"MEDIATION-ONLY" FILINGS IN THE DELAWARE COURT OF CHANCERY: CAN NEW VALUE BE ADDED BY ONE OF AMERICA'S BUSINESS COURTS?

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The following Essay by Vice Chancellor Leo Strine of the Delaware Court of Chancery advocates the enactment of legislation that authorizes the Court of Chancery to handle "mediation-only" cases. Such cases would be filed solely to invoke the aid of a Chancellor to mediate a business dispute between parties. By advocating this innovative dispute resolution option, the Essay embraces a new dimension of the American judicial role that allows American businesses to more efficiently solve complicated business controversies.

The mediation-only device was conceived in 2001 by members of the Delaware judiciary, including Vice Chancellor Strine, in consultation with members of the Delaware Bar and the Administration of Delaware Governor Ruth Ann Minner. After this Essay was widely circulated to certain constituencies and presented at a symposium sponsored by the Duke Law Journal *and the Institute for Law and Economic Policy (ILEP), legislation that contained the mediation-only device was drafted. In June 2003, with the full support of the Court of Chancery, Delaware Governor Minner secured passage of the legislation from Delaware's General Assembly. The mediation-only device was enacted into law as §346 and §347 of Title 10 of the Delaware Code. To the Editors' knowledge, this legislation is the first of its kind adopted in the United States.*

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† Vice Chancellor of the Delaware Court of Chancery. I thank Michael Rinaldi and Cathy Bundy for their invaluable assistance and my colleague Chancellor William B. Chandler III for his, as usual, constructive and incisive comments. This Essay was prepared in March 2003 in preparation for a joint symposium sponsored by the Institute for Law and Economic Policy (ILEP) and the *Duke Law Journal*. The author has made no attempt to update the Essay based on related legislative developments in Delaware, except to note the progress of the related legislation.

In this brief Essay, I float a trial balloon. Is there a way for Delaware to leverage the resources of its Court of Chancery to provide even more value to its business citizens by increasing that court's involvement in mediating business disputes? As is widely acknowledged, the American system of corporation law relies heavily on courts to ensure that the broad delegation of power to centralized management is actually used to increase shareholder wealth, rather than to exploit the providers of equity capital. Through the after-the-fact application of standards of fiduciary duty, the courts fill gaps that the parties to the corporate contract cannot rationally address by rigid rules beforehand. Likewise, common law courts use after-the-fact adjudication to resolve the disputes that arise from the problem of incomplete contracting that so often characterizes commercial contracts. Because of Delaware's preeminence in the corporate arena, its Court of Chancery is unusually experienced in performing both of these tasks.

This experience provides the members of the court with a sound basis to assist parties to business disputes in resolving their differences by an additional round of after-the-fact bargaining, through the process of judge-conducted mediation. Because this mediation process permits parties to shape their own solutions with expert assistance from the court at relatively low cost, it seems to have positive economic and social utility. Although judge-conducted mediation differs in important ways from adjudication, it is a logical extension of the judiciary's role as the branch of government that helps citizens resolve their controversies peaceably, fairly, and efficiently.

Given the increasing need of businesses for cost-effective methods to resolve civil disputes, the judiciary should be open to innovative methods of meeting that legitimate demand.

In recent years, the Court of Chancery has expanded its use of judge-conducted mediation. This expansion has been met with success. This Essay notes, however, that judge-conducted mediation in the Court of Chancery is not as widely available as might be optimal. To make the benefits of judge-conducted mediation more available to Delaware businesses, I advocate the authorization of confidential "mediation-only" filings, which would permit a wide range of business disputes to be mediated in the Court of Chancery, without the necessity for filing a formal lawsuit, regardless of whether any lawsuit might eventually fall within the Chancery's jurisdiction.

I.

American corporation law has long been characterized by a central tension. Essential to the corporate purpose is the broad empowerment of centralized management to deploy the assets of the firm to create wealth. And yet that very empowerment creates the potential for abuse of trust, leading to the need for protections to ensure managerial fidelity to the best interests of the corporation and its stockholders.[1]

By and large, the American approach to corporation law has eschewed bright-line rules as the method to address this tension, and instead has deployed the more contextual, standards-based tool of fiduciary duty review to keep corporate managers faithful. Professor Macey has succinctly explained the reason why:

