
CLLA
COMMERCIAL LAW LEAGUE OF AMERICA
EXPERTISE • INSIGHT • RESULTS
MEDIATING BANKRUPTCY DISPUTES: A GHOST-RUNNER ON SECOND OR NEED A NEW GAME?
Leslie A. Berkoff, Partner
Moritt Hock & Hamroff LLP
MH&H
Hon. Judith K. Fitgerald (ret.), Shareholder
Tucker Arensberg, P.C.
TUCKER ARENSBERG Attorneys
Candice L. Kline, Partner
Saul Ewing LLP
SAUL EWING LLP
CLLA EDUCATION WEBINAR

CLLA MEDIATION PANEL 2023

INDEX

Title:

Mediating Bankruptcy Disputes: A Ghost-Runner on Second or Need a New Game?

Topic Abstract:

Bankruptcy practice relies on mediation from preferences to chapter 11 plan formulation and confirmation, and many other claims and litigation disputes in a wide variety of settings, including appeals. The use and practice of mediation has generated some debate among academic and practitioner commentators, suggesting the issue is well developed for discussion.

1 - What are the pros/cons of current practices for mediating bankruptcy settlements for plan confirmation purposes?

2 - Who decides which players should have a seat at the table in the mediation?

3 - Is mandatory mediation akin to a "tax" for parties, i.e., in preference actions and chapter 11 plan disputes, does mediation provide real value?

4 - If mediation drags on, are there any mechanisms that could encourage efficiency?

5 - Among observers and practitioners, what best practices and opportunities for reform are worth highlighting? For example, is recourse to mediation appropriate if what is being mediated is a potentially unconfirmable plan?

6 - What other mediation and ADR models should be considered, including the use of staff mediator programs?

7 - What about discovery and confidentiality complications? Is there value to transparency and accountability, or is that overrated? How does transparency and accountability dove-tail with confidentiality requirements?

Topic Outline/Agenda:

Thursday, May 18, 2023 11:15 am to 12:15 pm CT

Panel Speakers:

Leslie A. Berkoff, Partner, Morritt, Hock & Hamroff LLP

Hon. Judith K. Fitzgerald (Ret.), Shareholder, Tucker Arensberg, P.C.

Candice L. Kline, Partner, Saul Ewing LLP

Timed Agenda:

Topic Introduction	11:15-11:20
Mediation in Bankruptcy – current cases and practices; Local rules and examples	11:20-11:40
Comparative ADR models, critiques, and opportunities	11:40-12:00
Additional considerations from the debtor and creditor perspectives	12:00-12:10
Q&A	12:10-12:15

Written Materials:

Substantive outline of panel discussion topics

Articles on mediation practices

Case examples – orders and local rules

Comparative examples, e.g., Seventh Circuit Mediation Program

What are the benefits and drawbacks of mandatory mediation in bankruptcy chapter 11 cases?

Benefits of mandatory mediation in bankruptcy chapter 11 cases include:

1. It can help the parties to reach a settlement more quickly and efficiently than through traditional litigation.

2. Mediation can provide an opportunity for the parties to have a more open and honest dialogue about their positions and interests.

3. Mediation can also help to preserve relationships and minimize the damage caused by the bankruptcy process.

Drawbacks of mandatory mediation in bankruptcy chapter 11 cases include:

1. It can be costly for the parties, as they will need to pay for the services of a mediator.

2. It can be difficult to find a neutral and experienced mediator who is well-versed in the complexities of bankruptcy law.

3. Mediation is not always successful, and if the parties are unable to reach a settlement, they will need to proceed with traditional litigation.

4. The process may be time-consuming and slow down the process of bankruptcy.

5. It can be difficult to enforce a settlement agreement reached through mediation.

file:///C:/Users/Owner/Documents/Mediation/Confidentiality%20and%20Its%20Exceptions%20in%20Mediation%20for%20clla%20may%202023.html

ABA Groups Litigation Committees Alternative Dispute Resolution Practice Points

November 24, 2020 PRACTICE POINTS

Confidentiality and Its Exceptions in Mediation

Courts must take the smallest bites possible out of the confidentiality shield when a carve-out is warranted.

By Stuart Widman

Confidentiality of mediation communications and information is essential to its validity and effectiveness. In re Teligent, Inc., 640 F.3d 53, 57-58 (2d Cir. 2011). It promotes a candid flow of information that informs the mediator of issues and concerns which, if resolved, could lead to settlement. The August 2005 Model Standards of Conduct for Mediators, issued jointly by the American Bar Association, American Arbitration Association, and Association for Conflict Resolution enshrine confidentiality as an immutable part of the process.

Yet, as with most principles and policies, there are important competing interests that nibble at the edges of confidentiality, creating exceptions. Those are usually statutory exceptions, but they also include judicially-made exceptions that balance the integrity and protections of the mediation process against even weightier needs and interests.

Some of the statutory exceptions include (1) when disclosure is necessary for criminal prosecution; (2) when necessary to prove coercion or fraud that led to the mediated settlement; (3) in order to establish the existence or terms of a settlement agreement; and (4) when necessary to impose sanctions or to discipline counsel in connection with a mediation proceeding. (See “The Protections and Limits of Confidentiality in Mediation,” two-part article in November and December 2006

“Alternatives,” published by the CPR International Institute for Conflict Prevention & Resolution.)

A December 2019 decision from the Southern District of New York illustrates the balancing and cautious approach when applying the last of the above-listed exceptions, determining whether sanctions should be imposed upon counsel. Arthur Usherson v. Bandshell Artist Management, 2019 WL 6702069 (S.D.N.Y. December 9, 2019).

That case centered on the veracity of statements made by plaintiff's counsel to the court in the wake of a failed mediation. The defendant in the case sought sanctions against plaintiff and its counsel for not properly participating in the mediation. Specifically, defendant said plaintiff and its counsel did not attend “in person” as required by the court’s Mediation Referral Order and accompanying Mediation Rules of the Southern District. Those rules mandate attendance by each party and by the lawyer who is primarily responsible for handling the trial of the case.

There, defendant was only available for the mediation by telephone, and plaintiff's lead counsel sent two associates in his stead. Plaintiff's counsel said the mediator gave advance permission to send the associates and for plaintiff to appear by telephone. Defendant's motion for sanctions disputed both claims, said they were false, and said the mediator would testify to their falsity if permitted.

The court allowed a "limited inquiry" into the communications between plaintiff's counsel and the mediator in order to clarify whether the mediator did, in fact, give the advance permission to depart from the rules. That exception to the general scope of confidentiality was critical to determine non-compliance with the court's orders and the rules, as well as assessing if plaintiff's counsel had committed perjury (his statements to the court were both on the record and in a sworn declaration).

The court deviated from the dome of confidentiality because of "the unique circumstances of this case." Nonetheless, the court "carefully limit[ed] the evidence" which the mediator was to provide, and also proceeded in stages.

First, the mediator was to submit a declaration detailing his communications with plaintiff's counsel, including specifying whether, when and how the mediator gave the alleged permission. Notably, the opinion did not say what the next steps would be, but it likely included the mediator's in-person testimony if plaintiff challenged the mediator's veracity. The court would decide what the next steps were after reviewing the mediator's declaration.

That limited disclosure was designed to avoid any discussion about the substantive exchanges at the mediation itself. Indeed, those disclosures looked solely at pre-caucus procedural matters, not the parties' settlement negotiations. That limited incursion, the court opined, was essential to avoid unfairness to defendant and to preserve the integrity of the proceedings before the court and under the rules. Those interests, coupled with the "careful restrictions" the court set, outweighed the general rule of confidentiality.

Finally, the court set boundaries of public disclosure of the contested proceedings, again striking a balance between the presumptions favoring public access to judicial documents versus the confidentiality bubble. The court concluded that the public has a strong interest in knowing about plaintiff's counsel's truthfulness (he had previously been sanctioned by other courts), and that the considerations against public disclosure were weak.

Thus, redacted versions of the parties' submissions were filed on the public docket, and un-redacted versions were kept under seal. The redactions included any discussions of the parties' conduct at the mediation itself (especially their substantive negotiations) as well as the identity of the mediator and court employees working on the court's mediation program. Other future filings were to be made public, provided they did not contain any of the redacted content.

The case illustrates when and how the policy of mediation confidentiality falls to a higher purpose. But it also underscores how courts must take the smallest bites possible out of the confidentiality shield when a carve-out is warranted. Doing so carefully can preserve confidentiality while still allowing justice to be meted out.

Stuart Widman is a commercial arbitrator, mediator, and litigator at Widman Law Offices LLC in Chicago, Illinois.

THE REVIEW OF
BANKING & FINANCIAL SERVICES
A PERIODIC REVIEW OF SPECIAL LEGAL DEVELOPMENTS AFFECTING LENDING AND OTHER FINANCIAL INSTITUTIONS

Vol. 38 No. 11 November 2022

MEDIATION IN BANKRUPTCY — AN IMPORTANT, ALBEIT UNWIELDY TOOL

In this article the author acknowledges that mediation is now a staple of large chapter 11 bankruptcy cases, but she notes issues that make mediation an unwieldy tool in the bankruptcy context.

By Julia Winters *

Mediation is now a staple of large chapter 11 bankruptcy cases, particularly those cases involving mass tort litigation. Despite the increased use of mediation, there remain aspects of the practice that simply do not work as well in bankruptcy as in other fora. This article discusses recent trends in bankruptcy mediation, in particular, in the mass tort case context, and highlights some of the square-hole-round-peg issues with mediation that arise in bankruptcy cases.

MEDIATION HAS BECOME UBIQUITOUS IN CHAPTER 11 CASES

The Alternative Disputes Resolution Act of 1998 required each district court to authorize "the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy."[1] Since its passage, mediation has become ubiquitous in large, chapter 11 bankruptcy cases in the United States.[2] With its rise, bankruptcy courts have established local rules and/or standing orders to address how mediation can, and should be, employed. According to one survey, at least 80 percent of bankruptcy court districts had adopted local rules regarding mediation as of August 30, 2018.[3]

The districts where most large, chapter 11 cases are filed — Delaware, Southern District of New York, and the Southern District of Texas — all have standing orders, local rules, or procedures governing the practice.[4] The District of Delaware also *mandates* mediation in all

[1] 28 U.S. C. § 651.

[2] Prior to its passage, bankruptcy courts used the general, Power of Court, provision of the Bankruptcy Code to order mediation. 11 U.S.C. § 105.

[3] A List of Bankruptcy Districts That Have and Have Not Adopted Local Mediation Rules, August 30, 2018, *available at* https://mediatbankry.com/2016/12/06/a-list-of-bankruptcy-districts-that-have-and-have-not-adopted-local-mediation-rules/.

[4] *In re*: Procedures Governing Mediation of Matters and the use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, United States Bankruptcy Court, Southern District of New York, June 28, 2013, *available at* https://www.nysb.uscourts.gov/content/mediation-procedures; Local Rule 9015-5 of the Local Rules for the United States Bankruptcy Court, District of Delaware, February 1, 2022, *available at* http://www.deb.uscourts.gov/content/rule-9019-5-mediation; Procedures for Complex Cases in the Southern District of Texas, Section S, August 1, 2021, *available at* https://www.txs.uscourts.gov/page/complex-chapter-11-cases.

