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.	)	

DEFENDANTS' OPENING BRIEF IN SUPPORT OF THEIR MOTION FOR JUDGMENT ON THE PLEADINGS

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NATURE AND STAGE OF PROCEEDINGS

On October 25, 2011, plaintiff Delaware Coalition for Open Government, Inc. ("DelCOG") filed a Complaint against the State of Delaware, the Delaware Court of Chancery and its five members: the Honorable Leo E. Strine, Jr. (Chancellor); the Honorable John W. Noble (Vice Chancellor); the Honorable Donald F. Parsons, Jr. (Vice Chancellor); the Honorable J. Travis Laster (Vice Chancellor); and the Honorable Sam Glasscock, III (Vice Chancellor). DelCOG makes a facial challenge to the constitutionality of 10 *Del. C.* § 349 and Court of Chancery Rules 96, 97, and 98. DelCOG contends that those provisions violate the First and Fourteenth Amendments of the Constitution of the United States because they provide that arbitration proceedings conducted in the Court of Chancery of certain business disputes are to be treated as confidential and not open to the public.

Defendants filed answers on November 16, 2011. On December 16, 2011, the defendants moved for judgment on the pleadings. This is defendants' opening brief in support of that motion.

SUMMARY OF ARGUMENT

1. Plaintiff has no First Amendment right of access to arbitration proceedings in the Delaware Court of Chancery. To establish such a right, plaintiff must plead and prove both that: (i) the type of governmental proceeding in question [arbitration proceedings] has historically been open to the press and general public; and (ii) public access plays a significant positive role in the functioning of the proceeding, including consideration of whether public access impairs the public good. *See N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 200-01, 209 (3d Cir. 2002); *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1175 (3d Cir. 1986) (en banc).

2. Plaintiff's First Amendment challenge fails both prongs of the two-prong test:

a. Arbitration proceedings historically have not been open to the press and general public. To the contrary, they have been conducted in private for hundreds of years. Consistent with that history, the Alternative Dispute Resolution Act of 1998, 28 U.S.C. § 652(d), requires that federal court-sponsored alternative dispute resolution programs -- which include arbitration by a Magistrate Judge -- be conducted in private.

b. All leading contemporary providers of commercial arbitration recognize the privacy of arbitration proceedings, and the legal literature makes clear that privacy is seen as a critical benefit of arbitration. Thus, and because businesses can choose among competing arbitral fora that offer private arbitration hearings, plaintiff has not pled and cannot prove that requiring public access to arbitration hearings in the Court of Chancery would necessarily result in actual publicly accessible arbitration hearings. Delaware entities would have a compelling reason to arbitrate their disputes elsewhere, privately and confidentially, in private fora in other jurisdictions or countries. Such a result would be a material loss of business activity for the State of Delaware and the United States, with no countervailing public benefit. Moreover, by making

filings in the Delaware Supreme Court upon applications to review or enforce an arbitration award subject to claims of public access, the General Assembly has made a legislative judgment that replicates claims to public access in cases brought in state and federal courts under the Federal Arbitration Act. That legislative judgment respecting the timing of claims to public access is owed deference under *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3d Cir. 1986) (en banc), which states that "[f]ederal courts should not overturn a state's evaluation of structural concerns in the absence of egregious circumstances." *Id.* at 475.

3. Under settled law, the State of Delaware and the Court of Chancery are immune from suit in this Court under the Eleventh Amendment to the United States Constitution.

STATEMENT OF FACTS

A. The Parties

Plaintiff DelCOG is a Delaware non-profit corporation dedicated to promoting transparency and accountability in government. (D.I. 1 ¶ 1) The defendants are the State of Delaware, the Delaware Court of Chancery and its five members. (*Id*. ¶¶ 2-8) The individual defendants are being sued for actions they are taking "under color of State law." (*Id.* ¶ 20)

B. The Challenged Legislation

DelCOG challenges the constitutionality of 10 *Del. C.* § 349, which authorizes members of the Court of Chancery to arbitrate certain business disputes upon request of the parties:

> (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.

10 *Del. C.* § 349(a). The "eligibility criteria" of Section 347(a), which authorizes the Court of Chancery to mediate business disputes, are: (1) the parties must consent to the process; (2) at least one party must be a "business entity" as defined in 10 *Del. C.* § 346 (a statute authorizing mediation of technology disputes in the Court of Chancery); (3) 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; (4) no party is a "consumer" as defined in 6 *Del. C.* § 2731; and (5) for disputes involving monetary damages, the amount in controversy must be at least $1,000,000. 10 *Del. C.* § 347(a). Section 347(b) authorizes the Court of Chancery to make rules defining eligible disputes. 10 *Del. C.* § 347(b).

At particular issue here is the provision in the legislation prescribing that arbitration proceedings in the Court of Chancery be conducted confidentially:

> (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.

10 *Del.* C. § 349(b).

The legislation further provides that the parties can file an application of public record in the Delaware Supreme Court to enforce an arbitration award or to review an arbitration award under the narrow grounds applicable under the Federal Arbitration Act:

> (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 the Act.

10 *Del. C.* § 349(c). In other words, an arbitration award of the Court of Chancery cannot be appealed on the ground that the Arbitrator committed legal error or misconstrued the facts. *See* 9 U.S.C. §§ 9, 10(a).[1]

[1] The Federal Arbitration Act provides that a United States District Court may vacate an arbitration award only in the following circumstances:

> (1) where the award was procured by corruption, fraud, or undue means;
> (2) where there was evident partiality or corruption in the arbitrators, or either of them;
> (3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
> (4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a).

The bill enacting these provisions, House Bill No. 49, was passed unanimously by the House of Representatives on January 29, 2009, and passed unanimously by the Senate on March 31, 2009. It was signed by Governor Jack Markell on April 2, 2009, at which time the legislation became effective. 77 Del. Laws, c. 8 §§ 1, 9.[2]

The synopsis for House Bill No. 49 describes how authorizing arbitration of business-to-business disputes in the Court of Chancery was intended to keep the Court "at the cutting-edge in dispute resolution":

> By this means, the Court of Chancery can remain at the cutting-edge in dispute resolution. Many federal and international statutes specifically identify instances when tribunals will stay or defer to the parties' decision to have their dispute resolved by way of arbitration. These statutes often deal with issues, such as intellectual property disputes, that are of importance to Delaware entities. Thus, this bill, if enacted, will permit Delaware entities to have disputes of this kind arbitrated by a member of the Court of Chancery by voluntary agreement.

