IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

PENNSYLVANIA SKILL GAMES, LLC, Plaintiff/Counterclaim Defendant, v. ACTION SKILL GAMES, LLC, Defendant/Counterclaim Plaintiff, and POM OF PENNSYLVANIA, LLC AND SAVVY DOG SYSTEMS, LLC, Intervenors.	)	Civil Action No. 2:20-cv-01177-PLD Magistrate Judge Patricia L. Dodge **MOTION TO CERTIFY ORDER, DATED DECEMBER 14, 2020 [ECF 41] FOR INTERLOCUTORY APPEAL PURSUANT TO 28 U.S.C. §1292(b)**

The undersigned has objected to the Western District of Pennsylvania's Alternative Dispute Resolution ("**ADR**") process as being implemented in violation of the United States Constitution, Amendments V, XIII and XIV. In accordance with the oath taken to uphold the Constitution of the United States, the undersigned continues the objection and moves the Court as set forth herein in good faith. After review of the record and available law, the question presented by the undersigned in this motion appears to be one of first impression.[1]

[1] If there is precedent applicable to the precise question presented herein, it has not been discovered by the undersigned or cited by the Court in its summary Order [ECF 41].

I. An Illustrative Dialog

[Citizen to WDPa] What is the cost of exercising my Constitutional right to a trial?

[WDPa to Citizen] Your Constitutional right to trial is paid in all material respects by your taxes, in addition to the case filing fee of $350, plus $52 in administrative fees, or $402. We are proud of our low cost to file a case in this District.

[Citizen to WDPa] Yes, but in researching the *real* fees, I am told that, in one particular case, a party had to pay another $500 in fees for mandatory mediation, more than double the amount of that filing fee. In another case, a party had to pay another $1,250 in mandatory fees for a "case evaluation," more than a 300% in additional fees over that filing fee. In yet another similar case, a party had to pay for a "case evaluation," and it cost the party another $2,250, 500% over the filing fee.

[WDPa to Citizen] We don't know anything about those costs. We don't even ask about those costs in our ADR Survey[2] or Report of the Neutral[3]. Those costs are up to the parties. It's not our fault that the parties *stipulate* to use expensive neutrals; therefore, we don't ask, we don't know, so we don't tell. Accordingly, those costs are not part of our transparency statistics.

This illustration isolates the Western District's hidden premise within a false choice. The hidden premise is that there is a mandatory fee, no less required than as part of the mandatory filing fee. The mandatory additional fee is simply stated as a premise without justification or transparency regarding the fact that the Court is, in fact, taxing the parties and different cases at different variable rates, on a subjective basis, for a collateral process.[4] The false choice is that the Western District requires the parties to choose from neutrals none of whom are identified as *pro bono,*[5] but the choices are attorneys who are simply identified to charge a fee for the service.[6]

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[2] https://www2.pawd.uscourts.gov/Applications/pawd_adr/SurveyADR/SurveyADR.cfm

[3] https://www2.pawd.uscourts.gov/Applications/pawd_adr/Documents/attrny/ReportOfNeutral_v2.pdf

[4] The Western District justifies taxing the cost by using a false comparison; to wit: the ADR brochure compares the cost of ADR against the cost of one day of deposition. Respectfully, this is clearly a rhetorically invalid comparison. The hypothetical deposition (that may never occur) would be on the merits, chosen voluntarily by the parties, implementing a case strategy, and not as a collateral fee imposed by the taxing venue. This is no less rhetorical than saying the implied *non sequitur* that someone should accept an invalid tax because it is "less than your cup of coffee per day."
See, https://www2.pawd.uscourts.gov/Applications/pawd_adr/Documents/ADR_Brochure_Final.pdf ("**Brochure**"); FAQ Questions and Answers, §12, https://www2.pawd.uscourts.gov/Applications/pawd_adr/Documents/ADR-Q&A_VERSION3_MARCH2014.pdf

[5] *See,* https://www2.pawd.uscourts.gov/Applications/pawd_adr/Pages/ListSelNeutral.cfm. In fact, a *pro bono* database filter selection does not exist.

[6] The published ADR materials are unclear, noting reference to "indigency," which is a natural person (non-commercial entity) concept, and, in others, the "inability to pay," which would require some form of collateral right

The question presented is not whether the Western District's ADR program might be *good* in some or even *most* cases, but whether the ADR program is Constitutionally *valid* in *all* cases.