* *JULIA WINTERS is a partner in the Insolvency & Restructuring Group at Katten Muchin Rosenman LLP. Her e-mail address is jwinters@katten.com.*

RSCR Publications LLC Published 12 times a year by RSCR Publications LLC. Executive and Editorial Offices, 2628 Broadway, Suite 29A, New York, NY 10025-5055. Subscription rates: $650 per year in U.S., Canada, and Mexico; $695 elsewhere (air mail delivered). A 15% discount is available for qualified academic libraries and full-time teachers. For subscription information and customer service call 609-683-4450; fax 609-683-7291; write Subscriber Services, RSCR Publications, PO Box 585, Kingston NJ 08528; e-mail cri.customer.service@comcast.net; or visit our website at www.rscrpubs.com. General Editor: Michael O. Finkelstein; tel. 212-876-1715; e-mail mofinkelstein@gmail.com. Associate Editor: Sarah Strauss Himmelfarb; tel. 301-294-6233; e-mail sarah.s.himmelfarb@gmail.com. To submit a manuscript for publication contact Ms. Himmelfarb. ISSN: 1051-1741.

adversary proceedings that include a claim to avoid a preferential transfer.[5]

MEDIATION CAN BE A POWERFUL BANKRUPTCY DISPUTE RESOLUTION TOOL

As with other alternative dispute resolution methods, mediation can be extremely useful in bankruptcy cases to narrow issues, to resolve actual or potential litigation, and to streamline proceedings. Parties have used mediation in bankruptcy to, among other things, resolve plan disputes, prepetition claims, and inter-creditor disputes. Mediation can be employed at various stages in bankruptcy cases — on the eve of plan confirmation, following summary judgment rulings in adversary proceedings, and even at the very inception of a chapter 11 case.

Perhaps more so than in any other type of bankruptcy case, mediation has become an essential component of mass tort chapter 11 filings. For instance, without mediation it may be impossible to get consensus around, or litigate to conclusion, the plan treatment of tort claimants or whether the releases sought by the debtor in exchange for distributions to tort claimants are reasonable and appropriate. As the bankruptcy court in the 2019 *PG&E Corporation* case explained when ordering mediation:

> After presiding over every hearing in these chapter 11 cases over the past nine months, the court is convinced that mediation should be attempted once again.
>
> Certain parties are polarized; the emotions are running higher and higher, the staggering costs (economic and otherwise) are multiplying daily and very recent events that need not be repeated here but are obvious to everyone in Northern California might make a successful reorganization even more of a challenge.
>
> . . .
>
> Meanwhile, as stated frequently by the court and others, thousands of wildfire victims, who stand before the court as involuntary creditors, await some resolution, albeit imperfect, to try to restore their economic losses, consistent not only with [the California Wildfire Fund bill], but more importantly, as compelled by the moral necessity of doing so.[6]

Indeed, nearly all (if not all) of the recent, high profile cases involving mass tort litigation have called on mediators to help determine the quantum of settlement consideration, the claimants entitled to recovery, how those recoveries are to be apportioned, and/or how mass tort settlements will be encompassed in a plan of reorganization.[7]

In re Purdue Pharma exemplifies the key role of mediation in mass tort bankruptcy cases.[8] Purdue Pharma filed for bankruptcy in the Southern District of New York on September 15, 2019, to address an "onslaught of lawsuits" related to the company's manufacture and sale of opioids brought by Federal and non-Federal governmental entities, as well as individuals, hospitals, and other non-governmental organizations.[9] The debtors commenced bankruptcy having already reached a settlement with numerous stakeholders, including their shareholders: the Sackler family, 24 state attorneys general, analogous officials from five U.S. territories, and a plaintiffs' executive

[5] Local Rule 9015-5(a), *available at* http://www.deb.uscourts.gov/content/rule-9019-5-mediation.

[6] Order Appointing Mediator, *PG&E Corporation*, Case No. 19-30088 (DM) (Bankr. N.D. Ca. October 28, 2019) at 2.

[7] In addition to the cases discussed herein, *see, e.g.*, Order (1) Appointing Mediators, (2) Referring Certain Matters to Mediation, and (3) Granting Related Relief, *In re Imerys Talc America, Inc., et al.*, Case No. 19-10289 (LSS) (Bankr. D. Del. November 30, 2021); Order (1) Appointing Mediators, (2) Referring Certain Matters to Mediation, and (III) Granting Related Relief, *In re Boy Scouts of America and Delaware BSA, LLC, et al.*, Case No. 20-10343 (LSS) (Bankr. D. Del. March 1, 2021).

[8] *In re Purdue Pharma L.P., et al.*, Case No. 19-23649 (RDD) (Bankr. S.D.N.Y. September 15, 2019) ("*Purdue Pharma*").

[9] Debtors' Information Brief, *Purdue Pharma*, September 16, 2019 at 1.

committee in multi-district litigation collectively representing over 1,000 plaintiffs.[10]

The Purdue Pharma debtors engaged in three mediations during the course of their bankruptcy case, first employing Kenneth Feinberg and Hon. Layn Phillips to mediate the relative allocation of settlement proceeds amongst different groups of opioid creditors from March through September 2020.[11] Then, after filing a plan of reorganization in March 2021, the bankruptcy court appointed fellow bankruptcy judge, Shelley C. Chapman, to mediate disputes over the plan's proposed releases of the Sackler family.[12] That mediation involved the debtors, the official unsecured creditors committee, an ad hoc committee of plaintiffs supporting the plan, the non-consenting states, the multi-state governmental entities group, and representatives of the Sackler family. The plan mediation, which lasted roughly two months, resulted in an incremental $50 million in the Sackler family's contribution to an opioid trust, and a settlement with 15 of the 24 non-consenting states.[13] Finally, after the district court reversed the bankruptcy court's order confirming the debtors' plan of reorganization (on the basis that the bankruptcy court lacked the jurisdiction to grant third-party releases of the Sackler family), the bankruptcy court ordered further mediation with Judge Chapman between the appealing non-consenting states and the Sackler family.[14] That mediation resulted in the Sackler's increasing their settlement contribution by over $1 billion and the nine appealing states agreeing to be bound by the plan releases.[15]

In re Mallinckrodt plc, et al. — the case of another pharmaceutical company facing thousands of lawsuits related to its manufacture and distribution of generic opioids — also involved mediation to clear a path to a plan of reorganization.[16] There, the debtors similarly employed Kenneth Feinberg to develop a mediated relative allocation of settlement proceeds among opioid creditors.[17]

More recently, the debtors in *Madison Square Boys & Girls Scouts, Inc.*, which filed in the Southern District of New York on June 29, 2022, sought mediation as part of their first day pleadings.[18] The debtors in that case face approximately 140 lawsuits alleging sexual abuse violations of New York's Child Victims Act, and commenced bankruptcy to "fairly and equitably" resolve those claims, through mediation for a 90-day period.[19]

DESPITE MEDIATION'S PROLIFERATION, BANKRUPTCY DYNAMICS COMPLICATE ITS USE

Although mediation has become a routine component of chapter 11 cases, and is likely necessary in some circumstances, readers should be mindful of the ways in which bankruptcy can make mediation an unwieldy tool. The sheer number of stakeholders in chapter 11 cases can complicate mediation and make it exceptionally expensive, particularly when there is a complex capital structure with different sets of creditors, each represented by their own counsel and financial advisors. In *Intelsat*, for example, the mediation involved at least nine parties, along with their lawyers and financial advisors.[20] While the advent of remote mediation sessions during the pandemic has alleviated some of the cost, bankruptcy mediation remains an expensive endeavor, albeit less costly than full-blown litigation.

Another tricky issue in bankruptcy mediation is how to engage in the process creditors who do not wish to remain restricted from trading during the mediation. One of the pillars of successful mediation is the engagement of principals, not just advisors.[21] However,

[10] *Id.* at 44-45.

[11] Order Appointing Mediators, *Purdue Pharma*, March 4, 2020.

[12] Order Appointing the Honorable Shelley C. Chapman as Mediator, *Purdue Pharma*, May 7, 2021.

[13] Mediator's Report, *Purdue Pharma*, July 7, 2021.

[14] Order Appointing the Honorable Shelley C. Chapman as Mediator, *Purdue Pharma*, January 3, 2022.

[15] Mediator's Fourth Interim Report, *Purdue Pharma*, March 3, 2022.

[16] *In re Mallinckrodt plc, et al.*, Case No. 20-12522 (JDD) (Bankr. D. Del. October 12, 2020) ("*Mallinckrodt*").

[17] Order (1) Appointing a Mediator and (2) Granting Related Relief, *Mallinckrodt*, February 11, 2021.

[18] *In re Madison Square Boys & Girls Scouts, Inc., et al.*, Case No. 22-10910 (SHL) (Bankr. S.D.N.Y. June 29, 2022) ("*Madison Square*").

[19] Declaration of Jeffrey Dold (1) In Support of First Day Motions and (2) Pursuant to Local Bankruptcy Rule 1007-2, *Madison Square*, June 30, 2022 ¶¶ 5-6.

[20] Order Compelling Mediation of Plan and Confirmation-Related Disputes and Appointing Judicial Mediator, *In re Intelsat S.A., et al.*, Case No. 20-32299 (KLP) (Bankr. E.D. Va. April 21, 2021).

[21] Indeed, the bankruptcy court for the district of Delaware mandates the participation of principals Local Rule 9015-5(C)(iii)(a), *available at* http://www.deb.uscourts.gov/content/rule-9019-5-mediation.

mediation can, and often does, include the exchange of material non-public information ("MNPI") regarding the debtor's financial condition and operations, which can cause creditors to run afoul of insider trading rules should they participate and trade at the same time.

This issue came to the forefront after the *Washington Mutual* bankruptcy case ("WaMu"). WaMu filed for bankruptcy in September 2008, at the height of the financial crisis.[22] Its banking business was sold by the FDIC to JPMorgan Chase, however ownership of certain WaMu assets remained in dispute following the sale. Four distressed debt investor-creditors participated in settlement negotiations over the treatment of the disputed assets. To avoid insider trading, the investors created formal restricted periods during which they participated in negotiations, were potentially exposed to MNPI, and did not trade. At the end of these restricted periods, WaMu would disclose any MNPI exchanged so that the investors could resume trading. The lock-up procedures were challenged by a group of shareholders, who argued that the investors' claims should be recharacterized, subordinated, or disallowed based on their trading on MNPI. The bankruptcy court held that there were "colorable claims" of insider trading, notwithstanding the blow-out mechanism.[23] The court determined that the investors could not rely on the debtors' determination of materiality, and that the investors may have temporarily assumed the role of a non-statutory insider by participating in the negotiations.[24]

Following the *WaMu* decision, some mediation orders have addressed the issue by providing comfort that a party's participation in mediation will not make it an insider.[25] In other instances, principals participate in general, all-party sessions, but leave the caucusing to their advisors, who can relay the non-MNPI components of offers or other materials exchanged to them, delegate decision making authority to an advisor, or create trading walls between the individuals participating in the mediation and the rest of the investment institution.[26] None of these solutions are perfect, however, and as *WaMu* aptly demonstrates, can be subject to challenge.

Similarly, the involvement of principals can be complicated by the role of private equity sponsors who may simultaneously be the target of litigation claims from the debtor's estate and control the debtor's board of directors — the decision makers who are either tasked with representing the company in mediation, or to whom officers delegated that responsibility report. In the absence of independent directors appointed to represent the estate's interests, parties can challenge the integrity of the mediation process when directors and officers affiliated with the sponsor are involved.

In addition, parties to bankruptcy disputes do not always neatly align on either side of a "v." There can be parties who are aligned for certain aspects of the dispute(s) — for example, how to value the assets available for creditor recoveries — while disagreeing on other aspects — such as how those assets should be distributed. Bankruptcy cases often involve simultaneous litigation and negotiations, and parties can (and often do) switch allegiances during the case, even while mediation is ongoing.