Del. H.B. 49 syn., 145th Gen. Assem. (2009). The synopsis also explains how Court of Chancery arbitration is limited to "business-to-business disputes about major contracts, joint ventures, or technology. Specifically excluded are cases involving consumers." *Id.*

The synopsis further explains that an arbitration proceeding in the Court of Chancery is confidential "because arbitration is traditionally private," but that there is no statutorily mandated confidentiality for the record submitted where a party seeks to vacate or confirm the arbitration award in the Delaware Supreme Court:

> Because a member of the Court of Chancery would be handling the arbitration, the bill also vests the Supreme Court with authority to hear any action to enforce or vacate an order issued by a member of the Court of Chancery as an arbitrator. And, because arbitration is traditionally private, the bill maintains

[2] On July 27, 2010, Governor Markell signed House Bill 433, which similarly authorizes arbitration proceedings in the Superior Court that "shall be considered confidential and not of public record until such time, if any, as the proceedings are the subject of an appeal." 10 *Del. C.* § 546(c); 77 Del. Laws, c. 439, § 1. DelCOG's Complaint does not challenge the constitutionality of or otherwise refer to 10 *Del. C.* § 546.

> proceedings in the Court of Chancery as confidential but makes clear that the record will be filed with the Supreme Court, in accordance with its Rules and the Rules of the Court of Chancery in the event of appeal.

Id.

C. The Challenged Rules of the Court of Chancery

To implement 10 *Del. C.* § 349, the Court of Chancery adopted Rules 96, 97 and 98, which became effective on February 1, 2010. The procedures set forth in Rules 96, 97 and 98 illustrate the difference between arbitration proceedings and litigation in the Court of Chancery.

Rule 96(c) provides that the "parties with the consent of the Arbitrator may change any of these arbitration rules by agreement and/or adopt additional arbitration rules." Del. Ch. Ct. R. 96(c). Rule 96(c) further provides that Court of Chancery Rules 26 through 37 shall apply to the arbitration proceeding, "[e]xcept to the extent inconsistent with these rules, or as modified by the Arbitrator or the parties[.]" *Id.* Apart from Court of Chancery Rules 26 through 37 and 96 through 98, no Rules of the Court of Chancery are expressly applicable to an arbitration proceeding. For example, Court of Chancery Rule 45 governing subpoenas is not applicable.

Pursuant to Rule 97(a), the arbitration process is commenced by a petition, which "must contain a statement that all parties have consented to arbitration by agreement or stipulation." Del. Ch. Ct. R. 97(a)(3). No other pleadings are contemplated. The petition is not included as part of the public docketing system. Del. Ch. Ct. R. 97(a)(4). "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." *Id.*

Pursuant to Rules 96(d)(3) and 97(c), within ten days after commencement of the arbitration, there shall be a telephonic preliminary conference, one purpose of which is "to consider with the parties whether mediation or other non-adjudicative methods of dispute

resolution might be appropriate." Del. Ch. Ct. R. 96(d)(3), 97(c). Pursuant to Rule 97(d), "as soon as practicable after the preliminary conference," there shall be a telephonic preliminary hearing addressing, among other topics, the scope of discovery, whether sworn statements may be introduced, whether any official record of the proceedings shall be maintained, and the "possibility of mediation or other non-adjudicative methods of dispute resolution." Del. Ch. Ct. R. 96(d)(4), 97(d). In the absence of agreement on the manner of prehearing exchange of information, "the Arbitrator … shall direct such prehearing exchange of information as he/she deems necessary and appropriate." Del. Ch. Ct. R. 97(f).

The parties "may agree at any stage of the arbitration process to submit the dispute to the Court for mediation." Del. Ch. Ct. R. 98(d). The parties may agree that the Arbitrator shall mediate the dispute. *Id.* Rule 98(e) provides that 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." Del. Ch. Ct. R. 98(e).

The arbitration hearing "generally will occur no later than 90 days following receipt of the petition." Del. Ch. Ct. R. 97(e). At the arbitration hearing, each side presents evidence and "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." Del. Ch. Ct. R. 96(d)(6). "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." Del. Ch. Ct. R. 98(a). "Arbitration hearings are private proceedings such that only parties and their representatives may attend, unless all parties agree otherwise." Del. Ch. Ct. R. 98(b).

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." Del. Ch. Ct. R. 98(f)(1).

As noted in Section B above, an application may be made to the Delaware Supreme Court to vacate, stay, or enforce an order of the Court of Chancery issued in an arbitration proceeding, and the Delaware Supreme Court will exercise its authority "in conformity with" and "not inconsistent with" the Federal Arbitration Act. 10 *Del. C*. § 349(c).

"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]." Del. Ch. Ct. R. 97(a)(4). The Delaware Supreme Court has not adopted any rules relating to applications to vacate or confirm an arbitration award. Accordingly, there is no statute or rule of Court that bars claims of public access to any portion of the record that is filed in the Delaware Supreme Court upon review of an arbitration award issued by the Court of Chancery.[3]

D. Arbitration Proceedings Pending in the Court of Chancery

In late September, 2011, Advanced Analogic Technologies, Inc. disclosed in a public filing with the Securities and Exchange Commission that it had initiated an arbitration proceeding in the Court of Chancery against Skyworks Solutions, Inc. (D.I. 1 ¶ 16) DelCOG has not pled any facts about that arbitration proceeding, or about the history of arbitration, or about the effect of requiring public access to arbitration hearings in the Court of Chancery.

[3] Under Delaware Supreme Court Rule 9(bb), in an appeal from the Court of Chancery or the Superior Court, "any document or other part of the record which has been sealed by order of the trial court shall remain sealed unless this Court, for good cause shown, shall authorize the unsealing of such document or record." Del. Sup. Ct. R. 9(bb). Rule 9(bb), by its terms, does not automatically limit access to judicial records in the Delaware Supreme Court that had been unavailable to public inspection in the Court of Chancery by virtue of a statute or rule of court.

E. DelCOG's Claim

DelCOG seeks, among other relief, an order (i) declaring that 10 *Del. C.* § 349 and Court of Chancery Rules 96, 97, and 98 are unconstitutional, (ii) permanently enjoining defendants from conducting any non-public proceedings under 10 *Del. C.* § 349 and Court of Chancery Rules 96, 97, and 98, and (ii) unsealing all documents filed under seal pursuant to 10 *Del. C.* § 349 and Court of Chancery Rules 96, 97, and 98. (D.I. 1 at 5)

ARGUMENT

The standard of review on a Rule 12(c) motion parallels that which applies to a motion for failure to state a claim under Rule 12(b)(6). *Revell v. Port Auth.*, 598 F.3d 128, 134 (3d Cir. 2010). "When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937, 1950 (2009). Such a determination is a context-specific task requiring the court "to draw on its judicial experience and common sense." *Id.* A complaint need not contain detailed factual allegations; however, "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555 (2007) (internal quotations and citations omitted). The motion should be granted if, accepting as true all of the non-moving party's well-pleaded allegations, there is no material fact in dispute and the moving party is entitled to judgment as a matter of law. *Bowers v. City of Wilmington*, 723 F. Supp. 2d 700, 705 (D. Del. 2010) (citing *Jablonski v. Pan Am. World Airways, Inc.*, 863 F.2d 289, 290 (3d Cir. 1988)).