> The dilemma is that policymakers cannot benefit shareholders by developing rules that successfully regulate whole classes of corporate transactions. . . .
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> . . . Because harm to shareholders results not from particular types of transactions, but rather from the circumstances in which the transactions are employed, rules that purport to govern classes of transactions are both underinclusive and overinclusive. Such rules are underinclusive because they inevitably validate corporate conduct that is detrimental to shareholder welfare. They are overinclusive to the extent that they are viewed as mandatory and thus prohibitive of transactions that would conflict with the rules yet increase shareholder wealth.[2]

Because American corporation law has used the standards-based law of fiduciary duty as its primary answer to the potential that management will misuse the broad authority it has been statutorily granted, the judiciary has assumed a "gap-filling" role, in which the common law process of adjudication has limited managerial power when necessary to protect stockholders and has provided

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1. Professor and former Chancellor William T. Allen has described this tension well. *See generally* William T. Allen, *Ambiguity in Corporation Law*, 22 DEL. J. CORP. L. 894 (1997) (suggesting that the ambiguity of corporate law is productive and that artistry and imagination are important components of work in the field).

2. Jonathan R. Macey, *Courts and Corporations: A Comment on Coffee*, 89 COLUM. L. REV. 1692, 1697–98 (1989); *see also* Jill E. Fisch, *The Peculiar Role of the Delaware Courts in the Competition for Corporate Charters*, 68 U. CIN. L. REV. 1061, 1082 (2000) (suggesting that Delaware's success in attracting corporate charters arises from the Delaware judiciary's unique process of corporate lawmaking).

transactional planners with guidance about practices that might incur judicial ire.[3] Although the relative indeterminacy that this standards-based approach produces is not without its critics,[4] this approach has enabled the implementation of a highly adaptive and flexible system of corporate law, which provides wide berth for corporate managers to implement innovative transactions and business strategies, while using the constant possibility of judicial intervention to ensure overall integrity.[5]

As is well known, Delaware is the domicile of a majority of America's largest corporations. For this reason, the Delaware court that is entrusted with jurisdiction over corporation law disputes—the Delaware Court of Chancery, on which I am privileged to serve—has had more opportunity than any other court in the nation to adjudicate corporate disputes and to play this gap-filling role. As a court of equity, the Court of Chancery acts not only as the expositor of the law, but as the finder of facts, a role that requires the judges of the court to immerse themselves regularly in the sociological and economic complexities of major and not-so-major corporate transactions. Through this process of repeated learning, the chancery judges endeavor to develop some common sense insights into what constitutes rational business behavior. The State of Delaware's investment in a Chancery Court and a Supreme Court that can act with the speed and expertise to meet the business community's needs is an important element of service it provides to its corporate domiciliaries and their stockholders.

Consistent with its status as a court of equity, the Delaware Court of Chancery also has deep experience in another significant

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3. *See* Allen, *supra* note 1, at 897; Fisch, *supra* note 2, at 1082–84. *See generally* John C. Coffee, Jr., *The Mandatory/Enabling Balance in Corporate Law: An Essay on the Judicial Role*, 89 COLUM. L. REV. 1618 (1989).

4. For a provocative argument that Delaware corporate law is more indeterminate than optimal, see Marcel Kahan & Ehud Kamar, *Price Discrimination in the Market for Corporate Law*, 86 CORNELL L. REV. 1205, 1214, 1233–41 (2001).

5. My own biased opinion is that the Delaware approach, quite common in American law, has, on balance, served our nation well. *See* Leo E. Strine, Jr., *Delaware's Corporate-Law System: Is Corporate America Buying an Exquisite Jewel or a Diamond in the Rough? A Response to Kahan & Kamar's* Price Discrimination in the Market for Corporate Law, 86 CORNELL L. REV. 1257, 1279–80 (2001); *see also* William T. Allen, *The Pride and the Hope of Delaware Corporate Law*, 25 DEL. J. CORP. L. 70, 72 (2000) ("The fact that the Delaware system dominates others does not of course mean it is optimal. But I am willing to assume that it supplies a pretty efficient system of legal organization."). Many non-Delawareans believe that the First State's system of corporate law is a sound one. *See, e.g.*, ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 9, 37–44 (1993); Fisch, *supra* note 2, at 1082–84.

area of law important to business entities—contract law. Because equity courts can specifically enforce contracts, the Delaware Court of Chancery regularly hears disputes between businesses whose contractual relations have broken down.[6]