Further, a mediated resolution of one issue can give rise to new disputes between the parties. In that sense, mediation in bankruptcy can be like a game of whack-a-mole, where one resolution gives rise to new disputes and different allegiances. For example, as a result of the third Purdue Pharma mediation, the appealing states agreed to support the releases in the plan in exchange for additional consideration just to them. However, that mediated agreement prompted the State of Florida, which had previously supported the settlement with the Sackler family, to object on the ground that the deal struck with the appealing states afforded them

---

[22] *In re Washington Mutual Inc.*, Case No. 08-12229 (MFW) (Bankr. D. Del. September 26, 2008).

[23] *In re Washington Mutual Inc.*, 461 B.R. 200 (Bankr. D. Del. 2011).

[24] *Id.* at 266.

[25] *See, e.g.*, Order Selecting Mediator and Governing Mediation Procedure, *In re Cengage Learning Inc.*, No. 13-44106 (ESS) (Bankr. E.D.N.Y. Sept. 25, 2013), at ¶ 12.

[26] *See, e.g.*, Order Appointing a Mediator, *In re Windstream Holdings, Inc., et al.*, No. 19-22312 (RDD) (Bankr. S.D.N.Y. July 30, 2019) ¶ 14 ("To extent any Mediation Party attends mediation and receives material non-public information, any such Mediation Party shall maintain internal information blocking procedures and shall not share any such information generated by, received from or relating to the mediation with any other of its employees, representatives or agents, including trading and investment advisor personnel, so that any such Mediation Party (excluding any employees, representative or agents that participated in the mediation and received material nonpublic information), notwithstanding this Order or anything in any confidentiality agreement to the contrary, may trade in any claims against the Debtors or the Uniti Entities . . .").

disproportionately favorable treatment in violation of Bankruptcy Code.[27]

CONCLUSION

Bankruptcy courts and parties have already taken steps to address the idiosyncrasies of bankruptcy mediation and will likely continue to adapt the practice. In the meantime, participants should be mindful that, given its complexity, bankruptcy mediation often leads to an 'art of the possible' settlement rather than a resolution that is acceptable all participants. This, of course, poses challenges of its own to the mediation parties who walk away unsatisfied. Not only are they outside a deal that has been blessed by an impartial mediator, they may not disclose any of the information gleaned during the mediation or even the conduct of the mediation due to sweeping mediation privilege. In short, sometimes in bankruptcy, mediation is a blessing and a curse, depending on whose side you're on. ■

[27] The State of Florida's Objection to the Motion of Debtors Pursuant to 11 U.S.C. § 105(a) and 363(b) for Entry of an Order Authorizing and Approving Settlement Term Sheet, *Purdue Pharma*, March 3, 2022.

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

By Leslie A. Berkoff and Edward L. Schnitzer

Remedies for Refusing to Consummate a Settlement Agreement Reached at Mediation

Coordinating Editor
Leslie A. Berkoff
Moritt Hock & Hamroff LLP; New York

Edward L. Schnitzer
Montgomery McCracken Walker & Rhoads LLP
New York

Raising an allegation that a party has not participated in the mediation process in good faith has historically been a sensitive hot-button issue for mediators, parties, and even the courts. In fact, even on occasions where the charge is made and the question has been posed to a court, courts have generally been reluctant to find bad faith at a mediation unless there is some clear objective line that one of the parties crossed, such as a failure to appear, failure to have a party representative with knowledge or authority attend, or a failure to provide a mediation statement. Courts regularly make clear that while mediation may be mandatory, settling at a mediation is not. However, what if parties have reached some form of agreement at mediation, then refuse to move forward to consummate the same? Is that also bad faith? What will courts do in such a scenario?

At the outset, let's consider the leading example of a court's reluctance to find bad faith (or a lack of good faith) in *In re A.T. Reynolds & Sons Inc*.[1] In that case, the mediator "submitted a report to the bankruptcy court detailing the allegations of bad faith," including 11 specific allegations concerning one of the parties.[2] Those allegations included certain actions of the party: (1) objecting to the topics to be covered in mediation; (2) demanding to know the identities of who would attend the mediation; (3) suggesting the mediation would be a waste of everybody's time; (4) sending a junior representative and junior counsel; (5) attending mediation without an open mind or willingness to compromise; (6) being unwilling to listen at mediation; (7) threatening to never use the mediator's services again if he reported any bad faith, and (8) refusing to make a settlement offer until after a bad-faith hearing in court.[3]

Based on those details and the evidence presented at a hearing, the bankruptcy court found that the offending party's "dilatory and obstructive behavior" was evidence of a "fail[ure] to participate in the mediation in good faith."[4] The bankruptcy court held that such failure amounted to contempt of court and issued sanctions requiring the offending party to "bear the costs of the Mediation, including the costs of the Mediator and the other Mediation Parties to attend."[5]

Upon appeal, the U.S. District Court for the Southern District of New York reversed the bankruptcy court's sanctions and contempt orders, finding that the sanctions order was an abuse of discretion and the contempt order was unjustified.[6] The crux of the district court's decision was that the alleged offending party complied with all objective requirements of the applicable mediation order and that a failure to settle did not equate to a lack of good faith, as the party "was within its rights to enter the mediation with the position that it would not make a settlement offer."[7] The district court also expressed significant concern with "[i]nquiring into the parties' level of participation" at the mediation, as such inquiry could "imperil ... the confidentiality of mediation."[8]

More recently, Hon. **Gregory L. Taddonio** of the U.S. Bankruptcy Court for the Western

1 452 B.R. 374 (S.D.N.Y. 2011).
2 *Id.* at 379.
3 *See In re A.T. Reynolds & Sons Inc.*, 424 B.R. 76, 80 (Bankr. S.D.N.Y. 2010).
4 *Id.* at 95.
5 *Id.*
6 *In re A.T. Reynolds*, 452 B.R. at 385.
7 *Id.* at 382.
8 *Id.* at 383.

District of Pennsylvania addressed a question of whether a party's refusal to consummate an agreement constituted bad faith in *In re Jones*.[9] The mediation at issue in *Jones* concerned an action by the chapter 7 trustee to avoid the transfer of the debtor's sole interest in his house to himself and his wife as tenants by the entirety. After the court ordered mediation at the defendant's request, mediation took place and ended with the mediator filing a certification of completion "verifying that the Defendants reached an agreement with the trustee."[10]

After a settlement stipulation had not been filed, the court entered an order to show cause. In their response, the debtor and his wife "admitted [that] they reached an agreement with the trustee, but they did not want their attorney to memorialize it."[11] The court determined that mediation was unsuccessful but held a hearing to determine whether the parties failed to "make a good-faith effort" to reach a settlement.[12] The court explained that while "sanctions issued under a Court's inherent authority usually need a determination of bad faith, evaluating good faith under Rule 16(f) does not require such an affirmative finding."[13] Judge Taddonio explained as follows:

> Mediating parties must act in good faith. The question here is whether the Defendants ... did so. In general, they demanded and engaged in mediation with the chapter 7 trustee but, after an agreement was reached, declined to memorialize it. Instead, the Defendants tried to re-negotiate the settlement before ultimately abandoning it [altogether].[14]

In imposing sanctions,[15] the court held that the defendant's actions "were not substantially justified and display a lack of good faith," therefore sanctions were necessary to "reimburse the trustee for this wasted effort."[16] In particular, the court held that the defendants' actions "delayed the adjudication of this adversary proceeding and multiplied the number of hearings [that] the trustee had to attend and responses [that] he was required to file, unnecessarily squandering the resources of the Court and this estate."[17]

While Judge Taddonio ordered sanctions relating to conduct at mediation relating to a settlement, he made it clear that he did not disagree with one of the fundamental holdings of *A.T. Reynolds*: "To be clear, the Court is not sanctioning the Defendants for a failure to come to an agreement. Rather, their refusal to memorialize the agreement they actually reached along with their pre- and post-mediation conduct informs the Court's decision."[18]

Alternatives to Finding Bad Faith?

In *Jones*, "[r]ather than enforce an agreement that was never defined, the Court determined that mediation was essentially unsuccessful."[19] By not enforcing the settlement, the litigation continued, requiring the court to rule on the trustee's motion for summary judgment. Are there alternatives for courts to consider as opposed to rendering a finding of bad faith? In *Shinhan Bank v. Lehman Brothers Holdings Inc.*, the bankruptcy court, district court and court of appeals explored the alternative approach: enforcing the settlement reached at mediation.

In *Shinhan Bank v. Lehman Brothers Holdings Inc.*, the parties were referred to mediation while a motion to dismiss was pending. The parties had a settlement conference with a mediator in which a mediation proposal was made. Counsel for Shinhan wrote to the mediator 14 days later: "We appreciate your consideration in allowing Shinhan Bank additional time to consider your settlement proposal in this matter, which we are pleased to report that Shinhan has agreed to accept. We look forward to hearing back from you once you have Lehman's response."[20]

That same day, the mediator sent an email to both sides confirming the settlement terms. The next day, counsel for Lehman circulated a draft settlement agreement, to which Shinhan's counsel only provided nonsubstantive comments. In the meantime, oral arguments on the motion to dismiss took place. Shinhan's comments were accepted, and an execution version, signed by Lehman, was circulated. The case then took a turn on June 28. That morning, in response to Lehman counsel asking Shinhan counsel for an update on receiving a fully executed settlement agreement, Shinhan's counsel responded, "Shinhan just confirmed that they have completed their internal approval process and the Settlement Agreement will be signed by Thursday, June 30 ... after which they will remit the Settlement Amount."[21]

Four hours later, the bankruptcy court granted the motion to dismiss and entered an "order dismissing Lehman's claims against Shinhan and other defendants in the adversary proceeding, with prejudice."[22] The dismissal apparently changed Shinhan's view on the settlement agreement, as its counsel then informed Lehman's counsel "that it did not believe an enforceable settlement agreement had been entered into and that it would not pay the Settlement Amount."[23]

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP and chairs the firm's Dispute Resolution Practice Group. Ed Schnitzer is a partner with Montgomery McCracken Walker & Rhoads LLP and chair of the firm's Bankruptcy and Financial Restructuring Department. He is also a co-education director of ABI's Mediation Committee. They are based in New York.

9 2021 WL 3148959 (Bankr. W.D. Pa. July 26, 2021).
10 *Id.* at *2.
11 *Id.*
12 *Id.* at *3.
13 *Id.*
14 *Id.* at *1.
15 As of January 2022, the amount of sanctions had not yet been finally determined.
16 *Id.* at *5.
17 *Id.*
18 *Id.*
19 *Id.* at *3.
20 *Shinhan Bank v. Lehman Brothers Holdings Inc. (In re Lehman Brothers Holdings Inc.)*, 2017 WL 3278933, at *1 (S.D.N.Y. Aug. 2, 2017).
21 *Id.* at *2.
22 *Id.*
23 *Id.*

Rather than raising bad faith, Lehman filed a motion to enforce the settlement reached at mediation, a motion that was granted by the bankruptcy court. In affirming that decision, the district court noted:

> Allowing Shinhan to back out of the April 20 agreement because the parties took steps to record their agreement in a writing would frustrate the important goal of committing to writing already-agreed-to settlements.[24]

The district court was then affirmed by the Second Circuit, even though the circuit noted that it was "a close case."[25] Like the district court, the Second Circuit noted:

> Indeed, Shinhan's counsel [had] assured [Lehman Brothers Holdings Inc.'s] counsel that the settlement agreement would be signed, and it was only after [Lehman Brothers Holdings Inc.'s] adversary proceeding against Shinhan was dismissed that Shinhan reneged on its agreement.[26]

The Second Circuit did make note of "Shinhan's counsel's experience settling cases in the Lehman bankruptcy" as being relevant to whether the parties had in fact "agreed to all of the material terms of the agreement on April 20 [when the mediator confirmed the settlement]."[27]

Conclusion

It should be beyond cavil that even in cases where mediation is mandatory, as opposed to cases where the parties voluntarily opted into mediation on their own, settlements are not mandatory. In fact, mediating parties do not even have to make a settlement offer. However, if the parties make offers and reach a settlement, they are expected to carry through with any agreement they reach. In the event they do not, both the *Jones* and *Lehman* cases provide two avenues that aggrieved parties may take to seek redress. abi

Reprinted with permission from the ABI Journal, Vol. XLI, No. 4, April 2022.