I. THE FIRST AMENDMENT DOES NOT AFFORD A RIGHT OF PUBLIC ACCESSS TO ARBITRATION PROCEEDINGS

A. The Right of Public Access Under the First Amendment

In *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), the United States Supreme Court ruled, through splintered opinions, that the First Amendment entitles the public and press to attend criminal trials. The holding of *Richmond Newspapers* has been extended to entitle the public to attend civil trials, unless an important countervailing interest is shown. *Publicker Indus., Inc. v. Cohen*, 733 F.2d 1059, 1071 (3d Cir. 1984). Subsequently, a majority of the United States Supreme Court joined a single opinion holding that a First Amendment right of

access applies to criminal preliminary hearings "as conducted in California," which "function[] much like a full-scale trial." *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 7, 10 (1986) ("*Press-Enterprise II*").

Richmond Newspapers and its progeny, however, do not create any "general right of public access to governmental proceedings or information." *N. Jersey Media Group v. Ashcroft*, 308 F.3d 198, 209 (3d Cir. 2002). Rather, "*Richmond Newspapers* requires that when a court assesses a claimed First Amendment right of access, it must 'consider [i] whether the place and process have historically been open to the press and general public … [and] [ii] whether public access plays a significant positive role in the functioning of the particular process in question.'" *Id.* (quoting *Press-Enterprise II*, 478 U.S. at 8).

The two prongs of the test are known as the "experience test" and the "logic test." *Id.* at 202. Both prongs must be satisfied to sustain a constitutional challenge under the First Amendment. "Even if we could find a right of access under the *Richmond Newspapers* logic prong, absent a strong showing of openness under the experience prong … we would find no such right here." *Id.* at 216.

As discussed below, DelCOG has not pled the requisites of a First Amendment claim under either prong. Arbitration proceedings have historically been closed to the press and the public. Over hundreds of years, English and American law has made clear that commercial arbitration is conducted privately. In recent years, court-sponsored alternative dispute resolution programs have proliferated in state and federal courts, and those proceedings, including arbitration, are conducted in private. Moreover, as a matter of logic, because the enabling rules of arbitral forums contemplate private arbitrations, and because it is universally accepted that privacy is preferred by business entities, striking down 10 *Del. C.* § 349(b) and Court of

Chancery Rules 96, 97 and 98 would achieve a public detriment and no public benefit, as it would prompt Delaware entities to arbitrate in other, non-public fora.

B. The Experience Prong

"'[T]he role of history in the access determination' is 'crucial.'" *Ashcroft*, 308 F.2d at 213 (quoting *Capital Cities Media, Inc. v. Chester*, 797 F.2d 1164, 1174 (3d Cir. 1986) (en banc)). In the absence of strong historical precedent for conducting a type of civil governmental proceeding openly, the Third Circuit has repeatedly rejected First Amendment claims of public access.

In *First Amendment Coalition v. Judicial Inquiry and Review Board*, 784 F.2d 467 (3d Cir. 1986) (en banc), the United States Court of Appeals for the Third Circuit rejected a First Amendment challenge to a provision of the Pennsylvania Constitution that allowed public access to records of the Pennsylvania Judicial Inquiry and Review Board only if the Board recommends that the Pennsylvania Supreme Court impose discipline on a judicial officer. The Court stated that the administrative proceedings in question, "unlike conventional criminal and civil trials, do not have a long history of openness," and the plaintiff's claim was "not supported by historical antecedents." *Id.* at 472, 477.

A few months later, the United States Court of Appeals for the Third Circuit, acting en banc, affirmed the dismissal of a complaint seeking access to records of the Pennsylvania Department of Environmental Resources because the pleading "failed to allege that a tradition of public access exists." *Capital Cities*, 797 F.2d at 1175. The majority opinion elaborated that the plaintiff had "neither pleaded nor offered to prove the existence of a tradition of public access to the type of administrative records here in dispute[.]" *Id.* "Inconsistent government practice" is insufficient. *Id.* Here, too, plaintiff has failed to plead the existence of a tradition of public

access to the type of proceeding at issue. Nor can DelCOG offer to prove the existence of such a tradition.

Third Circuit case law makes clear that a plaintiff must plead and prove a tradition of openness to pass the historical test. In *Publicker Industries*, the Third Circuit stated that its "task … is to review the English and American legal authorities to determine whether they reveal a corresponding presumption of openness inhering in the civil trial which 'plays a particularly significant role in the functioning of the judicial process and the government as a whole.'" 733 F.2d at 1068 (quoting *Globe Newspaper Co. v. Superior Court for the County of Norfolk*, 457 U.S. 596, 606 (1982)).

Subsequently, *Capital Cities* quoted approvingly the following passage from *First Amendment Coalition*:

> *Richmond Newspapers* and the cases decided in its wake stressed the tradition of open trials in England and then later in colonial America. Since the Bill of Rights had been adopted against the backdrop of the long history of trials being presumptively open, the Court concluded that the First Amendment prohibits the government from summarily closing courtroom doors which had long been open to the public at the time that Amendment was adopted.

797 F.2d at 1174 (quoting 784 F.2d at 472) (internal quotations of *Richmond Newspapers* omitted). *Capital Cities* also noted that certain Supreme Court precedent "focused on the time when our organic laws were adopted," while *Press-Enterprise II* "canvassed the last two hundred years of our national experience." *Id.* at 1175 n.27 (internal quotations omitted). *Capital Cities* further noted that Supreme Court cases look "not to the practice of the specific public institution involved, but rather to whether the particular type of government proceeding had historically been open in our free society." *Id.* at 1175.

More recently, in *Ashcroft*, the court distilled from prior precedent that "at least within the geographic confines of the Third Circuit, a showing of openness at common law is not

required." 308 F.3d at 213. "[U]nder these decisions, a 1000-year history is unnecessary, and that in some cases, largely limited to the criminal context, relatively little history is required." *Id.* Even so, the *Ashcroft* Court ruled that deportation hearings do not "boast a tradition of openness sufficient to satisfy *Richmond Newspapers*." *Id.* at 212. The Court examined evidence of open deportation proceedings since the 1890s, as well as evidence from the early 1900s that deportation hearings were frequently closed to the general public. *Id.* at 211-12. "Although the 1964 Department of Justice regulations did create a presumption of openness, a recent – and rebuttable – regulatory presumption is hardly the stuff of which Constitutional rights are forged." *Id.* at 213.