In an interesting sense, this aspect of the Court of Chancery's jurisdiction is similar to its corporate jurisdiction. Many contract disputes between businesses flow from the same sort of "incomplete contracting" problem that characterizes corporate law generally. That is, the contracting parties often recognize that one of them must be invested with discretionary authority to act in certain circumstances, leading to the potential for abuse at the expense of the other. But, as in the corporate law context, the parties may not be able to formulate specific language to address the risk of abuse without sacrificing the benefits that were expected to flow from entrusting one of the parties with authority to act. And, of course, contracting parties will often lack the foresight to write language to cover every possible contingency, leaving gaps that must be filled by the court in an after-the-fact resolution of a dispute between the parties.[7]

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6. Examples of this court's involvement in high stakes contractual disputes include: *FleetBoston Financial Corp. v. Advanta Corp.*, No. CIV.A.16912-NC, 2003 WL 240885 (Del. Ch. Jan. 22, 2003) (finding that the failure to disclose known miscoding problems prior to a major financial service provider's acquisition of a consumer credit card business violated duties under contract and tort law); *In re IBP, Inc. Shareholders Litig.*, 789 A.2d 14 (Del. Ch. 2001) (enforcing a merger agreement and related contracts between two of the nation's leading distributors of meat products); *USA Cable v. World Wrestling Federation Entertainment, Inc.*, No. CIV.A.17983, 2000 WL 875682 (Del. Ch. June 27, 2000) (denying an injunction and specific performance when a television cable network failed to properly utilize its right to match a third-party offer to televise an entertainment company's programming), *aff'd*, 766 A.2d 462 (Del. 2000); *Merck & Co. v. SmithKline Beecham Pharmaceuticals Co.*, No. C.A. 15443-NC, 1999 WL 669354 (Del. Ch. Aug. 5, 1999) (enjoining a pharmaceutical manufacturer from marketing a vaccine in specific markets because the manufacturer misappropriated a competitor's trade secret), *aff'd*, 766 A.2d 442 (Del. 2000); *Universal Studios Inc. v. Viacom Inc.*, 705 A.2d 579 (Del. Ch. 1997) (finding a breach of a noncompete provision, and the fiduciary duty of loyalty implied therein, in a contract between leading companies in the entertainment industry).

7. *See* Fisch, *supra* note 2, at 1082–83:

> Private business contracts are . . . likely to contain gaps due to changing or unanticipated circumstances or the practical impossibility of complete specification. Standards allow the courts to fill these gaps through ex post determinations. As Ian Ayres has observed, courts and the common law process are particularly well suited to this role.

(citing Ian Ayres, *Making a Difference: The Contractual Contributions of Easterbrook and Fischel*, 59 U. CHI. L. REV. 1391, 1394 (1992)).

II.

In both the corporate and commercial realms, the Court of Chancery strives to fill gaps sensibly, by rendering after-the-fact judgments that result in incentives for future parties to conduct their affairs with each other in wealth-creating, but non-exploitative, ways and, when possible to do so fairly and efficiently, to govern their relationships by clear contractual text.[8] Those of us engaged in this adjudicative task on a more or less daily basis like to think that this is a valuable service that enables the procession of useful economic activity.

But we recognize that a judicial adjudication is no more than a second-best solution even when parties in a business relationship have reached a stage in their relationship when they are litigating against each other. Indeed, it is often the case that the parties are at odds precisely because their relationship confronted circumstances that they did not anticipate, rather than because one of the parties is engaging in clearly forbidden behavior. Put another way, many of the corporate and commercial cases that our court addresses are painted in shades of gray, rather than in black and white. They often turn on the interpretation of arguably ambiguous contractual terms, the implied duty of good faith and fair dealing, or an assessment of the economic fairness of a plausibly useful transaction tinged with self-interest. Not infrequently, the parties to a business-to-business dispute have a larger relationship that they wish to preserve, notwithstanding the litigable controversy that divides them. Many of these arguments are best resolved by an expeditious, if imperfect, settlement that results from an additional, after-the-fact negotiation.

Undoubtedly, many commercial parties who reach this point in their relationship do engage in another round of contracting to work out their problem short of judicial intervention. A small industry has also arisen to provide alternative dispute resolution (or "ADR") services to parties who desire third-party assistance in the process of working out their differences outside of the judicial process. In no small measure, the explosion in the use of ADR has been driven by the spiraling costs and time-consuming nature of traditional litigation.