24 *Id.* at *4.
25 *In re Lehman Brothers Holdings Inc.*, 739 Fed. App'x 55, 59 (2d Cir. 2018).
26 *Id.* at 58.
27 *Id.*

AMERICAN BANKRUPTCY INSTITUTE
JOURNAL
The Essential Resource for Today's Busy Insolvency Professional

Mediation Matters

By Leslie A. Berkoff and Connor Bifferato

Mediation: How Litigators Can Maximize a Unique Opportunity

Coordinating Editor Leslie A. Berkoff
Moritt Hock & Hamroff LLP; New York

Connor Bifferato
The Bifferato Firm, PA Wilmington, Del.

Leslie Berkoff is a partner with Moritt Hock & Hamroff LLP in New York and chairs the firm's Dispute Resolution Practice Group. She serves as a private and panel mediator for bankruptcy courts nationwide and the New York state courts. Connor Bifferato is with The Bifferato Firm, PA in Wilmington, Del., and is a certified mediator and arbitrator by the Delaware State Bar Association.

It is often said that litigators are hired to make other people's problems their own, which is why litigators often view the world and every disagreement as a fight. While we consider ourselves litigators as well, this article is being presented from a mediator's perspective. We believe that having substantial litigation experience is extremely useful, if not necessary, to being a successful mediator. This article is focused on how litigators might benefit from reconsideration of the mediator's role as an asset rather than a potential obstacle in their case.

Recognizing that every meeting with their opponent feels to a skilled hired gun like an impending fight, we want to offer a more valuable approach to mediation. When litigators view mediation through the lens of the process's value, rather than seeing it as just another deadline or added expense, litigators gain the advantage of using mediation to the maximum benefit of their client and their case. By learning to maximize the value of both the mediator and the process, litigators can learn to use mediation to the greatest effect, and they stand to gain the most from the entire mediation process.

It is a fact that mediation is not only potentially the most effective and efficient tool to resolve litigation, but consider that it is also an extremely and uniquely effective mechanism to bring a case into sharp focus. Every litigator assembles their case from the start by considering every possible theory to advance their client's cause. As the case gains momentum, however, it is often hard to pare down the theories that may no longer be effective in favor of a leaner and tighter approach.

Bogged down by all of the minutiae of litigation, the most effective arguments might not always be obvious to the subjective perspective of the lawyer and their client. In a sea of evidence and shifting legal implications, all litigators confront moments of painful recognition that parsing out the *most* relevant facts in favor of those that support the best legal arguments can be a daunting task. Experienced litigators know that ultimately, many of the initial theories of their case must be abandoned in favor of focusing on the strongest theories. However, the best choices might not always be clear to lawyers or their clients, who have been living with the case for months and possibly years. Even if you can begin to see the weakness of one approach and the strength of another, your client might have become invested in each and every possible argument.

In the first instance, the mediation process and the mediator (if you have properly selected one[1]) will help you bring your case into a clearer focus and evaluate some of the arguments from a more objective perspective. Moreover, allowing the mediator to help you better inform a client about the validity of a position is a tremendously valuable tool in moving toward settlement, or at least toward refining the best path to a successful resolution. In order to avail yourself of this process, you must be clear and focused in the facts and law that you bring to the mediator, be *honest* in your private discussions of the strengths and weaknesses, and be candid about your and your client's expectations. Moreover, you need to be engaged and objective in your communications with the mediator to understand and appreciate the mediator's independent, nonbiased perspective. Do not take questions about your case as criticism. Remember, the mediator is there to challenge every assumption of both sides. Everything said in private caucus remains confidential.

You must put your sword down for this part of the process, understanding that, if necessary, you can readily grab it again before the end of the day

1 Leslie A. Berkoff, "The Importance of the Right Mediator," XXXVI *ABI Journal* 4, 38, 102-03, April 2017, *available at* abi.org/abi-journal.

or process. Every litigator's natural inclination is to approach each encounter with their adversary as an opportunity to advance their position by force of will. At their core, even very eloquent and deeply experienced litigators often have difficulty putting aside aggressive advocacy, even when they come to the table with the stated intent of negotiation.

Taking advantage of the confidential and collaborative nature of mediation, even in joint sessions, will help to channel that desire to win by aggression into recognition of an opportunity to gain an advantage by being open and listening. Rather than using a joint session at mediation to attempt to impress your client by "convincing" the mediator, and your opponent, of the strength of your case, consider using that time to allow the mediator to focus the parties on issues over which there might be no dispute and to narrow the focus on the remaining legal and factual disputes. This is where the advocate can learn to make the best use of a mediator and the mediation process.

Always bear in mind that in mediation, unlike every other venue in a litigation forum, the mediator does not need to be persuaded or convinced of anything. The mediator should not be treated like a party or a judge. Rather, the mediator is there to gather information; understand and help identify issues, risks and potential outcomes; evaluate the cost of litigation against the potential exposure or recovery; and bridge the gap between the parties. Consequently, the focus of your advocacy needs to shift toward providing as much information and clarity on positions and known risks, and toward gaining a greater understanding of the opponents' positions. Because the mediator has no interest in the ultimate outcome, the risk analysis is an effort to settle all or even part of the dispute. While the advocate's role remains the same, it is just tuned to the potential for learning and what the best or right resolution might look like, in or outside of mediation.

Remember that during a private caucus, rather than fighting the mediator, you can and should use the mediator to do what you as the litigator might not be able to do: speak the truth to your client. That is not to say that successful mediation comes from litigators conceding their weaknesses, but rather that successful litigators recognize the potential gaps in their case and use the mediator to communicate those concerns to their client and assist in risk analysis. Sometimes litigators do not want to appear "weak" by acknowledging their case is not a slam-dunk or they do not hold the winning hand. In order to maintain the client's confidence in the litigator's ability to aggressively advocate for them, it is at times useful for the litigator to have the mediator drill down on the missing pieces and the risks in the case. By having the mediator lay out the downsides for the parties to discuss (privately), it takes pressure off of the litigator and allows them to retain their role as an advocate of their client's cause. Sometimes the litigator just needs someone else to bring the dose of reality to their client, or even to themselves.

For alpha litigators, one of the hardest asks is that they listen more than argue. Being open-minded and exerting self-control in this context will invariably yield the best results. Certainly, learning about the case through mediation is not a one-way street, and you must challenge adverse assertions. However, strategically discussing the issues that have been a barrier to settlement prior to mediation can yield answers that you might not have expected, or that you might have mistakenly assumed that you understood. After all, if you had all of the answers *before* mediation, you would most likely have found the path to resolution before then as well.

We once heard a very experienced mediator, a retired judge, suggest that at mediation, the lawyers' duties shift from their clients' goals to "settlement." While we think that is a step too far and do not adhere to the concept that a lawyer's duty in mediation shifts, we do believe that using the confidential process to explore how a settlement can be achieved, or what different versions of a resolution might look like, is always appropriate. Lawyers bring their duty to advance their client's interests with them to any proceeding, including mediation. That is not to say that lawyers cannot use the mediator to help them advance their clients' interests by presenting a realistic view of their case and the cost of litigation to both sides. Exploring paths to a resolution with a mediator requires consideration of the best and worst aspects of your client's case. Not only is this an opportunity to bring reality to your client and the opposition through a neutral disinterested party, but it is also an opportunity to test your theories within the safe confines of a confidential process.

Of course, part of the effective use of mediation and the mediator is understanding why the process is necessary, the value of the process, and what a good mediator can bring to the table. While mediation is an additional cost in the litigation roadway, there is almost always significantly greater value to be gained through *effective* use of the process. Adjusting your expectation of and your approach to mediation will reveal the most valuable outcome, with or without an immediate settlement.

In almost every mediation in which we have been involved, which combined reaches into the thousands, not one of them went forward because the parties were otherwise able (or willing) to reach a resolution before mediation. More often than not, mediation was required or "suggested" by the court. It was a bump in the litigation road that, if we are being honest, was often forced upon one or both parties — who may resent the intrusion on their progression toward trial. Incorporating a set of mediation requirements or deadlines into a pretrial schedule or by rule, the parties and their counsel are given a brief break to step back and, with the help of neutral party, evaluate their case at that stage of litigation.

Mediation is much more than focusing the parties on settlement; it is about considering the case in light of all alternatives in any given moment of litigation. Effective litigators are highly motivated individuals who do not readily or easily relinquish control over the direction in which they will proceed. However, in the process of considering settlement options, litigators can step back and use mediation to provide clarity about their case and their opponent's case while never relinquishing that control.

In light of the value we have described so far, it is important to be careful about whether it is productive to signal or even consider the view that the mediation process or the cost of the mediator is unnecessary or unwanted. Sometimes resentment that the opposition would not come to a resolution before mediation creates frustration and angst. But when lawyers raise the cost of the mediation as an added financial burden to the overall litigation costs as part of the mediation, they create an initial hurdle that an experienced media-

tor knows they must overcome. The intended first goal of all mediators is to gain the trust *and* confidence of the parties and their counsel. Part of that sometimes means explaining the value of the mediation.

A practical litigator can save some time and dialogue at mediation by coming prepared with an informed client ready to use the mediation process to its fullest potential. Whether it is helping to arrive at an expedited resolution or to crystallize issues for trial, preparing your case and your client for mediation with these values in mind always yields the best results. Using mediation to derive the benefits we have described by themselves is invaluable. When properly exploited by prepared participants, the value of mediation significantly exceeds the expense and time of participation. Consider avoiding having the mediator justify the cost of mediation by not using the mediation cost as a weapon against your opponent.

When advocates and parties add the "cost of the mediation" to their settlement demand, they create a stumbling block not only to resolution, but to realizing all of the benefits that the unique opportunity of mediation affords. Experienced lawyers will recall that not long ago, the opportunity for a confidential discussion and a neutral assessment of the merits and weaknesses of their and their opponent's case was nonexistent. The only other option before the rise in the popularity of mediation was to spend tens of thousands on trial consultants, who benefited from prolonging the case rather than streamlining the path to resolution. Alternatively, their case might be stayed for months or years while a busy court tries to catch up on its demanding docket. This was the state of litigation less than 20 years ago. Truly the cost of mediation is typically a drop in the bucket compared to the overall cost of litigation, which can include needless hours of discovery, motion practice and court delays, and the lack of any alternatives other than years of waiting, not to mention the adverse impact on the ongoing business itself.

Consider an additional benefit that the distinctive mediation "forum" provides in light of human nature. In any litigation, and certainly in bankruptcy litigation, parties frequently express their overwhelming need to stand on just and noble principles (often to the significant frustration of their counsel). They recognize that they have been wronged by the "illogical process," and they will not concede anything at the expense of their principles. But most of the time, they just need the chance to have a third party hear their story. "Principles in civil litigation" should be the subject of many additional articles. For now, however, the mediator can explain what the litigator often cannot — that while values and principles are important beyond measure, advancing them is in the hands of the legislative branch, not the judicial. Principles are expensive and often not practical from a business-judgment perspective (*e.g.*, who is minding the store while you are advancing the litigation?). Avoiding years of protracted litigation or unrequited appeals is a critical foundation of commercial mediation. A good mediator often refocuses parties in a different manner than their advocate would have but might not have been able to at the risk of losing the confidence of their client. All of this also gives the parties the chance to vent their frustrations to a neutral third party (rather than in a courtroom).