As discussed below, the history of conducting arbitration proceedings in private is unbroken and uncontradicted. Commercial arbitration has been conducted privately for hundreds of years, even when a judge has served as the arbitrator. More recently, court-sponsored alternative dispute resolution programs that incorporate arbitration have proliferated, and in the federal courts, those alternative dispute resolution proceedings are required by statute to be confidential. Given that history of privacy, plaintiffs cannot establish a tradition of openness that would permit recognition of a First Amendment right of public access to arbitration proceedings.

1. Privacy in Commercial Arbitration

"In English law … it has for centuries been recognized that arbitrations occur in private." Michael Collins, *Privacy and Confidentiality in Arbitration Proceedings*, 30 TEX INT'L L.J. 121, 122 (1995) (citing Sir Michael J. Mustill & Stewart C. Boyd, *The Law and Practice of Commercial Arbitration in England* 432-34 (2d ed. 1989)). The first written records of arbitration in England appeared in the twelfth century, and arbitral practice had developed into a very sophisticated procedure by the time of the first English treatise on the law merchant,

published in 1622 by Gerard de Malynes, which contains a chapter entitled "Of Arbitrators and their Awards." 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 2:3, at 2-8 & n.6 (3d ed. 2011).

English law recognized three methods of private arbitration at the time of the American Revolution. For centuries, the only form of private arbitration was a voluntary submission out of court, which was subject to some degree of intervention by courts of law and equity. In the sixteenth century, an entirely different system developed, whereby parties in a judicial proceeding could obtain an order referring some or all of the issues to the decision of any arbitrator. In 1698, Parliament enacted legislation that allowed parties who wished to submit a dispute to arbitration to obtain from a court a reference making their submission a rule of court. Mustill & Boyd, *supra*, at 432-34. The same authors note that it is "implicit in the nature of private arbitrations that the proceedings are confidential, and that strangers shall be excluded from the hearing." *Id.* at 303-04.

In England from the seventeenth century onward, many mercantile disputes were resolved in arbitrations conducted by the merchant and craft guilds. Katherine V.W. Stone, *Arbitration – National*, *in* 1 *Encyclopedia of Law & Society: American and Global Perspective*s 89 (David S. Clark ed., 2007). The tradition of arbitration conducted in private by merchant associations carried over into the American colonies. One of the first acts of the New York Chamber of Commerce upon its establishment in 1768 "was to make provision for arbitration by means of establishing arbitration committees." William C. Jones, *Three Centuries of Commercial Arbitration in New York: A Brief Survey*, 1956 WASH. U.L.Q. 193, 207 (1956). During the British occupation of New York in 1779, when the courts were not functioning, the New York Chamber of Commerce requested and received permission from the British

Commandant to renew their meetings, in order that mercantile disputes could be arbitrated. *Id.* at 208-09. As one scholar puts it, "arbitration's privacy and independence [fostered] efficient resolution of disputes among the American and British merchants during and after the American Revolutionary War." Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. KAN. L. REV. 1211, 1223 (2006). By 1927, over 1,000 American trade associations had systems of arbitration. Stone, *Arbitration – National*, *supra*, at 89.

The first American treatise on arbitration supports the proposition that arbitration proceedings at common law were conducted outside of public view. It states that parties may expressly stipulate in their arbitration submission as to the time and place of the arbitration hearing, and if they fail to do so, the time and place of the arbitration hearing is left to the arbitrator's discretion. John T. Morse, Jr., *The Law of Arbitration and Award* 116 (1872). Notice of the arbitration hearing must be given to each party, and each party is entitled to be present whenever witnesses or arguments are heard on behalf of his opponent. *Id.* at 117. There is no contemplation of public notice. "It is the fact of notice which alone appears to be essential; and the numerous cases which strenuously assert this rule are generally silent as to the method or person in which or by whom the notice is to be given." *Id.* at 118.

Moreover, the same treatise makes clear that at common law, parties could stipulate that their arbitrator be a sitting judge:

> If no proceedings are pending or contemplated in court, there is of course no objection to selecting a judge to act as an arbitrator under a submission *in pais*. On the contrary, it is very common so to do, and no objection has ever been made to the arrangement before any tribunal of authority.
>
> If the parties submit a *lis pendens* to the judge of the court, he is an ordinary arbitrator acting *in pais*, and no writ of error will lie to his decision and award.

Id. at 106 (footnote omitted). An arbitral submission *in pais* is a contract of submission framed by virtue of the common law. *Id.* at 43. *In pais* means "Outside court or legal proceedings." *Black's Law Dictionary* 806 (8th ed. 2004). An act *in pais* is an "act performed out of court, and which is not a matter of record." 1 John Bouvier, *A Law Dictionary Adapted to the Constitution and Laws of the United States of America* 70 (12th ed. 1868).[4]

In the early twentieth century, laws were adopted to facilitate the expansion of privately conducted commercial arbitration. The commercial bar in New York initiated a campaign to overturn the common law rule that contracts to arbitrate were revocable. The efforts of the New York Chamber of Commerce and the New York Bar Association led to the passage of the New York Arbitration Act in 1920, similar statutes in other states, and, in 1925, to congressional enactment of the Federal Arbitration Act. Stone, *Arbitration – National*, *supra*, at 90. "[T]he FAA was designed to promote arbitration" and embodied a "'national policy favoring arbitration.'" *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1749 (2011) (quoting *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006)).

Also in the 1920s, the predecessor of the American Arbitration Association was founded, with the mission of setting up rules and regulations that would lead to the rendering of awards that would not be set aside by the courts. Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 856 (1961). Among the ethical principles established under the rules of practice of the American Arbitration Association was privacy: "It is the responsibility of the arbitrator to maintain the privacy of the proceedings, for it is he who decides who shall be

[4] In 1972, Rule 3.9 of the American Bar Association Model Code of Judicial Conduct was amended to proscribe judges from acting as arbitrators in a private capacity, unless expressly authorized by law. Rule 3.9 allows judges to act as arbitrators as part of their official duties. *See Annotated Model Code of Judicial Conduct* 393-95 (ABA, 2d ed. 2011).

admitted to a hearing…. Only with the mutual consent of the parties, or where the rules provide for public hearings, may this rule [of privacy] be changed." Frances Kellor, *Arbitration in Action* 32 (1941).