The general systemic cost of a *judicial system* is managed by taxes and universally administered administrative fees. Once those taxes and administrative fees are paid, a person's path to trial relief is direct. But, for mandatory ADR, it is inherently a presumptuous self-interested paternal *collateral* process that this *particular party* must be diverted for its own particular good, this way, by compulsion of force, based upon the pre-judgment hypothetical that the other *direct* path would not be as favorable. Therefore, the entire premise of mandatory ADR is grounded in a hypothetical at best as to any *particular* party, and it must be viewed with the strictest scrutiny because it impinges upon a fundamental Constitutional right. And, upon this hypothetical, with struggling businesses in need, and praying for direct redress for the cause of action itself, the Western District commands potentially thousands of dollars of extra fees, in a collateral proceeding, with a variable different fee in each case, unlimited by any constraint, cap or rule, for the right to redress at trial.

Impossible to do otherwise? Compare the ADR Local Rules for the busy and well-respected Northern District of California:

> **Compensation. ENE Evaluators shall *volunteer* up to *two hours of preparation time and the first four hours* in an ENE session. *After four hours* in an ENE session, the Evaluator may (1) continue to volunteer his or her time or (2) give the parties the option of either concluding the proceeding or paying the Evaluator. The ENE proceeding will continue only if all parties and the Evaluator agree. If all parties agree to continue, the Evaluator may then charge his or her hourly rate or such other rate that all parties agree to pay. If more substantial preparation by the Evaluator is desired, the parties may discuss appropriate alternative payment arrangements with the Evaluator. Alternative arrangements must be approved by the ADR Legal Staff. No party may offer or give the Evaluator any gift.**

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to be heard on those collateral merits to determine if the direct or indirect taking of the fee will or will not occur. *Compare,* https://www2.pawd.uscourts.gov/Applications/pawd_adr/Documents/ADR_Brochure_Final.pdf with ADRPP §4.3.C.

ADR 5-3(b) (emphasis added),[7] or the ADR Rules of the Central District of California:

> **(a) Volunteer time. Panel members shall *volunteer their preparation time and the first three hours of a mediation session*. After three hours of a mediation session, the panel member may (1) give the parties the option of concluding the mediation; (2) continue the mediation and volunteer his or her time; or (3) continue the mediation on such terms and rates as the panel member and all parties agree. The mediation session will continue beyond three hours only if all parties and the panel member agree.**
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> U.S. Dist. Ct., Central District of California, General Order 11-10, §3.8 (emphasis added).[8]

Moreover, the *systemic limitation on hours* as fairly set forth in these districts smartly recognizes, as a practical matter, in all cases as a general rule, the *real* cost for the ADR, which includes the aggregate value of time and opportunity lost by all the parties, the aggregate fee of the multiple attorneys for the parties at all of their hourly rates, out-of-pocket expenses, travel, copy charges, and all other neutral and attorney costs, caused by mandatory compulsion and force, all based upon the hypothetical.

Although each federal venue has the power to regulate its docket,[9] there is no indication that the Western District has systemically developed or even tried to develop a no-cost ADR system that is implemented universally to all applicants, such as other respected venues. Moreover, the Western District's redirecting the costs and fees into a mandatory collateral external process escapes and conceals proper accountability, transparency and responsibility for causation. If reasonably possible to do otherwise, the Western District is commanded by the U.S. Supreme Court to do otherwise. *See, e.g.*, ¶20, *infra.*

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[7] https://www.cand.uscourts.gov/about/court-programs/alternative-dispute-resolution-adr/adr-local-rules/#ADR-MOP

[8] http://www.cacd.uscourts.gov/sites/default/files/general-orders/GO-11-10.pdf. The Central District does not offer ENE as a defined option, but tried and true mediation only.

[9] *See, e.g.,* The Civil Justice Reform Act ("**CJRA**"), as Title I of the Judicial Improvements Act of 1990, Pub.L. 101–650, 28 476, 104 Stat. 5089, enacted December 1, 1990; Alternative Dispute Resolution Act of 1998

II. Procedural Background

1. Access to the judiciary and the requested relief for claimed injury is *the quintessential* "fundamental" legal right of an American citizen, implicating the strictest scrutiny, because all social processes and legal rights ultimately converge into access to the courts by which such rights are enforced.