Conclusion

If by now you have recognized that mediation provides significant value at some stage in every litigation, then we have successfully gotten our point across. A great mediation result is very often an agreement by both sides to come to a resolution and put the battle behind them. An equally successful mediation often has the parties and lawyers leaving with a much better understanding of the strengths and impediments in their case; they may have clarified factual and legal issues and even discarded some arguments altogether.

Just about every mediation has the potential to save the parties far more than they have expended in time and fees. Litigators who refocus their definitions of "success" will approach mediation as the point in their case at which they can now either efficiently resolve their client's dispute or, at worst, put their case through a rigorous examination and come away with a much better idea of what a good resolution looks like. At a minimum, they gain clarity on effectively presenting their case to a trier of fact and law. Hopefully we have allowed you to put your perception of mediation to the test and come away with a more useful expectation of the process. abi

Reprinted with permission from the ABI Journal, Vol. XL, No. 10, October 2021.

This article first appeared in the Fall 2015 issue of the NYSBA New York Dispute Resolution Lawyer, Vol. 8 No. 2

Effective Advocacy in Mediation

By Leslie Berkoff

Mediation is a collaborative process that allows parties to resolve a pending dispute in a manner that is far more flexible than that which can be achieved under a court decision. In mediation, the parties can contribute to crafting a resolution of the existing dispute in a unique way that might better suit their individualized needs. Much is often written about the style or qualities of the mediator that one can choose for a particular case to guide and steer the mediation process and how that should be accomplished. However, this article is intended to focus on the critical role the mediator-advocate can play in ensuring a successful mediation process from beginning to end in order to facilitate a positive result for the client.

"The more the mediator knows and understands about the facts the more effective he or she can be."

As a result, an attorney's role as an advocate begins at the start of the process with the selection of the mediator. Short shrift should not be given to this decision, as this can be the key in part to achieving a good result. Advocates should feel free to interview the mediator, as well as request that the mediator provide recommendations from participants in past mediations. You should consider polling colleagues to ascertain their own independent experience with a proposed mediator. The screening process should also closely examine whether the mediator has familiarity with the relevant area of the law governing the mediation.

In addition, you should consider the mediator's personality traits to see if they are a good fit for the process and consider your own client's personality and perhaps contrast it with those of your particular adversary and their clients. You want a mediator who can wrangle all of these potentially competing personalities and bring balance in the process. Some cases may call for a more authoritative figure or a more creative one. Knowing the participants may lead you to consider how a strong, soft or other particular style of mediator will best control the process.

Once the selection has been made, it is entirely appropriate to speak to the mediator privately and separately in advance of the mediation process. There is no forbidden ex parte communication in this process, unlike with the court in cases. Many mediators will have a pre-mediation call or calls. While some parties might mistakenly view this as an opportunity to win over the mediator, this is simply not the case. Approaching these calls in this fashion will actually lead you to lose sight of their purpose. Most mediators practice under a construct of being facilitative in the process, not determinative, and are not "siding" with anyone. Rather, during these pre-mediation calls, your goal should be to educate the mediator so that he or she has all key facts and case law germane to the issues at hand. The more the mediator knows and understands about the facts the more effective he or she can be. It is important to convey the concerns your client has about in the litigation, or even the mediation itself, which will impact the process; identifying possible key stumbling blocks to the process; highlighting certain "personality" issues, or raising concern that the presence of certain parties in the process could be constructive or destructive.

Along these lines, if there is someone who you feel your adversary must absolutely bring to the mediation, you should identify that person to the mediator so that it is resolved in advance of the mediation session. Imparting your "institutional" knowledge of the dispute can be tremendously helpful for the mediator. Remember, your goal is to have a successful process. With the right tools, a good mediator can structure a more successful result for both parties if they are not blind to key points and hot button issues.

The next step in the process will normally be preparing a mediation statement. Too often this document becomes nothing more than either a regurgitation of the arguments contained in the pleadings or motions that may have been filed with the Court, or a brief on the law in the area and perhaps some key facts. However, the pre-mediation statement should not be just a recitation of case law and argument, but should be a settlement-focused document designed to educate the other side on the key points of strength in your position.[1] Keep in mind that you are not really arguing your case to the mediator, as he or she is not deciding it, but rather looking to set forth in a clear and concise manner the critical points of fact and law to help guide the mediator through the dispute at hand.

Don't forget that the mediator is stepping into this dispute midway through discovery (or at times before it has even taken place). It is important that in preparing statements to be produced to the mediator, the parties clearly and succinctly lay out their arguments, supporting facts and case law, as well as outline their settlement position, authority and range. This enables the mediator to efficiently focus on the key issues and to ascertain whether there may be common ground and potential for agreement and compromise. In addition, areas where the positions are so divergent that the attention to structuring

the mediation is necessary, to facilitate any resolution, should also be emphasized.

Moreover, the shared pre-mediation statement is a great opportunity to educate the other side about the strengths of your case, factually or legally, so that they enter the mediation in a settlement-focused frame of mind. In many respects, this may be the first time, other than an answer, that the other side is learning your key arguments, your interpretation of the facts or case law. In fact, if the mediation is occurring pre-discovery, the other side has little information to balance their own views of the likelihood of success for their side or yours. Thus, you should include a factual, legal and procedural history of the litigation. Be sure to identify prior efforts at settlement so the mediator has a true scope of what has transpired to date as well as any upcoming key court dates.

Sharing your own analysis can be a very useful tool if appropriately employed. While there are certainly strategic considerations in not sharing every key legal point, at a minimum consider sharing those with the mediator in a separate confidential statement. Don't miss the chance to use this document, as it is a great opportunity to also educate the mediator about any of the kinds of issues that may have, or should have, come up in the pre-mediation call. Moreover, once you have had a chance to review the other side's mediation statement there may be a critical point or two that you want the mediator to specifically focus on for the mediation, so do not be afraid of supplementing confidential statements.

Also, be sure that in advance of the mediation that the client is educated about how the process will work so that he or she is properly prepared for the day's events. While you may have participated in multiple mediations and know how a day can unfold, most likely your client has not. If you fully inform the client about how the process runs, the time lags that occur during the separate caucuses, as well as the purpose and meaning of joint sessions and separate caucuses, he or she can be better prepared for all the developments that follow. Confidentiality rules should also be reviewed with the client and, to the extent appropriate, ensure that the client does not raise "new" surprising points in open session or in front of the mediator without you first having a chance to vet and counsel him or her in this regard. While a good mediator should review all of this, at the end of the day you are your client's advocate and the ultimate burden rests on you.

Prior to the mediation you should also be sure that your client has crystallized his or her goals or wish list in advance; specifically what the client really wants, or needs to, get out of the mediation. You should be sure that the right party or parties are coming to the mediation. Review this with your client; nothing chills or derails the process more than not having the right decision-maker there or the party with the right knowledge. This can adversely impact the chances of success in the process. You can also send a very negative message to both the mediator and the other side as to your "good faith" in the process and willingness to resolve the pending issues. Be sure that tax consequences are considered, if possible, as those can be critical during the process and being prepared in advance is important.

"The shared pre-mediation statement is a great opportunity to educate the other side about the strengths of your case...."

Provided that you meet with success during the mediation process and reach an agreement, be sure that the mediation does not conclude without a written term sheet that has been agreed to and signed by both sides. Too often the desire to close out the day before an agreement is presumably reached can result in remorse the next day, or week after, when the parties suddenly have divergent recollections of the specifics of the deal.

One court has described mediation as "a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute."[2] If you, as the lawyer advocate, take all the proper steps to help effectively prepare the mediator, the other side and your client for the process, then this can be the means to secure the most successful resolution.

Endnotes

1. *Definitive Creative Impasse-Breaking Techniques in Mediation*, Molly Klapper, J.D. Ph.D, New York State Bar Association, Chapter 2 by Elayne E. Greenberg, Esq.
2. *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol. Mgmt.*, 491 F.3d 266, 276 (5th Cir. 2007) (quoting UNIF. Mediation Act Section 2 (2001)).

Leslie A. Berkoff, lberkoff@moritthock.com, is a partner with the firm of Moritt Hock & Hamroff LLP and co-chair of the firm's Bankruptcy/Litigation Department. She concentrates her practice in the area of bankruptcy and related commercial litigation representing a variety of corporate debtors, trustees, creditors and creditor's committees, both nationally and locally, and serves regularly as a mediator both in the Bankruptcy and New York State Commercial Courts.

This article originally appeared in the ABA's November 2014 Just Resolutions Newsletter

Mediating With the New Kid in Town

By Leslie A Berkoff

Bankruptcy Mediation – A Different Construct than Other Forums

Mediation in the bankruptcy forum is a unique process different than other types of mediation. In almost all bankruptcy courts, mediation is used in both business and consumer cases. Mediation is used to resolve multi-party disputes, discrete issues in larger litigations, and oftentimes to resolve traditional clawback claims brought under 11 U.S.C. §§ 544, 546, 547, 548 and 550. However, there is often a key difference to mediation in other forums. In bankruptcy, the party acting as the plaintiff in the bankruptcy mediation process is oftentimes not the original business owner but rather a litigation committee or liquidation trustee who is running a court ordered process long after the debtor has failed or has sold off these claims to a litigation trust. Oftentimes, the premise for the action being sent to mediation is the trustee's duty to pursue "clawback actions" (preferences or fraudulent conveyances which are creatures of bankruptcy law), although the underlying business facts governing the transfers are key. As a result, the dynamic is very different than other types of cases where both parties involved in the mediation were also involved in the original underlying "dispute" and have history and first-hand knowledge of the key facts. In fact, in bankruptcy mediation the plaintiff may have no historical knowledge of the underpinning business transactions which relate to the dispute at hand. Moreover, it is entirely possible that the key employees or other parties with knowledge of the history of the dispute and the related facts are long since gone from the company – having lost their jobs months or years prior during the failed restructuring of the corporate operations or having left for greener pastures when things turned rocky or uncertain. This means that the plaintiff has to learn all of the key facts at a time when there may be no one with first-hand knowledge to educate them and must rely on books and records interpreted by unfamiliar parties.

Despite the New Plaintiff – Does the Process Still Work?

Can you successfully mediate with a new and unfamiliar party at the table? The answer, this author believes, is yes and, by experience, quite well. Mediation is still an incredibly useful and productive tool and its use is on the rise in bankruptcy cases as a way to minimize costs and streamline the litigation process. In fact, in bankruptcy cases where there can be hundreds of "clawback" actions brought at one time, it can be an essential means to implement a successful collection process. Moreover, mediation can be singularly effective in these cases because the party negotiating for the estate is actually charged to act as a fiduciary and must maintain his or her focus, the concern to maximize assets, minimize and justify expenses, and strive to provide a return for creditors. This is not necessarily the same in non-bankruptcy mediations where plaintiffs are involved in the history of the dispute and tied to the company in a different fashion by their ongoing responsibilities in management and operations. In my experience, this new plaintiff can oftentimes survey the facts with more benign objectivity. True, they don't know the history, but these plaintiffs can be educated on the specific business facts, unique to the debtor's business currently at play and incorporate that into knowledge gleaned from other businesses where they might have served in a similar capacity in the past. Moreover, they lack the emotional or historical baggage that can impede a mediation in a more traditional setting. These are not the people who caused the problem at hand or are responsible for the facts that led to the dispute.