Secondary authorities from the mid-twentieth century make clear that privacy was one of the principal perceived benefits of modern commercial arbitration:

- "Very often settlement of a controversy by arbitration, privately, outside of the court is infinitely superior to a victory that might be achieved in court. Particularly is this true of the more common forms of every day business controversy."[5]

- "The privacy of arbitration is one of its great advantages. The public airing of private matters, trade secrets, confidential operating costs and the like, to which may be added the loss of prestige and goodwill, attendant upon the publicity of a court trial, can be prevented by rules which insure that only the parties and the arbitrators may be present at the hearing and that all will respect the confidence of the proceeding."[6]

- "Among the many reasons advanced for the use of arbitration are the usual ones of speed, economy and privacy."[7]

- "Although we do not know, we believe that the chief moving factors [for individuated arbitration] are: (1) a desire for privacy …."[8]

- "Publicity of commercial litigation is adverse to the interests of both parties…. In arbitration, such adverse publicity is completely avoided; attendance at the hearings by outsiders is not possible without the parties' express permission."[9]

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[5] Alexander P. Blanck, *Arbitration – a Substitute for Commercial Litigation*, 18 BUS. L.J. 19, 19 (1931) (quoting Hon. John C. Knox, Senior Judge of the United States District in New York).

[6] J. Noble Braden, *Sound Rules and Administration in Arbitration*, 83 U. PA. L. REV. 189, 195 (1934).

[7] Frances Kellor, *Arbitration in Action* 14 (1941).

[8] Soia Mentschikoff, *Commercial Arbitration*, 61 COLUM. L. REV. 846, 849 (1961).

[9] Martin Domke, *Commercial Arbitration* 10-11 (1965).

The privacy of arbitration proceedings is recognized today as an essential attribute of commercial arbitration. As stated in a leading treatise: "Additional advantages which arbitration offers are total privacy of the proceedings (which may be important to business people) and a less stressful conflict resolution atmosphere…. Before the parties make their opening statements the arbitrator may, at his or her discretion, determine whether persons other than the parties may attend the hearing. … The attendance of persons other than parties can pose a practical problem with wide implications." 1 Larry E. Edmonson, *Domke on Commercial Arbitration* § 1:4, at 1-13, § 29.7, at 29-10 (3d ed. 2011). *See also* 1 Bette J. Roth et al., *The Alternative Dispute Resolution Practice Guide* § 7:12, at 7-14 (2011) ("Contractual arbitration, for the most part, is considered to be a private process. In many practice areas, the parties consider the private disposal of their case to be a substantial advantage over traditional court litigation, and for that reason alone, choose arbitration as their means of dispute resolution."); Thomas E. Carbonneau, *The Law and Practice of Arbitration* 1 (2d ed. 2007) ("Arbitral proceedings are not open to the public and awards generally are not published."); 3 Ian R. MacNeil et al., *Federal Arbitration Law: Agreements, Awards and Remedies Under the Federal Arbitration Act* § 32.6.1, at 32:50 (Supp. 1999) ("A much-vaunted advantage of arbitration is the relative privacy of the proceedings…. [I]f the parties so agree, attendance at hearings may be severely restricted.").

The privacy of arbitration proceedings is embedded in the rules of national and international bodies that provide and regulate commercial arbitration. The Code of Ethics for Arbitrators in Commercial Disputes jointly adopted by the American Arbitration Association and American Bar Association states that "the arbitrator should keep confidential all matters relating to the arbitration proceedings and decision."[10] The American Arbitration Association

[10] AAA & ABA, Code of Ethics for Arbitrators in Commercial Disputes Canon VI(B) (2004),

Commercial Arbitration Rules require arbitrators to "maintain the privacy of the hearings unless the law provides to the contrary."[11] The arbitration rules of the International Institute for Conflict Prevention and Resolution ("CPR") provide that "arbitrators and CPR shall treat the proceedings … as confidential … unless otherwise required by law or to protect a legal right of a party."[12] The Arbitration Rules of the United Nations Commission on International Trade Law ("UNCITRAL") provide: "Hearings shall be held in camera unless the parties agree otherwise."[13] The Rules of Arbitration of the International Chamber of Commerce similarly provide: "The Arbitral Tribunal shall be in full charge of the hearings, at which all the parties shall be entitled to be present. Save with the approval of the Arbitral Tribunal and the parties, persons not involved in the proceedings shall not be admitted."[14] The arbitration rules of the International Centre for Dispute Resolution, International Centre for Settlement of Investment Disputes, London Court of International Arbitration, World Intellectual Property Organization and other international commercial arbitration organizations each contain similar privacy provisions. Nigel Blackaby & Constantine Partasides, *Redfern and Hunter on International Arbitration* 136 (2009).

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available at http://www.abanet.org/dispute/commercial_disputes.pdf.

[11] AAA, Commercial Arbitration Rules R-23 (2009), *available at* http://www.adr.org/sp.asp?id=22440#R23.

[12] CPR, Rules for Non-Administered Arbitration R. 18 (2007), *available at* http://www.cpradr.org/Resources/ALLCPRArticles/tabid/265/ID/600/2007-CPR-Rules-for-Non-Administered-Arbitration.aspx.

[13] UNCITRAL, Arbitration Rules Art. 28(3) (2010), *available at* http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf.

[14] Int'l Chamber of Commerce, Rules of Arbitration Art. 21(3) (2010), *available at* http://www.iccwbo.org/uploadedFiles/Court/Arbitration/other/rules_arb_english.pdf.

2. Privacy in Court-Sponsored Alternative Dispute Resolution Proceedings

In the 1970s, concerns about swelling judicial caseloads led to the modern Alternative Dispute Resolution ("ADR") movement, which included the adoption of pilot programs for court-annexed arbitration systems, mediation programs and early neutral evaluation programs. By 1998, one-quarter of the 94 federal district courts and one-half of all state courts had either mandatory or voluntary arbitration programs as part of their judicial process. Katherine V.W. Stone, *Alternative Dispute Resolution*, in 1 *The Oxford International Encyclopedia of Legal History* 131 (Stanley N. Katz ed., 2009). Arbitration was the second most frequently authorized ADR program, after mediation. Elizabeth Plapinger & Donna Stienstra, *ADR and Settlement in the Federal District Courts: A Sourcebook for Judges and Lawyers* 4 (1996).

In 1998, Congress passed the Alternative Dispute Resolution Act of 1998, which includes the congressional finding that "certain forms of alternative dispute resolution, including mediation, early neutral evaluation, minitrials, and voluntary arbitration, may have potential to reduce the large backlog of cases now pending in some Federal courts throughout the United States, thereby allowing the courts to process their remaining cases more efficiently[.]" Alternative Dispute Resolution Act of 1998, Pub. L. No. 105-315, § 2, 112 Stat. 2993 (1998). The statute requires each United States district court to "devise and implement its own alternative dispute resolution program, by local rule …, to encourage and promote the use of alternative dispute resolution in its district." 28 U.S.C. § 651(b). Each district court is also required to "provide litigants in all civil cases with at least one alternative dispute resolution process." 28 U.S.C. § 652(a).