2. The United States District Court of the Western District of Pennsylvania interposes an Alternative Dispute Resolution ("**ADR**") process for the right to continue access to the federal courts to obtain a remedy for the claimed injury.

3. The ADR program is set forth within W.D.Pa LCvR 16.2, with the detailed rules being set forth in the Western District's ADR Policies and Procedures ("**ADRPP**").

4. The ADRPP expressly provides for three methods of ADR, being mediation, "early neutral evaluation" ("**ENE**") and arbitration. [*See, generally,* ADRPP]

5. By Order of Court, dated October 30, 2020 [ECF 26], the parties were ordered to conduct their initial conference in accordance with Fed.R.Civ.P 26(f) and to file a Fed.R.Civ.P 26(f) report and a "Stipulation of ADR Procedure."

6. In accordance with said Order, the parties conducted their conference on November 17, 2020. At that conference, Plaintiff elected mediation and was willing to participate in a mediation pursuant to ADRPP §3.[10] Defendants proposed a form of a "hybrid" ADR pursuant to ADRPP §4 to be followed by a mediation pursuant to ADRPP §3.

7. The divergence between the parties as to the ADR process was raised by the parties in the record in their 26(f) Report [ECF 30, ¶¶6, 16] and ADR Consent [ECF 32], both filed in anticipation of the December 4, 2020 initial scheduling conference with this Court ("**Scheduling**

[10] At that time, Plaintiff was willing to concede the ADRPP systemic errors stated herein, as a practical matter.

Conference"). [Minutes Entry, ECF 36; *see also,* Pre-Conference Order, ECF 26]

8. At the Scheduling Conference, this Court verbally stated its inclination to order (or otherwise appeared to have a preference for) the "hybrid" form of ADR proposed by Defendants. At the Scheduling Conference, Plaintiff retained its objection and was not in the position to stipulate to an ENE and/or a "hybrid" ADR. All parties consented to a mediation pursuant to ADRPP §3. The dispute was regarding the ENE, or the "hybrid" process also consisting of an ENE pursuant to ADRPP §4.

9. In this Court's Case Management Order [ECF 37, "**Case Management Order**"], the parties were ordered to proceed with the "hybrid" ADR.[11]

10. The undersigned filed a Motion for Clarification, [ECF 40],[12] ("**Motion for Clarification**"), which is incorporated herein by this reference. In the Motion for Clarification, Plaintiff summarized its objections as follows:

> **In summary:**
>
> **a. Plaintiff consents to mediation pursuant to ADRPP §3.**
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> **b. Plaintiff objects to any other form of ADR, including, but not limited to two processes, or any "hybrid" processes.**
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> **c. Plaintiff concedes that this Court has substantive authority to command mediation as part of its inherent power, the fee being a separate consideration. Plaintiff respectfully believes that this Court imposing any form of a more expensive method of ADR exceeds its jurisdiction, is an inherent abuse of discretion, violates the ADRPP, and violates Plaintiff's legal rights, by placing burdens and conditions to access the U.S. Courts that are not reasonably calculated to be the least restrictive and least expensive tried and true accepted methodology for ADR, being mediation.**

[11] In Plaintiff's Motion [ECF 40], Plaintiff's reference to the Court's Case Management Order [ECF 37] was to what appeared to be a minutes entry. Upon further review, the ECF 37 email notice had an attachment that specifically ordered the "hybrid" ADR. This is pointed out for clarity of the record, but the issue is immaterial and mooted by the Order now at issue, dated December 14, 2020 [ECF 41].

[12] Noting that the Motion for Clarification [ECF 39] was restated by ECF 40. ECF 40 is referenced herein.

d. As Plaintiff has consented to ADRPP §3 mediation, no statement regarding the fee on that basis is required. However, to any extent that some other methodology is imposed by the Court, Plaintiff first objects to payment of any fee, hereby requesting that Defendants pay the entire fee for the service they seek the Court to impose, or, in the alternative, Plaintiff objects to the Court's appointment of any neutral with a fee that exceeds $245 per hour and any ARD that would exceed eight (8) total hours of service.[13]

e. Granting Plaintiff's requested relief is not prejudicial to Defendants; granting Defendants' proposed dual "hybrid" ADR methodology without Plaintiff's consent is prejudicial to Plaintiff.

f. The Scheduling Conference has occurred, and LCvR 16.2D requires that the Court make the ADR selection.