Within the judicial process, courts across the country have embraced the idea of annexing ADR programs to their dockets, by

8. For an interesting give-and-take regarding this function of the courts in the corporation law, see Coffee, *supra* note 3, at 1678–83 and Macey, *supra* note 2.

implementing requirements ranging from mandatory arbitration of certain cases, to voluntary mediation, to required settlement conferences.[9] This ADR movement in the courts has been motivated in large measure by concerns about burgeoning dockets, delays in case processing, and the expense of full-scale litigation. As importantly, however, judges have become increasingly sensitive to the value of processes that enable parties to shape their own solutions with appropriate assistance from a disinterested party.

III.

The Delaware Court of Chancery has not been immune to this trend. In recent years, we have embraced the ADR tool known as mediation in very important ways. One bears emphasis here.[10] For the past several years, members of the court have been active in mediating disputes for their colleagues. That is, one of us who is *not* assigned to a case will mediate the case. In increasing measure, the incidence of mediation by members of the court has been driven by litigant demand. As experience with the process has grown, leading Court of Chancery practitioners have become comfortable with it and will often jointly request that the assigned trial judge find another member of the court willing to mediate their matters. Much more often than not, the process has led either immediately or within a short time to a settlement.

Even taking into account the possibility of selection bias (i.e., that parties who ask for mediation or who are referred to it by the trial judge are more likely to be involved in disputes amenable to voluntary resolution), there are attributes of Chancery Court-conducted mediation that might be viewed as creating a particularly felicitous environment for the forging of peace.

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9. I assume the reader's basic familiarity with the differences between arbitration, which is a variant of traditional litigation that involves a neutral decisionmaker announcing a result that is most often binding on the parties, and mediation, which is a process in which a neutral helps the parties attempt to reach a mutually livable settlement of their differences. This Essay only addresses the possibility of an increased role for the Court of Chancery in mediation.

10. One of these important ways that I will not stress involves the handling of a very sensitive portion of our caseload: that dealing with the appointment of guardians of infirm persons and with probate disputes. In that segment of our caseload, the court has adopted a requirement that the parties attempt to resolve their differences by mediation. *See* DEL. CH. CT. R. 174.1. As a matter of expense, this requirement makes good use of the parties' resources. As an overridingly more important concern, however, this requirement seeks the peaceful resolution of what are often very painful and difficult family matters, with the hope that the mediation can preserve or be a step towards restoring family harmony.

I begin with the obvious. The process is conducted in a courthouse by a judge whose day-to-day work is the resolution of complicated business disputes on a court noted for its attempt to promulgate consistent rulings. The courthouse setting is important because it impresses upon the participants—most notably, the clients—that they are involved in a proceeding of some dignity and importance, and, as importantly, that they will be subject to a full-blown trial if they do not settle. The involvement of a business judge is important because it is the closest thing to the "horse's mouth" that parties to litigation can get. Although judicial mediators are scrupulous about honoring their obligation not to talk to the assigned trial judge about the mediation, the judicial mediator is expected to and does provide his own views of the merits and of the risks that the mediating parties face. This affords the parties the maximal opportunity to make a reasoned judgment regarding how the litigation might come out.

This feature of a judge's participation also helps overcome recalcitrance or hubris. It is often the case that decisionmakers or advisers involved on one or both sides have an overly optimistic viewpoint about their sides' chances. That it is a judge who is expressing a grayer view of the matter seems helpful.

Another human factor is helped by the participation of a judge because judge-conducted mediation serves some of the cathartic purposes of a trial. Even in business cases, emotions can run high. Litigants have a desire to tell their stories, to have someone understand that they're not bad guys or to express their disappointment or sense of loss.[11] The less confrontational setting of a mediation can give parties a chance to explain themselves directly to a judge, who can help them find a graceful way to acknowledge the wisdom of making some concessions. And because the mediator is a judge, the participants tend to comport themselves with greater dignity than would be the case outside a judge's presence.

The use of a judge as a mediator has yet another consequence that might not be readily perceived. A judicial officer (unlike a private mediator) is not employed by the day at a high rate of pay to conduct an interminable process of diplomacy between parties reluctant to strike a deal. Because judicial time is valuable and other matters must be decided, the judge-mediator necessarily demands

11. Yes, this is true even in commercial and corporate disputes.

that the parties prepare carefully for the mediation in advance and cut to the chase earlier than might be the case with a private mediator. Put more bluntly, the demands on the judge's time result in a process that impels the negotiating parties to get down to business themselves. Most critically, the judge-mediator does the parties little service if he does not give them a candid assessment of the risks they each face at some point in the process. Although there are various techniques by way to impart this input,[12] the reality is that it is this guidance that the best litigators and most savvy businesspersons seek from the judge-mediator. Although such guidance does not turn the process into an arbitration, it does make the parties base their settlement offers on unvarnished input from the judge-mediator.