They are simply able to analyze the pros and cons of the litigation risks that are before them and decide how to proceed.

Bankruptcy in Mediation is a Cost Saving Tool

The filing of a bankruptcy case is usually commenced with a flurry of motion practice, which can mount quickly into significant fees. The multitude of motions that need to be filed to set the stage for the reorganization or liquidation process and the breadth of creditors that these motions can reach and affect, oftentimes leads to voluminous responsive filings and multiple hearings. Additional contested matters are created by the ancillary obligation for debtors and trustees to commence separate "spin off" litigations during the reorganization process to determine the value of collateral, the validity of liens, facilitate the recovery of assets, and/or determine various property rights. In order to reduce mounting legal fees (which will reduce recoveries to creditors or impact the ability of a debtor to successfully reorganize) many bankruptcy courts have turned to mediation as a means to address these issues.

Recognizing the usefulness of the mediation process in balancing costs and resolving disputes has led bankruptcy courts to encourage the development and implementation of local rules providing for mediation and for administering the process. Most courts have now established mediation panels comprised of a pre-approved (and, at times, pre-vetted) panel mediators who can be called upon to serve in a case at times by the participants; at times these mediators are simply selected by the Judge. Although the Federal Rules of Bankruptcy Procedure are silent about the ability to use mediation in the bankruptcy forum, a significant number of bankruptcy courts have opted to create formal court rules that authorize the use of mediation; other courts have used mediation on an ad hoc basis. This is predicated in part on the fact that, in 1998, Congress passed the Authorization of Alternative Dispute Resolution in 1998 (Public Law 105-315-Oct. 30, 1998), which provides for the use of alternative dispute resolution in bankruptcy. Moreover, well recognized organizations, like the American Bankruptcy Institute, have enacted formal training programs for bankruptcy dedicated mediators.

General Use in Mega Case*s*

In recent years, mediation has been especially effective in the context of "mega-bankruptcy" cases such as *Enron Corporation* and the *Adelphia Communications Corporation* bankruptcy cases. So too, have a many other bankruptcy cases utilized this entering orders providing for proposed procedures in cases where a debtor, creditors' committee or trustee anticipates filing a large number of avoidance actions. *See, e.g., In re Eastman Kodak Company,* Case No. 12-10202 (ALG) (Bankr. S.D.N.Y.) (Docket No. 6380); *In re Oldco M. Corporation (f/k/a Metaldyne Corporation)*, Case No. 09-13412 (MG) (Bankr. S.D.N.Y.) (Docket No. 1726); *In re Lehman Brothers, Inc.*, Case No. 08-01420 (JMP) (Bankr. S.D.N.Y.) (Docket No. 2894); *In re Creative Group, Inc.*, Case No. 08-10975 (RDD) (Bankr.S.D.N.Y.) (Docket No. 421); *In re Bernard L. Madoff*, Adversary Case No. 08-01789 (BRL) (Bankr. S.D.N.Y.) (Docket No. 3141).
Mediation has also proven to be a significant tool in the Detroit bankruptcy case. In fact, it has been recognized that, absent the use of mediation, in this case the funds and resources were simply not there to efficiently resolve the issues. "What has transpired is a delicate balancing act in bankruptcy court, where the public's right to know how public money is being handled is

being weighed against the rights of creditors and debtors to resolved their disputes in private." *See* Tresa Baldas, Matt Helms & Alisa Priddle, *How Mediation has Put Detroit Bankruptcy on the Road to Resolution,* Detroit Free Press, Feb. 20, 2014, http://www.freep.com/article/20140202/NEWS01/302020063/Orr-Snyder-Rosen-Detroi-bankruptcy. As lead mediator, Chief Judge Rosen oversaw several contentious restructuring talks between the city and its creditors, brokered the rescue fund to boost pensions and shielded artwork from being sold.

Bankruptcy courts are courts of dispute resolution independent of mediation. An effective bankruptcy lawyer knows that productive negotiations with creditors to develop a consensual plan, if possible, are the keystone of a successful reorganization process. Part of the impetus in all of these cases to using mediation is the benefit of reducing costs in the bankruptcy case as litigation costs for the debtor (or estate representative) or litigation committee are paid from property of the estate; funds that are paid for litigation diminish and deplete creditor recoveries.

Defendants Benefit as Well

While many defendants often express concern over the use of a "litigation appointed plaintiff," in the process, more often than not the clinical and dispassionate approach applied by this new party when balanced by need to justify fees more than tempers any lack of historical knowledge or personal history. As noted earlier, plaintiffs feel constrained to justify any actions they take more keenly than other traditional plaintiffs do. So too, a creditor's committee has a fiduciary obligation to represent the interests of all unsecured creditors.

Mediation is a delicate process that works best when parties are committed to the resolution and keep their eye on the end goal of achieving a reasonable result that balances litigation risks and concerns. The insertion of a new party into the factual dispute between business entities that have a history as to which this new party may have no first hand familiarity does not adversely affect that dynamic.

Given the considerations that one must draw upon as guidelines in resolving matters in mediation i.e. costs, risks and closure, are the same kinds of concerns that underpin the fiduciary obligations owed by the plaintiff in these matters the consistency of these concerns only serves to facilitate a reasonable and expeditious result. Overall, defendants should appreciate that an increased level of objectivity is brought to bear on the process and recognize that the need to unemotionally balance these concerns may allow for a more expeditious and efficient result which benefits them in the end.

Leslie A. Berkoff *is the Chair of Moritt Hock & Hamroff LLP's Bankruptcy and Corporate Restructuring Practice where she represents lenders, landlords, debtors, and trade creditors in cases pending nationwide. A mediator with over 15 years of experience, Ms. Berkoff has served as a mediator in a multitude of bankruptcy cases as well as general commercial litigation cases. Ms. Berkoff is a graduate of the American Bankruptcy Institute's ("ABI") inaugural class in Bankruptcy Mediation and currently serves as Co-Chair of Special Projects for the ABI Mediation Committee. She can be reached at lberkoff@moritthock.com.*

https://flabizlaw.org/member-articles/chapter-11-plan-confirmations-and-mediation-the-need-for-uniformity-under-the-bankruptcy-code/

Chapter 11 Plan Confirmations and Mediation: The Need For Uniformity Under the Bankruptcy Code

NOVEMBER 11, 2021MEMBER ARTICLES

Chapter 11 Plan Confirmations and Mediation: The Need for Uniformity Under the Bankruptcy Code

Matthew Akiba, Barakat + Bossa, PLLC

Introduction

"[B]ankruptcy itself is a form of alternative dispute resolution."[1] One would think that alternative dispute resolution ("ADR"), more specifically, mediation, would be regularly employed by all Bankruptcy courts given the cost and time constraints imposed on debtors who have resorted to Bankruptcy in the first place. Indeed, the main goal of a Chapter 7 proceeding is "to provide certain debtors who are facing severe hardship with the ability to obtain a 'fresh start,' free of creditor harassment, the threat of lawsuits, and overwhelming debt."[2]

The success of many Chapter 11 proceedings on the other hand, depends on the interested parties' willingness to reach a negotiated settlement of their claims against the debtor.[3] Why then, do only 51 out of the 94 Bankruptcy courts in the United States authorize the use of mediation,[4] and why is ADR only permitted through the promulgation of local rules[5] as opposed to a uniform rule in the Federal Rules of Bankruptcy Procedure? This article will explore the use of mediation through the lens of Chapter 11 proceedings and seek to explain why a uniform rule would bolster the use of ADR in bankruptcy proceedings in the United States.

Common Chapter 11 Disputes: Contested Matters vs. Adversary Proceedings

From the outset, it is important to note the primary purpose of a Chapter 11 case and the types of disputes that arise once a Chapter 11 is filed. Chapter 11 cases leave much for lawyers to do as opposed to a Chapter 7 case where, "most of the important decisions . . . have been made by Congress and set out in the Bankruptcy Code."[6] A typical Chapter 11 case calls for a wide-ranging restructuring of the debtor's finances and that a plan for payment of the creditors will be negotiated between the debtor and creditors to be approved by the bankruptcy court.[7]

Within the ambit of a Chapter 11 case, there are mainly two categories of disputes where ADR mechanisms can regularly be used. First there are "adversary proceedings," which are separate lawsuits that are initiated by a familiar complaint and answer, mirror a typical civil litigation, and are specifically enumerated in Bankr. R. 7001.[8] Second are "contested matters," which are more common and "involve more straightforward issues that typically need to be resolved before the bankruptcy case can move forward."[9] The confirmation of a Chapter 11 plan is an example of a contested matter.[10]

This distinction matters in this context because Bankruptcy courts place restrictions in their local rules on the types of matters that can be resolved through mediation based on what type of dispute it is. For instance, of the 51 courts that authorize mediation five authorize mediation solely for adversary proceedings; fifteen courts authorize mediation solely for contested matters and adversary proceedings; and the rest take a "broader approach, permitting the use of mediation 'in any dispute' that arises in the case."[11] Accordingly, in those bankruptcy courts that permit mediation only for adversary proceedings and contested matters, mediation will not be an option in those instances where plan negotiations in a Chapter 11 case are not classified as either.[12] Luckily, the Bankruptcy Courts for the Southern, Middle, and Northern Districts of Florida all expressly authorize the use of mediation.[13] However, the Northern District limits its mediation procedures to adversary proceedings and contested matters.[14]

Chapter 11 payment plans are negotiated between the parties and are subject to the approval of the bankruptcy court. Mediation may help in this often complicated endeavor given the fact that mediation entails: (1) the contribution of an impartial third party; (2) "the participants need not reach an agreement"; and (3) "the mediator has no power to impose an outcome."[15] Accordingly, the debtor and the debtor's creditors are able to efficiently reach an agreement on a Chapter 11 payment plan through the use of mediation without infringing on the court's sole authority to approve the plan because the mediator has no binding authority. Given the wide latitude for the use of ADR and its success thus far in Chapter 11 cases, it is surprising that parties in nearly half of the bankruptcy courts in the United States who are facing financial ruin do not have access to ADR[16] and thus, are unnecessarily relegated to lengthy and costly litigation which only diminishes the estate and the amount that can be repaid to creditors.

Authority to Employ ADR and the Lack of Uniformity Amongst the Local Rules

The lack of Bankruptcy courts that have an official ADR program may be the result of the absence of a uniform rule governing when to refer parties to ADR and confusion as to where that authority is to be derived from.[17] The ADR Act of 1998 states that: "each district court shall authorize, by local rule . . . the use of alternative dispute resolution processes in all civil actions, including adversary proceedings in bankruptcy, in accordance with [the ADR Act]." To add to the confusion, the Judicial Conference "has neither considered the question of whether the ADR Act's requirements apply to bankruptcy courts nor suggested how the requirements should be interpreted."[18] Thus, while it is unclear whether bankruptcy courts can look to the ADR Act for authority to use ADR, it is clear that the ADR Act does not bar bankruptcy courts from authorizing ADR programs.[19]

In fact, bankruptcy courts regularly use their district's ADR programs or refer the parties to ADR on an ad-hoc basis absent a defined ADR program.[20] More importantly, of the courts that use ADR, only forty explicitly permit—by local rule or standing order—judges to order the parties to commence ADR, which is less

than half of the bankruptcy courts in the United States.[21] More perplexing still is that in a 2009 survey, 81% of bankruptcy judges "reported having used or permitted [mediation] in a chapter 11 proceeding" and 69% of judges were favorably inclined to use mediation in Chapter 11 cases.[22] Given that the use of ADR in bankruptcy is overwhelmingly governed by local rules, mediation is often used in a variety of different ways depending on the district the bankruptcy court is located in and when it is employed, "its use may vary from judge to judge, even within a single court."[23] Accordingly, in as early as 1995, Ralph R. Mabey et al. called for "a consistent standard for the use of mediation and a unifying procedural framework"[24] which will be discussed in more depth in section V below.