11. Plaintiff's Proposed Order [ECF 39-1] proposed for relief:

> **This Court has reviewed Plaintiff's Motion for Clarification of Case Management Order [ECF 37]. As Plaintiff has raised numerous substantive and procedural objections to ADR other than a mediation, and *because all parties have consented at least to mediation* pursuant in their 26(f) Report [ECF 30, §16], the parties shall conduct mediation pursuant to ADR Policies and Procedures §3. The Court's Case Management Order, dated December 4, 2020, [ECF 37] remains otherwise effective as stated therein.**

Motion for Clarification, p. 9 (emphasis added).

12. On December 14, 2020, the Court issued a minutes entry order ("**Modified Order**") as follows:

> **During the December 4, 2020 case management conference, the parties disagreed over the form of ADR. Two of the three parties selected an ENE followed by a mediation. Because the Court has found that such an approach can be highly effective and occurs with some frequency, it ordered the parties to participate in a hybrid ENE/mediation session. In its motion [ECF No. 39], Plaintiff reasserts its objections to, among other matters, a hybrid ADR process. Accordingly, to that extent, its motion is granted and therefore, it is *ORDERED that the parties will proceed with an ENE.* In the event that all parties and the neutral agree to do so, they may, but are not required to, proceed with a mediation at any point during the ENE or thereafter. The Case Management Order [37] is modified as follows: "The parties shall file a Notice, rather than a Stipulation, by December 18, 2020, which identifies the neutral, provides the date of the ENE and identifies the party representatives who will be in attendance." All other relief requested by Plaintiff is denied. Signed by Magistrate Judge Patricia L. Dodge on 12/14/2020. Text-only**

[13] Plaintiff's concession, at that time, to mediate under ADRPP §3, or, if compelled into ENE under ADRPP §4, for some fair, reasonable and appropriate limitation, in accordance with the CJRA and revised Federal Rules.

> **entry; no PDF document will issue. This text-only entry constitutes the Order of the Court or Notice on the matter.**

Modified Order, *emphasis added.*

13. Without stating a reasoned opinion, the Modified Order summarily resolved two issues that were raised in the Motion for Clarification: a) elimination of the "hybrid" form of ADR that contradicted the express structure of the ADRPP; and b) presumptive elimination of a compulsory command to stipulate (that is, to be *forced* to *consent*) to an ADR process. *See,* ¶12.

III. Analysis of the Modified Order

14. There are three portions of the Modified Order that are at issue.[14]

a. **Ordering Plaintiff to Consent or Contract.** The Court stated that the "parties shall file a Notice, rather than a Stipulation," which is not understood as a distinct change, but in denotation only, because the premise of the command is still within the assertion of an objection of lack of jurisdiction or unconstitutionality to compel a collateral service agreement with an ENE service provider for a case evaluation; to wit, by any other name, the command remains a compulsory process with an implied stipulation to consent. The Court is effectively commanding the undersigned into a collateral contract for ADR evaluation services from an independent neutral and to pay the fees. An order of court to consent and/or to enter into a collateral services contract is, *prima facie,* a failure of proper jurisdiction or unconstitutional. The

[14] There are two other points stated in the Modified Order that should be noted, it not being clear if the statements are fundamental or incidental: a) The Court stated, "Because the Court has found that such an approach can be highly effective and occurs with some frequency, it ordered the parties to participate in a hybrid ENE/mediation session." As an abstract principle, such as set forth in *Buridan's Ass,* this statement alone is not effective causation for choice, as *mediation* is also highly effective and occurs with some frequency. Without bias or prejudgment, mediation would be the default traditional widely accepted mechanism. *See,* III.14.C, *infra.* b) The Court references, "two [sic, actually three] of the parties elected the hybrid ENE." It is suggested that any influence on the Court as to selection of method based upon some form of a *per capita* vote of adverse parties with separate litigation agendas is inherently prejudicial and an abuse of discretion, particularly when three parties are in the position of defendants, and the plaintiff will be required to bear a portion of the resultant cost of the process, by mandatory imposition of three adverse parties whose litigation goals for ADR process are inversely aligned to the goals of Plaintiff.