This does not mean, however, that mediation with a judge is largely preoccupied with a discussion of how relevant legal authorities apply to the facts of the matter being mediated. To the contrary, if anything, the experience chancery judges bring to the process allows them to spend more time on the parties' underlying business relationship and to help ensure that business factors that might not play a role in the eventual adjudication are given appropriate weight in the settlement calculus. And because chancery judges are all too familiar with the disputes that can arise from overly complicated business arrangements, they are also in a good position to help parties craft workable solutions and to avoid unwieldy settlements that are fraught with the possibility for future conflict.

For all of these reasons, the active involvement of a judge in the process of helping parties to business disputes resolve their conflicts consensually (particularly ones that arose from incomplete contracting in the first instance) seems likely to be of economic value and to have social utility. By providing parties with the opportunity to shape their own solutions to litigable controversies with the input of an experienced business judge, this mechanism should result in more efficient outcomes at less risk and expense than awaiting an up-or-down judgment on the merits.

IV.

If this is so, and if it is also the case that an important mission of the Delaware Court of Chancery is to provide timely and effective

12. For example, the bluntest words are often best reserved for a private session with the party that needs to hear them.

dispute resolution services to this state's business citizens, then a question for Delaware policymakers arises: Should the benefits of the useful process of judge-conducted mediation be made even more readily available to Delaware businesses?

As things stand, mediation in Chancery requires the filing of a formal lawsuit, instituted by a complaint that, in large measure, must be made publicly accessible.[13] For businesses hoping to achieve a just settlement without making their dispute public, but who desire the intercession of a judicial mediator to achieve that result, Delaware currently offers no option.[14] Moreover, situations probably arise when one party to a commercial relationship will not agree to litigate in Delaware,[15] or when venue is not proper here despite the Delaware citizenship of one of the parties,[16] but when the party reluctant to try the case in Delaware would desire the chance for mediation here before a judge of this court. Likewise, one can envision situations when two corporations might wish to mediate a dispute that, if litigated, would involve causes of action within the exclusive jurisdiction of the federal courts.[17]

Therefore, as a modest, but relatively novel, addition to the services that Delaware affords to those of its citizens that are business entities, our state could usefully consider opening the Court of Chancery to the filing of mediation-only matters.[18] By mediation-only,

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13. That is, even in a case involving trade secrets, the complaint must be made public, redacted of its sensitive factual allegations.

14. It remains true that such parties may seek out private mediators. But this involves great expense and lacks some of the unique and salutary attributes of mediation before an active business judge.

15. There could be a range of reasons for this, running from a simple refusal to litigate in the other party's backyard (if the other party has its operations in Delaware) or to agree to a forum that the other side prefers, to convenience, or to a desire for a jury trial.

16. In a commercial contract dispute, for example, the fact that one of the parties was a Delaware corporation would not be sufficient in itself to subject another party who was not domiciled in Delaware to this state's jurisdiction.

17. For example, a patent dispute.

18. At the time this Essay was crafted, this idea, as I understood it, was one that other members of the Court of Chancery found to be worthy of exploration, as did certain members of the Delaware Supreme Court. That said, none of my judicial colleagues should be tagged with endorsing the specifics of the "trial balloon" floated herein, which was intended as a starting point for serious implementation discussions. As a matter of background, it is worth noting that this idea had its origins in discussions Chancellor William Chandler III and I had with members of the Delaware Bar and the administration of Governor Ruth Ann Minner in the winter of 2001–02 regarding an initiative to enable the Court of Chancery to handle technology disputes, at which point the Chancellor and I expressed a possible interest in

I mean that the only point of the filing would be to invoke the services of a judge of the Court of Chancery to conduct a mediation between the parties.[19] In contrast to an ordinary lawsuit, mediation-only filings would be strictly confidential and would involve the filing of a short and plain statement of the matter in dispute. Judges of the court would be assigned to these matters in accordance with the same (largely random) protocols for other matters.

Recognizing that the types of matters that Delaware businesses might desire to mediate could be quite broad, the Court of Chancery should be empowered to mediate—with the consent of all filing parties[20]—any case falling within its traditional jurisdiction[21] and any commercial dispute among two or more businesses, so long as at least one of the filing parties is domiciled or has its principal place of business in Delaware. While personal injury and other individual tort matters should fall outside the scope of this initiative,[22] ordinary contract disputes among businesses should be grist for the mediation-only filing mill.[23] In recognition of the judicial energy that is exhausted

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extending the technology initiative to permit us to mediate disputes that might be litigated (if the mediation did not succeed) in other courts.

