foregoing reasons,

IT IS hereby ORDERED this 4th day of January, 2008, that plaintiff's Motion for Limited Extension of Discovery, for Expert Discovery, to Compel Deposition of Pilot and for Appointment of Mediator is DENIED; and

IT IS FURTHER ORDERED that all current deadlines in the case [Doc. No. 32] shall remain in effect.

D.N.J.,2008.
Norton v. Midwest Airlines
Not Reported in F.Supp.2d, 2008 WL 89930 (D.N.J.)

END OF DOCUMENT

Exhibit D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

JOHN H. NORTON, ET AL.	:	**CIVIL ACTION NO. 05-3701(NLH)**
Plaintiff(s)		
v.	:	
MIDWEST AIRLINES, INC., ET AL.	:	
Defendant(s)	:	

ORDER APPOINTING ARBITRATOR
AND SETTING DATE FOR ARBITRATION HEARING

AND NOW, this 20th day of August, 2007, it is hereby

ORDERED, **pursuant to Local Civil Rule 201.1(e) and Appendix M therein,** that the above civil action is herewith referred to arbitration and assigned to the following Arbitrator:

Christopher J. Perillo, Esquire **P.O. Box 104**
(856) 986-1149 **Moorestown, NJ 08057**
ARBITRATOR

has been selected at random by the arbitration clerk from among those certified as arbitrators, and shall hear this case at: **9:00 am, Thursday, September 20, 2007, at the Mitchell H. Cohen U.S. Courthouse, 1 John F. Gerry Plaza, 4th & Cooper Streets, Room 1050, Camden, NJ 08101.**

The arbitrator is authorized to change the time and date for the arbitration hearing provided the hearing is commenced within 30 days of the hearing date set forth in this order. Continuances beyond this 30 day period must be approved by the Court and the Clerk of the Court should be notified of any change; and it is

FURTHER ORDERED, counsel for plaintiff shall, within **10 days** upon receipt of this order, **SEND** to the Arbitrator copies of any complaint, amended complaint and answers to counterclaim; counsel for each defendant shall, within **10 days** upon receipt of this order, **SEND** to the Arbitrator any answer, amended answer, counterclaim, cross-claim and answers hereto, any third-party complaint and answer; and it is

FURTHER ORDERED, that all documentary evidence shall be marked in advance and exchanged, except for impeaching documents, pursuant to Local Civil Rule 201.1(f)(5); and it is

FURTHER ORDERED, that the above Arbitrator shall file with the Clerk of the Court within 30 days after the hearing has been concluded, the Arbitration Award which shall include a written statement and summary setting forth the basis of the Award, which shall pertain to all parties to the arbitration.

s/Chief Judge Garrett E. Brown, Jr.

****PHOTO I.D. IS REQUIRED UPON ENTRY INTO THE COURTHOUSE****