Court is effectively ordering Plaintiff to engage an ENE service provider for a "case evaluation," with an unlimited scope partially controlled by Plaintiff's adversary, against Plaintiff's consent. [*See,* ADRPP §6.E.3.(a) ("A mediator or neutral evaluator *shall*: (a) ask the parties to sign an *agreement to mediate or to engage* in ENE; (b) ask all persons participating in a mediation or ENE to sign a confidentiality *agreement*... and (c) clarify by *agreement or engagement* letter (ii) all fees and expenses that will be charged and payment terms." Emphasis added.)]

b. **Western District's Failure of Self-Responsibility for the ENE Process.** Pursuant to LCvR 16.2D, the undersigned asserts that the command of the Modified Order fails to set forth the entire process of the ENE, which must be a complete resolution of the ADR process when the parties are in disagreement.[15] The Western District, as creator of the framework, must establish appropriate defaults. For example, when the parties disagree, the matter will default to mediation, and when the parties are unable to select a mediator, one will be appointed by an administrator.[16] That is, the undersigned asserts that the *process* referenced by LCvR 16.2D is for the Court to order an entire collateral ADR *process*; to wit, the ADRPP requires this Court independently to impose, overruling any objection, the: a) method; b) the neutral; c) the fee and/or hourly rate; d) the extent or limitation on the fee, understanding each litigating party will independently need to develop the cash-flow to pay the taking of the fee (directly or indirectly) by compulsion of the Order of Court; and e) the terms and conditions of service and payment.[17]

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[15] Telling the undersigned to pick a neutral for a process that the undersigned asserts is beyond the Court's jurisdiction or is unconstitutional is inherently abusive. The undersigned is not in the position *"voluntarily" to choose* an ENE evaluator, which would then intercede some *causation by false choice* to the undersigned of exactly the fault to which the undersigned objects. Plaintiff cannot be the superseding cause to nullify its own objection. It places the Plaintiff onto the rack until it "voluntary" chooses a neutral. *See, supra,* II.10, *and related footnotes*.

[16] The default in paying a fee for the neutral is a catastrophic framework problem for the ADRPP, for the reasons set forth herein.

[17] Although the formula's default will not always be required to be applied as a *practical* matter, the process formula itself must assume and test the boundaries of what happens on the test of determining multiple individual persons or companies objecting to the ADR process for personal and subjective reasons, some of which may be privileged. Does the Court judge the subjective reasons that litigants cannot find an acceptable neutral for an acceptable fee per that litigant's budget? Does the Court judge who is a large company and who is a small company to determine whether

On the *formulaic* premise of the ADRPP as structured, tested at its logical conclusion, the Western District's ADRPP would implode by collateral ADR meta-disputes with the inability to impose a variable tax rate that is fairly applied to each particular litigant.[18]

The undersigned asserts that the ADRPP is fundamentally and catastrophically flawed if it cannot resolve each and every issue of its own structure, *transparently for public scrutiny.* If the Court is going to order a party to pay a neutral *$500 per hour* for a complex ENE "case evaluation," the Order will expose the ruling for public consideration, and it will be a subject of appeal at some point in the process, but an interceded *"mandatory stipulation"* voids grounds the appeal, *because the party consented*. There is no way around the simple fact that ordering parties to pay collateral attorneys' fees, in the record by command, will ultimately be challenged as unfair, unequally applied and will appear punitive at some grounded level.

Moreover, it seems reasonable that no citizen should be so pluckless as to be happy about an ADR process where the effective cost is different for that party only because of some substantively unstated basis, on this day or that day, by this judge or that judge, and then systemically concealed from public inspection.[19] It is an abuse of discretion for the Court, or the Western District, to mandate *effective costs and taxes* on a collateral process to get to trial, being a Constitutional right, most highly scrutinized, and then to profess behind a low filing fee stating that the cost of litigation is by causation of the parties who stipulated to it. The undersigned

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paying a fee is fair for that litigant? Will the Court set collateral ADR case budgets? Does the Court review financial statements and cash flows of a party early in the case? If the fee is fixed, it is static, based upon the conditions of systemic tax review universally applied to cover the mandatory ADR program; however, if the fee is variable, it must be tethered to some *policy* grounding fact that is *publicly transparent* and with each litigant *equally protected*.

[18] The concept that the ADRPP has "worked so far" is addressed, *infra,* III.15 The undersigned asserts that the ADRPP has survived by circumstantial accident, but not by framework.