Arbitration is one of the ADR options, though it is subject to certain restrictions. Courts may not require participation in arbitration without the parties' consent, 28 U.S.C. § 652(a), and

constitutional cases, civil rights cases, and cases in which damages of more than $150,000 is the relief sought are exempt from arbitration. 28 U.S.C. § 654(a). Although any party to the arbitration may request a trial *de novo* for any reason, 28 U.S.C. § 657(c)(1), if neither party requests a trial within thirty days of the arbitration, the arbitration award becomes binding as a court judgment and is not appealable. 28 U.S.C. § 657(a), (c)(1). Thus, many cases that plaintiffs initiate in federal courts are remitted to and resolved by arbitration – sometimes by a Magistrate Judge and always outside of public view, as described below.

An arbitrator is empowered to conduct an arbitration hearing, administer oaths and make awards. 28 U.S.C. § 655(a). All persons serving as arbitrators "are performing quasi-judicial functions" and are entitled to immunity on that basis. 28 U.S.C. § 655(c). Magistrate Judges are among the persons who may serve as arbitrators. 28 U.S.C. § 653(b). In this Court, a Magistrate Judge is expressly authorized to "[c]onduct various alternative dispute resolution processes, including but not limited to … arbitration … ." D. Del. Civ. R. 72.1(a); Order Relating to Utilization of Magistrate Judges at B.2.a (D. Del. Nov. 3, 2011).

Regardless of which ADR processes are adopted by each district court, the processes are confidential. Each district court is required by local rule to "provide for the confidentiality of the alternative dispute resolution processes and to prohibit disclosure of confidential dispute resolution communications." 28 U.S.C. § 652(d). As stated in a book published by the Federal Judicial Center:

> Confidentiality is generally considered a bedrock principle for most ADR procedures. Thus, participants in court-based ADR are usually assured at the outset of the process that their communications will be kept confidential.

Robert J. Niemic et al., *Guide to Judicial Management of Cases in ADR* 93-94 (2001). For example, the ADR Program for the District of Delaware states:

> Information disclosed to the magistrate judge during mediation, including the contents of any written submissions, are confidential and may not be disclosed to another party without consent of the disclosing party/side. Further, such information may not be used in the present litigation nor any other litigation, absent a court order. Violation of confidentiality may subject the violator to sanctions.

Overview of Mediation/ADR Processes (2010), http://www.ded.uscourts.gov/MPTmain.htm.

The ADR Policies and Procedures for the United States District Court for the Western District of Pennsylvania illustrate the privacy inherent in a court-sponsored arbitration. Section 5.4.B. provides that the arbitrator(s) may select "any location within the Western District of Pennsylvania" for the arbitration hearing, "including a room at a federal courthouse, if available," and that the location must be selected with due consideration of "the convenience of the parties and witnesses." W.D. Pa. Alternative Dispute Resolution Policies and Procedures § 5.4(B). Section 5.10.C. provides that each arbitration award "must promptly be sealed by the Clerk." *Id.* § 5.10(C). Section 6 articulates a general rule of confidentiality that is applicable to any ADR process, including court-sponsored arbitration. *Id.* § 6. That general rule of confidentiality requires all participants in the ADR process to treat as confidential "(i) the contents of all documents created for or by the neutral, (ii) all communications and conduct during the ADR process, and (iii) all 'communications in connection with' the ADR process." *Id.* § 6(A). One exception to the general rule of confidentiality is for "[d]isclosure of an arbitration award if no party files a demand for trial de novo …." *Id.* § 6(D)(9). In other words, the public has access only to binding arbitration awards that are entered as judgments.

If, as DelCOG contends, the First Amendment requires public access to arbitration hearings in the Court of Chancery, then the confidentiality provision of the Alternative Dispute Resolution Act of 1998 is similarly unconstitutional as applied to arbitration proceedings conducted in federal courts throughout the country. There is no logical distinction between an

arbitration hearing conducted in private by a Chancellor or Vice Chancellor and an arbitration hearing conducted in private by a federal Magistrate Judge.

Confidential ADR proceedings in any form would also be constitutionally suspect, inasmuch as those proceedings are also conducted by judicial officers. For example, the Third Circuit's Appellate Mediation Program is confidential, notwithstanding the fact that mediations can be conducted by "a senior judge of the court of appeals [or] a senior judge of a district court." 3d Cir. R. 33.1. The mediator, the attorneys, and other persons attending the mediation are "prohibited from disclosing statements made or information developed during the mediation process to anyone other than clients, principals or co-counsel, and then, only upon receiving due assurances that the recipients will honor the confidentiality of the information." 3d Cir. R. 33.5.

* * *

To summarize, the history of American and English arbitration is one in which the relevant laws and rules authorize and recognize the importance of conducting arbitration hearings in private. There is no tradition of open arbitration hearings, even when a judge acts as arbitrator.

C. The Logic Prong

In *Ashcroft*, the Third Circuit explained how to conduct a proper analysis of the logic prong of *Richmond Newspapers*:

> Although existing caselaw on the logic prong has discussed only the policies favoring openness, **we are satisfied that the logic prong must consider the flip side of the coin**. Indeed, the Supreme Court seems to have contemplated this, for in formulating the *Richmond Newspapers* test it asked "whether public access plays a significant positive role in the functioning of the particular process in question." **Any inquiry into whether a role is positive must perforce consider whether it is potentially harmful**.

> …
> … [A]s we have explained, that calculus perforce must take into account the flip side – the extent to which openness impairs the public good.

Ashcroft, 308 F.3d at 200-02 (emphasis added) (quoting *Press-Enterprise II*, 478 U.S. at 8). The *Ashcroft* Court explained:

> [W]ere 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 First Amendment right of access. For example, public access to any government affair, even internal CIA deliberations, would "promote informed discussion" among the citizenry. It is unlikely the Supreme Court intended this result.

Id. at 217.

The Third Circuit's prior en banc decision in *First Amendment Coalition* similarly analyzed potential negative effects of public access. The court wrote that "[f]orcing judicial review proceedings into an older criminal procedure mold would have a stifling effect on a state's ability to use creative methods in solving its problems." 784 F.2d at 473. The court also referred to the "almost universally accepted" "notion that the effectiveness of judicial disciplinary boards depends to a large extent on confidentiality." *Id.* at 475.