Given Delaware's capacity for rapid action on new ideas, it is not surprising to the author that enabling legislation, which provides the Court of Chancery with the mandate to implement a mediation-only program in accordance with the outline articulated in this Essay, was passed and signed into law in the most recent session of Delaware's General Assembly. That legislation also broadens the Court of Chancery's jurisdiction to handle certain commercial disputes, providing jurisdiction even if those disputes do not otherwise fall within the traditional equity jurisdiction of the court. This legislation, Senate Bill 58, was introduced with bipartisan support at the instance of Governor Minner. The court is now working on implementing rules.

19. The only adjudicative function I could imagine for the judge-mediator would be the ability to shift the costs of the mediation to one side, if that side failed to abide by the rules of the mediation (e.g., by not coming to the mediation with authority to settle the matter when that was required). This modest adjudicative power should not be subject to appeal. As the reader would expect, the implementation of this initiative would require, at the least, the adoption of formal rules. At present, the Court of Chancery rule governing mediation is Rule 174.

20. Such consent could be expressed at the time of filing or could be embodied earlier in the form of a contractual provision requiring the parties to participate in mediation in Chancery Court before the procession of arbitration or litigation.

21. This would cover all entity law disputes or claims for specific performance.

22. Such matters are not traditionally within Chancery's purview, and are more properly handled by Delaware's Superior Court, which is expert in such matters. These cases also raise unique concerns from business-to-business disputes, concerns that require extensive study, the completion of which should not delay action on the front I have identified.

23. Because mediation is not a remedy available at law, the implementation of this initiative is fully consistent with equity's role. As a matter of history, it is worth remembering that law courts refused to enforce arbitration agreements, a refusal that led to a remedy in equity. *See* SBC Interactive, Inc v. Corporate Media Partners, No. 16397, 1998 WL 749446, at *1 (Del. Ch. Oct. 7, 1998) (noting that enforcement of arbitration awards is a traditional function

in mediation and the need to ensure the rational deployment of scarce judicial resources, a relatively high filing fee[24] should be required and a jurisdictional limit of at least $1,000,000 should be imposed for any cases involving purely a claim for monetary damages. This will ensure that the matters are of sufficient consequence to justify the deployment of judicial resources to mediate them.[25]

I make no claim that a mediation-only filing option would be suitable for all types of business disputes. Notably, it is of no utility in the public corporation class action or derivative action setting because such actions must be initiated by a formal complaint and settled with formal court approval. Nor would it be so attractive an option that there would likely be lines at Chancery's door immediately, given the range of other alternatives for resolving disputes and the novelty of this initiative. But I do think that the mediation-only option would be a sensible, low-cost method for solving a wide range of commercial and corporate disputes[26] more discreetly and expeditiously.

Admittedly, the use of the Court of Chancery's judicial resources to resolve private disputes short of actual litigative combat can be seen as somewhat unusual. But that use draws on the skills that chancery judges develop in exercising their traditional adjudicative function and deploys those skills in aid of a larger service that the Court of Chancery has long sought to perform—the speedy and efficient resolution of disputes involving Delaware businesses. Indeed, what could be more characteristic of Delaware than an effort to adapt the capacity of its institutions to better meet the evolving needs of its business citizens?

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of equity courts); Amy J. Schmitz, *Ending a Mud Bowl: Defining Arbitration's Finality Through Functional Analysis*, 37 GA. L. REV. 123, 137–41 (2002) (describing law courts' distrust of arbitration). In any event, it might make sense for Delaware to implement a mediation-only filing docket within its Superior Court as well, which is available to any filing parties who prefer that forum or for any parties whose dispute involves only a monetary claim for less than $1,000,000.

24. For example, this could involve an initial filing fee of $5,000 to $15,000, and costs of $1,000 to $3,000 for every day of mediation after the initial one.

25. That is, controversies involving injunctive relief, specific performance, or the corporate law, for example, would always be a permissible subject for a mediation-only filing.

26. In the commercial context, the process would be of seeming viability in most situations, and particularly when the contesting companies had an ongoing relationship that they sought to preserve, or in situations when both the parties are seeking a rapid, confidential solution to their dispute (e.g., a dispute involving the terms of departure of a key executive). In the corporate context, the mediation-only process would be best suited to nonpublic companies with a small number of stockholders, all of whom could be represented at the mediation.