[19] The commanded collateral process would be individualized by different judges on different days for different parties for similarly situated cases or parties. To stay focused, this is a matter of the *collateral* ADR process for a variable tax directly or indirectly commanded by the venue in additional to the filing fee. This is *not* a matter of the *direct* case management track for the case on the merits, the venue filing fee having been already satisfied.

suggests this Court must complete the transparency of what must really be paid systemically, and in any particular case, to gain access to a trial. Indeed, the Western District's ADRPP system is a latent violation of findings in The Civil Justice Reform Act[20]; to wit:

> **(12) in light of the diversity of caseloads, types of litigation, local characteristics of the caseflow process, and the number of judges and support staff available across different Federal jurisdictions, each district court should have sufficient flexibility to formulate the specific details of its plan *within certain well-defined and uniformly applied parameters;***[21]

Id, at §2; *see also,* 28 USC 658 ("The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter.") The undersigned asserts that it is not a legally satisfactory "well-defined" and "uniformly applied" ADR process that has untethered discretion in the trial judge, on a variable fee basis, with no cost limits, in a non-transparent process, any more than a historically very clear and defined simply complex statement that someone believes in everyone's equal right to own a slave. *See,* 15.a, *infra.*

c. **Consent Override by Prejudgment.** In this case, at the time of the Motion for Reconsideration, all parties had consented to mediation, but Plaintiff did not agree to the ENE or the ENE portion of the "hybrid" ADR. But, strangely enough, the Modified Order compels exactly that portion of the proposed ADR that was *disputed*, rather than that portion of the ADR proposed that was *consented*. [*See, generally,* ECF 40, 41; *supra* ¶11, ECF 39-1] This appears to be an unnatural condition and the Court's reasoning for the override is not *prima facie* cognizable. Therefore, the undersigned suggests that Court must have been under some strong causation of

[20] The Civil Justice Reform Act ("**CJRA**"), as Title I of the Judicial Improvements Act of 1990, Pub.L. 101–650, 28 476, 104 Stat. 5089, enacted December 1, 1990

[21] *Id, at* §2*; see also,* Compensation of Arbitrators and Neutrals, 28 USC 658 ("The district court shall, subject to regulations approved by the Judicial Conference of the United States, establish the amount of compensation, if any, that each arbitrator or neutral shall receive for services rendered in each case under this chapter."

influence. However, at this stage of the litigation, such a strong causation implies some form of early judgment, perhaps punitive, imposing, as part of the cost of relief an extensive ENE "case evaluation" collateral process, based upon a compelled variable cost, without any time or cost limitation whatsoever that would, *e.g.,* comport with the CJRA. *See,* II.10.e., *supra.*

15. The undersigned acknowledges that the Western District ADRPP has been operating for almost 15 years, and the issues raised appear to be of first impression. Accordingly, the undersigned states the following:

a. **Time as Sole Justification.** History teaches that systemic flaws in people, societies, judges and courts, are sometimes corrected only by particular circumstances that converge within the course of time. *See, e.g., Plessy v. Ferguson,* 163 U.S. 537 (1896), *corrected by Brown v. Board of Education of Topeka,* 347 U.S. 483 (1954). The existence of a *status quo* is not necessarily determinative of the righteousness of the greater principle. Reflection takes a course of time and latent errors take time to ripen into a test context. Because something exists does not determine its merit.

b. **Probabilities.** The undersigned suggests that the Court view its perception of the ADRPP program in light of the statistical realities that the objections to the program raised herein that are usually mooted; to wit: a) if the parties had agreed to the ADR, which is the usual case, there would be no controversy; or b) if one of the parties had conceded as to method, which is the usual case, there would be no controversy; or c) if Plaintiff would have conceded to accept the "hybrid" method, there would be no remaining controversy; or d) if the Magistrate Judge had simply ruled for the *consented* mediation portion of the "hybrid" ADR instead of the disputed ENE portion of the "hybrid" ADR, there would be no controversy; or e) if Plaintiff would have decided to concede in light of the Modified Order, there would be no remaining controversy. But, facts are stubborn things, and it does not follow that the rarity of exposure of a systemic flaw thereby makes the flaw correct.

c. **Chilling Effect.** The effect of a challenge by a party or counsel to the ADRPP is beyond chilling. By raising and pressing this issue, which the undersigned believes in good faith to be justified, draws a significant risk of some negative consequence. No one will admit it, and yet everyone knows it exists. That is the reality of this context. Therefore, there is a chilling effect on counsel or the parties to challenge the ADRPP, and the premise of statistical Bar approval of the ADRPP is statistically skewed.[22]