Here, DelCOG cannot avoid the significance of the availability of alternative non-public arbitral fora, and of the generally accepted notion that privacy is a desirable aspect of arbitration. *See supra* Section B.1. Because alternative non-public fora are available, even if it can be conjured that there is some theoretical public benefit from public arbitration hearings, there is no plausible basis to presume that Court of Chancery arbitrations would ever occur in public. Delaware entities that want to arbitrate their disputes could instead choose a private, alternative arbitral forum. Consequently, the harm to the public from requiring public access to Court of Chancery arbitrations would be substantial. Delaware entities would lose the opportunity to have their disputes arbitrated in a nationally renowned forum. Requiring public access to arbitration

proceedings in the Court of Chancery would have a stifling effect on Delaware's efforts to "remain at the cutting-edge in dispute resolution." Del. H.B. 49 syn., 145th Gen. Assem. (2009). Delaware itself would be at a competitive disadvantage.

The legislative synopsis makes explicit reference to how Delaware's arbitration statute allows Delaware entities to avail themselves of the expertise of the Court of Chancery for purposes of the "[m]any federal and international statutes [that] specifically identify instances when tribunals will stay or defer to the parties' decision to have their dispute resolved by way of arbitration" and that "often deal with issues, such as intellectual property disputes, that are of importance to Delaware entities." *Id.* A leading practitioner explains:

> The biggest advantage of arbitration overall is the ability to enforce it around the world. Under the New York Convention of 1957, the signatories agreed to accept arbitral awards and to recognize them and to domesticate them. That is a huge advantage in international cases because with a court order or judgment, you may have trouble if the two countries will not recognize such a judgment. An arbitration award under the New York Convention can be enforced pretty much anywhere around the world in countries that are signatories to the convention. There are many, many countries that have now signed on to the convention.

Daniel E. González, *The Value of Arbitration*, in *Inside the Minds: Alternative Dispute Resolution, Leading Lawyers on the Art & Science of Arbitration, Mediation, & More*, at 49-50 (2004).[15]

Numerous countries are seeking to take advantage of the demand for international commercial arbitration. Delaware is just one jurisdiction that enacted a new arbitration statute to

[15] The "New York Convention" is another name for the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. It applies to "the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such awards are sought" as well as "arbitral awards not considered domestic awards in the State where their recognition and enforcement are sought." Convention on the Recognition and Enforcement of Foreign Arbitral Awards Art. I(1).

make itself and the United States a desired forum for international arbitration. A recent New York bar association report discusses the phenomenon and the economic stakes:

> It is significant that jurisdictions around the world, many with government support, are taking steps to increase their arbitration case load. **New arbitration laws were enacted in 2010 and 2011 in France, Ireland, Hong Kong, Scotland, Ghana and other nations to enhance their attractiveness as seats of arbitration**. Maintaining New York's position, which already generates hundreds of millions of dollars in revenues for law firms and related businesses and millions of dollars of tax revenues, and which complements and reinforces New York's position as a center of commerce and finance, requires that attention be directed to the measures discussed in this Report.
>
> **In 2010, at least three jurisdictions established specialized courts to handle international arbitration matters — Australia, India and Ireland. Several other jurisdictions well-known for international arbitration, including France, the United Kingdom, Switzerland, Sweden and China, have designated certain courts or judges to hear cases to challenge or enforce arbitration awards**. Among the cited reasons for this focus on arbitration is the governments' recognition of the importance of arbitration to their economies and to their position in today's world of global commerce.
>
> * * *
>
> [I]t would be beneficial if there were to be assignment of one or more Supreme Court New York County Commercial Division judges to handle arbitration matters regularly and to assure that that change is widely known. While all of the judges sitting in that Division are excellent, **other jurisdictions — among them Australia, India and Ireland — have gained from identification of special courts to handle arbitrations because such measures indicate that the jurisdiction favors and supports arbitration**….

Final Report of the New York State Bar Association's Task Force on New York Law in International Matters 4, 38 (June 25, 2011) (emphasis added). Scotland, for example, enacted a new arbitration statute in 2010 as part of an effort to become a competitive global venue for international arbitration. Joanna Dingwall, *International Arbitration in Scotland: A Bold, New Future*, 13 INT'L ARB. L. REV. 138, 144 (2010) ("Repeatedly, parties opt to arbitrate in one of the established global jurisdictions, such as England, France, Switzerland, Sweden or New York.

With the advent of the Scottish Act, Scotland will go head-to-head with these leading international players.").

This international competition reflects the demand among international businesses for the most efficient and practicable arbitral forum. Delaware's willingness to make members of the Court of Chancery available to arbitrate commercial disputes provides a unique benefit to Delaware business entities and their contractual counter-parties. To the extent international businesses find it valuable to commit to have their disputes arbitrated confidentially by a member of the Court of Chancery, that attractive feature redounds to the benefit of those entities and the United States as a whole. Adoption 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. Competing arbitral fora offer privacy, an attribute consistent with the history of commercial arbitration and the rules of the leading arbitration organizations. DelCOG's claim must fail because requiring public access to arbitration proceedings in the Court of Chancery would provide Delaware entities with a compelling reason to arbitrate disputes in alternative non-public fora – a consequence that could harm Delaware and the United States in general and would create no public benefit.

D. The Delaware General Assembly's Judgment About When Claims to Public Access Attach in Arbitration-Related Proceedings Is Owed Deference

The statute challenged by DelCOG expresses a legislative judgment about when a claim of public access can be asserted respecting an arbitration proceeding – at the moment when an application is filed in the Delaware Supreme Court to vacate or enforce the arbitral award:

> **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.

10 *Del.* C. § 349(b) (emphasis added). No statute or rule of Court bars claims of public access to proceedings in the Delaware Supreme Court. *See* Del. Ch. Ct. R. 97(a)(4) ("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."). Instead, the challenged statute acknowledges that the Delaware Supreme Court may choose to adopt rules on the subject, and it allows parties to file motions in the Delaware Supreme Court about whether any portion of the record should be under seal.

The statute empowers the Delaware Supreme Court to exercise the same authority as would a trial court under the Federal Arbitration Act. 10 *Del. C.* § 349(c); *see* 9 U.S.C. § 10(a). By treating proceedings in the Delaware Supreme Court as the equivalent of proceedings in a trial court under the Federal Arbitration Act, the General Assembly created a regime of public access that replicates the system under existing practice under the Federal Arbitration Act, in which a party can seek access to filings in a United States District Court or state court that are derived from an arbitration proceeding that was itself private and confidential.