Effective use of ADR in "Mega" Chapter 11 Bankruptcies

On February 18, 2020, the Boy Scouts of America filed for Chapter 11 bankruptcy in the Delaware Bankruptcy Court, following nearly 1,700 sexual abuse claims and the number is expected to grow.[25] The organization listed its liabilities as ranging from $100 million to $500 million and estimated its assets between $1 billion to $10 billion.[26] Importantly, the Boy Scouts have asked a federal bankruptcy judge to serve as an independent mediator to negotiate a payment plan between the parties.[27] This request was granted given that the Delaware bankruptcy court authorized mediation, other ADR, and Court-ordered mediation pursuant to Local Rule 9019(2)-(3), (5) respectively.[28] Indeed, "Judge Silverstein agreed to appoint three mediators to assist the Boy Scouts of America and its stakeholders, including abuse survivors, insurers, and other important parties in the case, as they work to resolve complex issues in connection with the Chapter 11 plan of reorganization."[29] As of August 2021, it appears that the mediation efforts have proven somewhat successful in that, Judge Silverstein approved an $850,000,000 Restructuring Support Agreement entered into between the Boy Scouts of America and nearly 250 local councils and law firms representing approximately 70,000 former scouts who allege they were molested.[30] Whether the outcome of this mediation will be successful is still in the air, but other "mega" Chapter 11 mediations have received praise for their swift and cost-effective outcomes.[i]

In mega-Chapter 11 cases such as the Boy Scouts case, bankruptcy courts are often driven to use ADR out of necessity to resolve large mass tort claims.[31] In such

cases, the debtor business has amassed hundreds if not thousands of personal injury claims against it and "[r]esolving these claims for distribution, or to establish feasibility of a Chapter 11 plan for confirmation purposes, rests with the court, the debtor, and the claimants."[32] In these situations, bankruptcy courts use mediation programs to get to a negotiated confirmation plan—usually in the form of a trust—which operates post-confirmation.[ii] Mediation can be especially useful in cases such as the Boy Scouts bankruptcy, where future, unknown, or unidentified creditors are to be expected by appointing independent representatives to represent these claimants.[33] While unknown claimants would obviously not be parties to the present mediation, these independent legal representatives will be parties to the mediation and can advocate on the unknown creditors' behalves.[34]

Effective use of Mediation for Small Businesses in Chapter 11

Small businesses can particularly benefit from mediation, especially under the new Chapter 11 Subdivision V bankruptcy rules, also known as the Small Business Reorganization Act ("SBRA"). The SBRA makes Chapter 11 bankruptcy more enticing to small businesses through the streamlining of the bankruptcy reorganization process, lowering the costs associated with filing for Chapter 11 bankruptcy.[iii] Reduced costs can be a saving grace for small businesses experiencing financial stress.

The purpose behind filing for bankruptcy under the SBRA is to allow small businesses to remain in business,[iv] but this may be a fruitless endeavor in the wake of a bankruptcy dispute. Filing for bankruptcy alone may incur costs that are significant to the small business, but litigation for adversary proceedings may lead to total financial ruin through high attorney's fees. In this sort of case, any cost-saving measures may be the difference that allows the small business to continue operating. Avoiding a buildup of attorney's fees in bankruptcy disputes leaves the small business with extra funds to use to help settle some of its debts through a Chapter 11 reorganization plan.

Creditors to these small businesses may also benefit from mediation in bankruptcy proceedings. Creditors run the risk of receiving drastically lower amounts than what is owed to them, or even nothing at all. If there is an increase in the likelihood

of success for the small business under Chapter 11, Creditors, in turn, have a higher likelihood of receiving some portion of their claim against their debtors.[v]

Finding Uniformity for ADR Programs in Bankruptcy

It is important to note that if the Boy Scouts of America filed their Chapter 11 case in New Hampshire, for example, mediation would likely be unavailable because the court has no local rule authorizing mediation, other ADR, nor court-ordered mediation.[35] Despite that there exists sufficient case, statutory, and inherent legal bases to enact a uniform rule to govern an ADR program, there has been no change to Bankruptcy Rule 9019, which governs "Compromise and Arbitration." Rule 9019(c) is limited to arbitration and provides: "On stipulation of the parties to any controversy affecting the estate the court may authorize the matter to be submitted to final and binding arbitration." However, as Mabey et al. pointed out nearly 25 years ago, "[t]here does not appear to be any reason to limit the reach of Bankruptcy Rule 9019(c) to binding arbitration in light of the expanded uses of ADR.[36]

This realization is only bolstered by the fact that as of 1995, only 12 Bankruptcy courts had local rules governing court-annexed ADR programs, and that number has since exploded.[vi] A simple amendment to Rule 9019(c), as proposed by Mabey et al. could read as follows: "The court may authorize the matter to be submitted to final and binding arbitration or to any other form of alternative dispute resolution."[37] Such a rule would help unify the divergence amongst bankruptcy courts, indeed, even amongst different judges within the same bankruptcy court in employing ADR in bankruptcy matters. Further, as Mabey et al. correctly pointed out: "a body of case law interpreting the [amended] ADR rule will be encouraged, thereby increasing litigants' knowledge and familiarity with the extent and limitations of ADR."[38]

[i] See Ralph Peeples, ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?: The Uses of Mediation in Chapter 11 Cases, 17 Am. Bankr. Inst. L.

Rev. 401, 405 (2009) (referring to the R.H. Macy reorganization, the Greyhound Lines ADR program, and the Second Best Products Chapter 11 filing).

[ii] Thomas H. Oemke et al., Arbitration and Mediation of Bankruptcy Disputes, 105 Am. Jur. Trials 125 § 70 (2007) (citing to the Dalcon Shield Claimant's Trust, the Manville Property Damage Settlement Trust, and the Manville Personal Injury Settlement Trust as examples).

[iii] Paul W. Bonapfel, A Guide to the Small Business Reorganization Act of 2019, 93 AM.

BANKR. L.J. 571, 574 (2019).

[iv] Id.

[v] Kerr Russell, Preparing for Mediation in Bankruptcy, JDSupra (Mar. 11, 2021) https://www.jdsupra.com/legalnews/preparing-for-mediation-in-bankruptcy-5141552/

[vi] 51 courts as of 2010. See Ralph Peeples, ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?: The Uses of Mediation in Chapter 11 Cases, 17 Am. Bankr. Inst. L. Rev. 401, 407 (2009).

[1] Robert J. Niemic et al., Guide to Judicial Management of Cases in ADR, Federal Judicial Center at 36 (2001).

[2] Justia, Chapter 7 Bankruptcy, ¶1 (Apr. 2018) https://www.justia.com/bankruptcy/chapter-7/.

[3] Ralph Peeples, ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?: The Uses of Mediation in Chapter 11 Cases, 17 Am. Bankr. Inst. L. Rev. 401, 405 (2009).

[4] Id. at 407

[5] P Moore's Federal Practice, Civil § A , ¶ 2 (2019).

[6] David G. Epstein et al., Bankruptcy: Dealing with Financial Failure for Individuals and Businesses 25 (4th ed. 2015).

[7] Id.

[8] Id. at 32.

[9] Carron Nicks, What are the Differences Between an Adversary Procedure and a Contested Matter?, Nolo, https://www.nolo.com/legal-encyclopedia/what-are-the-differences-between-an-adversary-procedure-and-a-contested-matter.html.

[10] Epstein, supra note 6 at 33.

[11] Peeples, supra note 3 at 410.

[12] Id.

[13] Bankr. S.D. Fla. Local Rule 9019-2(B)(1) (“The court may order the assignment of a matter or proceeding to mediation at a pretrial conference or other hearing, upon the request of any party in interest or the U.S. Trustee, or upon the court’s own motion.”); Bankr M.D. Fla. Local Rule 9019-2(i) (“Any pending case, proceeding, or contested matter may be referred to mediation by the Court at such time as the Court may determine to be in the interests of justice. The parties may request the Court to submit any pending case, proceeding, or contested matter to mediation at any time.”); Bankr. N.D. Fla. Local Rule 7016-1(A) (District Local Rule 16.3, concerning Mediation, ”shall be applicable in all adversary proceedings and contested matters as directed by the Bankruptcy Court.”).

[14] Bankr. N.D. Fla. Local Rule 7016-1(A)

[15] Jay Foldberg, Resolving Disputes: Theory, Practice, and Law (3d ed. 2016).

[16] Peeples, supra note 3 at 408-09.

[17] P Moore’s, supra note 5 at ¶ 2.

[18] Id.

[19] Id.

[20] Id.

[21] Peeples, supra note 3 at

[22] Id. at 420.

[23] Id. at 405.

[24] Ralph R. Mabey et al., Expanding the Reach of Alternative Dispute Resolution in Bankruptcy: The Legal and Practical Bases for the Use of Mediation and Other Forms of ADR, 46 S.C. L. Re. 1259, 1308 (1995).

[25] Paul Mones, Boy Scouts of America Bankruptcy, https://www.paulmones.com/practice-areas/boy-scout-sexual-abuse/boy-scouts-of-america-bankruptcy/?keyword=%2Bboy%20%2Bscouts%20%2Bbankruptcy&gclid=EAIaIQobChMI2f6Etcro5wIVAZSzCh3DxwHoEAAYASAAEgJWhvD_BwE.

[26] Eric Levenson, Boy Scouts' Bankruptcy Plan Follows Similar Path as USA Gymnastics and Catholic Diocese, CNN (Feb. 20, 2020).

[27] Nathan Bomey, Boy Scouts Bankruptcy: What we know about victims, assets and the future of scouting, USA Today (Feb. 18, 2020).

[28] Peeples, supra note 3 at 411, Table 1.

[29] Boy Scouts of America. Bankruptcy Court Grants Extension of Nationwide Preliminary Inunction, Pausing Abuse Lawsuits unitl Nov. 16; Appoints Mediators to Assist in Parties' Negotiation of BSA Plan of Reorganization, available at https://www.bsarestructuring.org/event/bankruptcy-court-grants-extension-of-nationwide-preliminary-injunction-pausing-abuse-lawsuits-until-nov-16-appoints-mediators-to-assist-in-parties-negotiation-of-bsa-plan-of-reorganization/.

[30] Andrew G. Simpson, Judge Clears Boy Scouts' $850M Sex Abuse Settlement Plan with Conditions, Claims Journal, (August 23, 2021), available at https://www.claimsjournal.com/news/national/2021/08/23/305544.htm.

[31] Thomas H. Oemke et al., Arbitration and Mediation of Bankruptcy Disputes, 105 Am. Jur. Trials 125 § 70 (2007).

[32] Id.

[33] Id.

[34] Id.

[35] Peeples, supra note 3 at 411, Table 1.

[36] Mabey, supra note 21 at 1310.

[37] Id. at 1309 (emphasis added).