16. Plaintiff set forth the substantive distinctions between mediation and ENE in the Motion for Clarification, which do not need to be reiterated. [*See,* Motion for Clarification, pp. 3–7, *and related footnotes*] Suffice it to say that it is beyond argument that a mediation process and an ENE process are very distinct procedures, with different goals, benefits and burdens. In a mediation, the essential quality is that the *parties control* a settlement negotiation. The mediator works a settlement negotiation, *controlled by the parties,* as the essential purpose. In an ENE, the ADR service *duplicates*, at a significant variable unlimited cost, the primary role of the attorney, which is to perform a case evaluation. Therefore, in a mediation, the mediator (who is specially trained in the Western District), brings something new and mollifying to the dispute, but an "evaluator" (who is not specially trained in the Western District) duplicates, at some level, the primary role of each attorney for which the party has already paid for the service.[23] Moreover, the ENE introduces substantive risks that are not part of a mediation. [*See,* Motion for Clarification, at p. 5–6, and *fn.* 4; *Compare,* ADRPP §3 with ADRPP §4]

[22] Whether the context finds a metaphor in suggesting Andersen's emperor having no clothes, or analogizes to Dicken's Oliver Twist "wanting more," the ant is always in some jeopardy for criticizing the anteater. It is no less here. The chilling effect on criticism of the Court is real. Notwithstanding the oath of office and the *critical* thinking that the judiciary desires for members of the Bar, challenges to the thing itself can tend to offend it. It is human nature.

[23] Someone may posit that the "evaluator" neutral brings a new evaluation to the parties, but this is a hypothetical that contradicts the strong presumption that each attorney is licensed to appear in the proceeding having already performed a competent case evaluation of the merits. Accordingly, the strong presumption would be that an ENE case evaluation is duplicative, and any statistic otherwise would need to be within the scope of a *non-stipulated* ADR by compulsion of the Court over objections. Irrespectively, a mediation is always encouraged, fresh and unique.

17. Substantively, the undersigned asserts that mediation is the *least restrictive method*, it is the *least intrusive method*, and it is the *least expensive* ADR process by default. Accordingly, Plaintiff suggests that the Western District exceeds its proper jurisdiction to impose more than the least restrictive method of ADR—being mediation—as part of a court-ordered ADR process, matched with a systemic obligation for the party to pay an unlimited variable fee, in order for a party to exercise a Constitutional right to gain further access to the federal courts. Forcing a party into an *evaluation process* standard, without its consent, in conjunction with a duty of good faith matched with sanction potential, is a violation of the Constitutional right of access. *See, United States Constitution,* Amendments V, XIII and XIV. *See, generally, Lea v. PNC Bank,* 2016 WL 738053 (W.D. Pa. 2016), and *Vay v. Huston,* 2015 WL 791430 (W.D.Pa 2015), and the cases cited therein.

18. Plaintiff concedes the jurisdiction of the Court to order an ADR mediation, but not anything other than a mediation, and only to the extent that the ADR is either contemplated by and subsumed by the case filing fee or by some other *transparent* fixed administrative fee or tax reasonably matched to the ADR program administration cost. Any effective fee to exercise the right to trial, based upon a variable cost, by collateral external compelled contract, with a portion of that fee determined by the actions of a litigation adversaries, is beyond the proper jurisdiction of the Western District, and is otherwise unconstitutional.

IV. Applicable Law

19. As set forth above, *e.g.,* the cited U.S. District Courts in California, being both busy and well-respected venues, were able to fashion an ADR procedure that protects the federal interest, and, at the same time, protects the interest of United States persons from hidden taxes, non-transparent mandatory costs to exercise a Constitutional right, jeopardy of requiring to pay a portion of a fee that is controlled by an adversary in a litigation process, the imposition of variable fees for different parties

similarly situated, subjective pre-judgments by the judicial officer as it relates to the case and exercising a right to trial, and creates stability and predictability in the administration of justice.

20. The undersigned asserts that the Western District's obligation is to impose the least restrictive, least intrusive, and least expensive method of ADR, which is mediation. Accordingly, although ENE is a valuable available method of ADR for *stipulating* parties, *ordering* a "case evaluation," which duplicates the essential role of and cost for the attorney for the party, exceeds the bounds of the venue's jurisdiction or proper power under the U.S. Constitution. Mediation is cost-effective and gets polarized parties to the table to discuss settlement. ENE is more costly, and the primary goal duplicates the evaluation role of counsel and is not primarily targeted to resolution.