There is no question that parties can be compelled to conduct arbitration hearings privately. There is no public policy against a provision in an employment agreement mandating the confidential arbitration of civil rights claims. *Parilla v. IAP Worldwide Services VI, Inc.*, 368 F.3d 269, 281 (3d Cir. 2004). Nonetheless, if an application is made under the Federal Arbitration Act to vacate or confirm an arbitration award that was rendered in a private arbitration, a district court possesses the discretion to determine whether the common law right of access requires the sealing or unsealing of the award or any other portion of the record. *See, e.g., Century Indem. Co. v. Certain Underwriters at Lloyd's, London*, 592 F. Supp. 2d 825, 828

(E.D. Pa. 2009) (sealing arbitration award); *Zurich Am. Ins. Co. v. Rite Aid Corp.*, 345 F. Supp. 2d 497, 507 (E.D. Pa. 2004) (unsealing judicial records respecting arbitration other than federal tax returns).

Delaware courts similarly apply the common law right of access. In a recent case involving an application to vacate an arbitration award under the Federal Arbitration Act, the Court of Chancery ordered that the arbitration award should be unsealed, subject to the parties conferring on whether any portion of the arbitration award may be redacted for good cause, such as "trade secrets or competitively sensitive information." *Chartis Specialty Ins. Co. v. Lasalle Bank, N.A.*, 2011 Del. Ch. LEXIS 108, at *12 (July 29, 2011). Nothing in the challenged statute prevents future litigation in the Delaware Supreme Court over public access to a filing in the Delaware Supreme Court in a proceeding to vacate or enforce an arbitration award.

Delaware's legislative judgment to restrict public access to the arbitration proceeding itself is owed deference. As the Third Circuit observed in *First Amendment Coalition*: "[T]he presumption of validity attaching to state legislative and constitutional provisions weighs heavy…. Federal courts should not overturn a state's evaluation of structural concerns in the absence of egregious circumstances." 784 A.2d at 475. At issue in *First Amendment Coalition* was a state constitutional provision respecting judicial disciplinary proceedings, to which public access would not attach unless and until a recommendation of discipline was made to the state supreme court. In upholding that legislative judgment, the court noted: "All rights of access are not co-extensive, however, and some may be granted at different stages than others…. A temporally based right is no stranger to the law. For example, tradition supports the secrecy of the grand jury, the entity in the criminal justice system to which the Board is most akin." *Id.* at 472-73.

Here, public access is excluded from arbitral proceedings in the Court of Chancery, though the public may gain access to records of those proceedings in the event that those records are filed in the Delaware Supreme Court. As discussed above, that "temporally based right" of access is supported by the long tradition of private commercial arbitration hearings, including arbitration hearings at common law that could be held before a judge acting in the capacity of an arbitrator, as well as the history of confidential court-sponsored arbitration hearings to which public access is restricted under the Alternative Dispute Resolution Act of 1998 and any state analogues thereto. Now, in the face of growing demand by business to resolve disputes by arbitration, and the international competition among jurisdictions to be a locus for commercial arbitrations, Delaware has made the legislative judgment to make its Court of Chancery available as an arbitral forum, subject to review in the Delaware Supreme Court, and has made the further legislative judgment that the arbitration hearing itself shall be private, with the potential for public access to filings in the Delaware Supreme Court in the event of review of the arbitral award. That legislative judgment respects the historical tradition and logic of conducting arbitrations in private. It also respects application of the common law right of access to the judicial review of arbitration awards. To require public access to arbitration hearings in the Court of Chancery would disregard that legislative judgment and rupture "the state-federal joint venture of providing justice." William H. Rehnquist, *The Prominence of the Delaware Court of Chancery in the State-Federal Joint Venture of Providing Justice*, 48 BUS. LAW. 351, 355 (1992).

E. Arbitration Under 10 *Del. C.* § 349 Is Distinct from Litigation

As discussed above, the challenged statute is consistent with the centuries-old experience of commercial arbitration hearings being conducted in private and the contemporary practice of court-sponsored arbitration being conducted in private. The statute reflects the logic of putting arbitrations in the Delaware Court of Chancery on the same private footing, and also preserves claims of public access in the event of an application in the Delaware Supreme Court to vacate or confirm an arbitration award. Perhaps recognizing that history and logic are not on its side, and that Delaware's General Assembly is owed some measure of deference, DelCOG resorts to pleading that arbitration proceedings under 10 *Del. C.* § 349 are not actually arbitration, but are "really litigation under another name." (D.I. 1 ¶19). No pleaded facts support that assertion.

As described in the Statement of Facts, proceedings under 10 *Del. C.* § 349 and Court of Chancery Rules 96, 97, and 98 differ markedly from litigation under the remainder of the Rules of the Court of Chancery. For example:

- the parties and the arbitrator are authorized to adopt their own arbitration rules, Del. Ch. Ct. R. 96(c);
- subpoenas of third parties under Court of Chancery Rule 45 are not incorporated into the proceedings, *see* Del. Ch. Ct. R. 96(c);
- the arbitrator is empowered to "direct such prehearing exchange of information as he/she deems necessary and appropriate," Del. Ch. Ct. R. 97(f);
- a party representative with settlement authority is required to participate in the arbitration hearing, Del. Ch. Ct. R. 98(a);
- the hearing itself "will generally occur no later than 90 days following receipt of the petition," Del. Ch. Ct. R. 97(e); and

- the arbitral award is reviewable by the Delaware Supreme Court only on the limited bases available under the Federal Arbitration Act, 10 *Del. C.* § 349(c); 9 U.S.C. §10(a).

Unlike a judgment of a trial court in ordinary litigation (or even an order of an appellate court), an arbitral award is readily enforceable in the many foreign jurisdictions that have signed the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Finally, and unlike litigation, the choice to engage in the dispute resolution process under 10 *Del. C.* § 349 is entirely voluntary on the part of all parties; each party's affirmative consent is necessary for the proceeding to go forward. In all these respects, among others, arbitration under 10 *Del. C.* § 349 is different from litigation.

II. THE STATE OF DELAWARE AND THE COURT OF CHANCERY ARE IMMUNE FROM SUIT IN THIS COURT UNDER THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The State of Delaware and the Court of Chancery are immune from suit in this Court. As this Court recently held:

> The Eleventh Amendment protects states and their agencies and departments from suit in federal court regardless of the relief sought. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984). In short, the "court and the State have sovereign immunity." *Brooks-McCollum v. Delaware*, 213 Fed. Appx. 92, 94 (3d Cir. 2007) (not reported).

Cannon v. Cooch, 2011 U.S. Dist. LEXIS 135983, at *6 (D. Del. Nov. 28, 2011); *see also Lombardo v. Pennsylvania*, 540 F.3d 190, 194-95 (3d Cir. 2008) ("[I]t is clear that the States possess immunity from suit in the federal courts, also known as Eleventh Amendment immunity.").

CONCLUSION

For all the foregoing reasons, defendants respectfully request that the Court grant their motion for judgment on the pleadings.

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