The U.S. Supreme Court supports Plaintiff's position; to wit:

> **It is not sufficient for the State to show that durational residence requirements further a very substantial state interest. In pursuing that important interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with 'precision,' *NAACP v. Button,* 371 U.S. 415, 438, 83 S.Ct. 328, 340, 9 L.Ed.2d 405 (1963); *United States v. Robel,* 389 U.S. 258, 265, 88 S.Ct. 419, 424, 19 L.Ed.2d 508 (1967), and must be 'tailored' to serve their legitimate objectives. *Shapiro v. Thompson, supra,* 394 U.S., at 631, 89 S.Ct., at 1329. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose 'less drastic means.' *Shelton v. Tucker,* 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231 (1960).**

Dunn v. Blumstein, 405 U.S. 33092 S.Ct. 99531 L.Ed.2d 274 (1972)

V. Certification of Modified Order

21. Therefore, Plaintiff moves for an Order certifying the Modified Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), and staying proceedings in this Court pending the Third Circuit's resolution of the §1292(b) appeal. The Modified Order contemplates that the legal question is whether this Court has jurisdictional power to compel a party to enter into a non-transparent collateral ENE services contract for ADR processes on a variable unlimited fee

basis, partially controlled by adversary litigants, and, if so, whether the ADRPP implementation is valid in accordance with the United States Constitution.

This question is clearly appropriate for immediate appeal under §1292(b): it is purely a legal question involving the ADRPP, and thus does not depend upon the development of any facts in this case. The question is one of "first impression," and there are substantial grounds for disagreeing with the Court's ruling in the Modified Order. Because the ADRPP is a policy of the Western District of Pennsylvania that, as a general rule, *affects all cases filed in the venue*, resolution of the legal question is of *exceptional* significance.

22. As a matter of fairness and transparency, if this venue is going to continue to proceed with the ADRPP, the undersigned asserts that appellate review is necessary and appropriate, and failure to certify would have a negative public perception.

23. Defendants have requested a stay of the procedure and a stay would not thereby prejudice Defendants. [*See,* ECF 42, 43][24]

24. Section 1292(b) of 28 U.S.C. provides:

> **When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.**

This context here presents exactly a "knotty" legal issue and an "ephemeral" question of law that might otherwise disappear. *See,* Federal Rules Handbook, 2021, West Publishing, §6.2, p. 1513, *and the cases cited therein*. The U.S. Supreme Court has provided additional guidance. The "collateral

[24] This motion and the stay requested is not intended as a substantive response to Defendants' Motion to Stay.

order doctrine" allows appeals of interlocutory orders when they "fall in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546 (1949). The Court later expressed this as a three-part test in Digital *Equipment Corp. v. Desktop Direct, Inc.,* 511 US 863, 867 (1994), that the order must be "conclusive," the order must "resolve important questions completely separate from the merits," and the order "would render such important questions effectively unreviewable" if an appeal is delayed until after a final trial.

> **The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' **1208 of it." *Digital Equipment Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 867, 114 S.Ct. 1992, 1995, 128 L.Ed.2d 842 (1994) (*quoting Cohen,* 337 U.S., at 546, 69 S.Ct., at 1226). In Cohen, we held that § 1291 permits appeals not only from a final decision by which a district court disassociates itself from a case, but also from a small category of decisions that, although they do not end the litigation, must nonetheless be considered "final." Id., at 546, 69 S.Ct., at 1225–1226. That small category includes only decisions that are conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action. Ibid.**

Swint v. Chambers County Com'n, 514 U.S. 35, at 42, 115 S.Ct. 1203131 L.Ed.2d 60 (1995), *citing, n Cohen v. Beneficial Industrial Loan Corp.,* 337 U.S. 541, 546, 69 S.Ct. 1221, 1225–1226, 93 L.Ed. 1528 (1949).

WHEREFORE, Plaintiff prays that this Court enter an order certifying its December 14, 2020 Order [ECF 41] for interlocutory appeal to the United States Third Circuit Court of Appeals.

Dated: December 20, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of December 2020, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF system with the Clerk of the Court using the CM/ECF system, which the undersigned believes will send a copy to all counsel of record.

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