[38] Id. at 1310.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	Chapter 11
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC,[1]	Case No. 20-10343 (LSS)
Debtors.	(Jointly Administered)
	Ref. Docket Nos. 17, 161, 164, 166, 316, 388, 617, 640, 646, 647, 648, 650, 652, 658, 662, 664, 710, 711, 712, 713, 756, 757, 759, 761, 762, 771, 772, 773, 782, 783, 785, 787, 790 & 797

ORDER (I) APPOINTING MEDIATORS, (II) REFERRING CERTAIN MATTERS TO MEDIATION, AND (III) GRANTING RELATED RELIEF

Upon the motion [Docket No. 17] (the "Motion") of the Boy Scouts of America (the "BSA") and Delaware BSA, LLC, the non-profit corporations that are debtors and debtors in possession in the above-captioned chapter 11 cases (together, the "Debtors"), for entry of an order (this "Order") referring the Mediation Issues (as defined below) to mediation (the "Mediation") among the Parties (as defined below), as more fully set forth in the Motion; and the Court having jurisdiction over this matter pursuant to 28 U.S.C. § 1334 and the *Amended Standing Order of Reference* from the United States District Court for the District of Delaware, dated February 29, 2012; and entry of this Order referring the Mediation Issues to mediation among the Parties (as defined below) being a core proceeding within the meaning of 28 U.S.C. § 157(b)(2); and the Debtors having consented to entry of a final order by this Court under Article III of the United States Constitution; and venue of this proceeding and the Motion in this District being proper pursuant to 28 U.S.C. §§ 1408 and 1409; and appropriate notice of and the opportunity for a hearing on the Motion having been given, and it appearing that no other or further notice need be provided; and certain objections to the Motion (and certain joinders in support of such objections) having been filed; and upon consideration of the Debtors' replies to such objections and the

[1] The Debtors in these chapter 11 cases, together with the last four digits of each Debtor's federal tax identification number, are as follows: Boy Scouts of America (6300); and Delaware BSA, LLC (4311). The Debtors' mailing address is 1325 West Walnut Hill Lane, Irving, Texas 75038.

joinders in support thereof; and upon the record before this Court, including the Motion and the statements in support of the relief requested therein at hearings before this Court on May 18, 2020 and June 8, 2020; and the objections to the Motion having been sustained in part and otherwise withdrawn, resolved or overruled; and the relief requested in the Motion being in the best interests of the Debtors' estates, their creditors and other parties in interest; and this Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and after due deliberation and sufficient cause appearing therefor, it is HEREBY ORDERED THAT:

1. The Motion is GRANTED as set forth herein.

2. The Honorable Kevin Carey (Ret.), Paul Finn and Timothy Gallagher are appointed as mediators (collectively, the "Mediators") for the purpose of mediating the comprehensive resolution of issues and claims in BSA's chapter 11 case through a chapter 11 plan (the "Mediation Issues"), which includes, without limitation, all matters that may be the subject of a motion seeking approval by the Court of solicitation procedures and/or forms of plan ballots, a disclosure statement, or confirmation of a chapter 11 plan (the "Direct Plan Actions").

3. Except as otherwise provided herein, the following parties (collectively, the "Mediation Parties") are referred to the Mediation: (a) the Debtors; (b) the Ad Hoc Committee of Local Councils of the Boy Scouts of America; (c) the Future Claimants' Representative; (d) the Official Committee of Tort Claimants, including its members, professionals, and the individual members' professionals; (e) the Official Committee of Unsecured Creditors, including its members, professionals, and the individual members' professionals; and (f) each of the insurers set forth on **Exhibit 1** hereto (the "Insurers"). Any additional party or parties who wish to participate in the Mediation, including, without limitation, any additional insurers, shall be included in the Mediation if (i) all of the Mediation Parties agree to include such additional party or parties in the Mediation and (ii) the Mediators agree that the participation of such additional party or parties is necessary or would be beneficial to the Mediation. The Mediation Parties who elect to participate in the

Mediation and the additional parties who participate in the Mediation in accordance with the immediately preceding sentence are collectively referred to herein as the "Parties."

4. At any time following entry of this Order, one or more of the Parties may, individually or jointly, propose in writing that the Mediators address one or more particular Mediation Issues (each such proposal, a "Mediation Proposal") so long as such Party or Parties submits the Mediation Proposal by email to all of the Mediators and all of the Parties and describes, with specificity, the Mediation Issue(s) that are the subject of the Mediation Proposal. Upon receipt of a Mediation Proposal, the Mediators shall confer and determine, in their discretion, the allocation of responsibility amongst themselves with respect to the Mediation Issue(s) that are the subject of the Mediation Proposal in accordance with Paragraph 2 herein. Notwithstanding anything to the contrary in this Order, and for the avoidance of doubt, no Party shall be required to participate in the mediation of any Mediation Issue(s).

5. The Mediators shall consult with the Parties on the matters concerning the Mediation, including, without limitation: (a) the structure and timing of Mediation procedures, including, without limitation, the attendance of specific Parties at particular Mediation sessions; and (b) the timing, general content, and manner of any submissions to the Mediators.

6. The Debtors are responsible for timely payment of the fees and costs of Judge Carey (Ret.) and Mr. Finn, which shall be payable on the terms and conditions of the attached agreements, without further application to or order of the Court. The Insurers who are Parties are responsible for timely payment of one-half of the fees and costs of Mr. Gallagher. The Debtors are responsible for timely payment of the other half of the fees and costs of Mr. Gallagher. All such amounts shall be payable to Mr. Gallagher on the terms and conditions of the attached agreement, without further application to or order of the Court.

7. The provisions of Local Rule 9019-5(d) pertaining to "Confidentiality of Mediation Proceedings" shall govern the Mediation provided, however, that if a Party puts at issue any good faith finding concerning the Mediation in any subsequent action concerning insurance coverage, the

Parties' right to seek discovery, if any, is preserved. During the Mediation process, the Mediators also may make applicable or direct the use of such other provisions of Local Rule 9019-5 as they deem necessary or appropriate, provided that concerns arising from COVID-19 shall be taken into account as to the Parties' attendance in person in connection with the Mediation and no such attendance in person shall be required while the Court is not permitting in-person appearances.

8. Notwithstanding the foregoing, this Order (a) does not require any Party to submit a dispute as to any matter or make a Mediation Proposal to a Mediator (other than a matter that would be the subject of a Direct Plan Action) before filing a pleading with the Court or any other court of competent jurisdiction, and (b) is without prejudice to any party in interest's objection to the continuance of the preliminary injunction in or other matters with respect to adversary proceeding number 20-50527 (LSS).

9. All rights of the Parties are preserved and shall not be prejudiced by participation in the Mediation, including, without limitation, any rights to: (i) have final orders in non-core matters entered only after a *de novo* review by a District Court Judge; (ii) seek withdrawal of the reference of any matter subject to mandatory or discretionary withdrawal; (iii) seek remand of any removed matter; (iv) oppose venue transfer of any removed matter; (v) demand arbitration or a jury trial in any proceeding; and (vi) contest the jurisdiction of the bankruptcy court to enter any order concerning any alleged insurance coverage that is the subject of the Mediation.

10. Notwithstanding any provision of this Order to the contrary, nothing contained in this Order shall in any way operate to, or have the effect of, impairing, altering, supplementing, changing, expanding, decreasing, or modifying the Parties' rights or obligations under any alleged insurance coverage that is the subject of the Mediation or otherwise.

11. The Confidentiality and Protective Order entered in these chapter 11 cases [Docket No. 799, Ex. 1] (the "Protective Order") shall govern the Parties' production, review, disclosure and handling of Discovery Material (as defined in the Protective Order) in connection with the Mediation.

12. The Debtors are authorized to take all actions necessary or appropriate to effectuate the relief granted in this Order in accordance with the Motion, including executing agreements with Judge Carey (Ret.), Mr. Gallagher, and Commonwealth Mediation on the terms set forth in the forms of agreement attached hereto as **Exhibits 2**, **3** and **4**, respectively, on substantially similar terms, or on terms more favorable to the estates and/or, as applicable, to the Insurers.

13. Unless the Court orders otherwise or the Parties otherwise agree, no Mediator shall be eligible for post-confirmation employment by any Trust or other similar organization formed pursuant to a plan of reorganization in these chapter 11 cases for the purpose of resolving and/or liquidating abuse claims.

14. This Court retains exclusive jurisdiction with respect to all matters arising from or related to the implementation, interpretation, and enforcement of this Order.

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

Dated: June 9th, 2020
Wilmington, Delaware

Exhibit 1

1. The Chubb Group of Insurance Companies, including but not limited to Insurance Company of North America.
2. The Hartford Companies, including but not limited to Hartford Accident and Indemnity Company and First State Insurance Company.
3. Allianz Global Risks US Insurance Company
4. National Surety Corporation.
5. Liberty Mutual Insurance Company.
6. American International Group, Inc. entities, including National Union Fire Insurance Company of Pittsburgh, PA; Lexington Insurance Company; Landmark Insurance Company; The Insurance Company of the State of Pennsylvania.

Exhibit 2

Carey Agreement

MEDIATION AGREEMENT

Boy Scouts of America ("BSA") and the "Parties," as defined in the *Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediations, and (III) Granting Related Relief* [D.I. ___] (the "Order")[1] entered in BSA's chapter 11 case, Case No. 20-10343 (LSS) (Bankr. D. Del.), have agreed to mediate certain issues in connection with BSA's restructuring, as set forth in Paragraph 1 below.

1. **Mediation Scope and Process:** The scope of the mediation and the process for the mediation shall be determined in the manner set forth in the Order.

2. **Mediator:** The Parties agree that Kevin J. Carey of Hogan Lovells US LLP shall serve as a Mediator. The services provided by the Mediator pursuant to this Mediation Agreement and the Order do not create any attorney-client relationship between the Mediator and any of the Parties. The Mediator shall provide invoices to BSA on a monthly basis via email (steve.mcgowan@scouting.org), with a copy to BSA's restructuring counsel (jboelter@sidley.com, mandolina@sidley.com and mlinder@sidley.com), setting forth in reasonable detail the time expended and costs incurred for purposes of the mediation during that month. The Mediator shall be compensated and reimbursed for expenses as follows:

a. Mr. Carey will charge for his legal services on an hourly basis in accordance with the ordinary and customary hourly rates in effect on the date services are rendered. His current hourly rate is $1,450.[2]

b. To the extent any other Hogan Lovells counsel, associate, or paralegal/legal support is needed to assist in the successful resolution of the Mediation Issues, such professionals will be compensated at their standard hourly rates, which are based on such professionals' level of experience.[3] At present, the standard hourly rate ranges charged by Hogan Lovells are as follows:

Billing Category	**U.S. Range**
Associates and Counsel	$450-960
Paralegals/Legal Support	$265-490

c. Mr. Carey will also seek reimbursement of actual and necessary out-of-pocket expenses. Theses incurred expenses customarily fall in the following categories: (a) copies; (b) outside printing; (c) telephone; (d) facsimile; (e) online research; (f) delivery serves/couriers; (g) postage; (h) local travel; (i) out-of-town travel (including subcategories for

[1] All capitalized terms used but not otherwise defined herein shall have the meanings ascribed to such terms in the Order.

[2] Hogan Lovells' hourly billing rates are subject to periodic review and adjustments, typically in January of each year.

[3] The hour billing rates charged by Hogan Lovells' professionals differ based on, among other things, the professional's level of experience and the rates normally charged in the specific office in which the professional is resident. Hogan Lovells does not adjust billing rates of its professionals based on the geographic location of a bankruptcy case or other matter.

transportation, hotel, meals, ground transportation, an other); (j) meals (local); (k) court fees; and (l) other.

3. **Payment of the Mediator**: BSA shall pay the Mediator's fees and expenses in accordance with Paragraph 2 of this Mediation Agreement.

4. **Mediator Role:** The role of the Mediator shall be determined in the manner set forth in the Order.

5. **Termination:** The services of the Mediator may be terminated by order of the Court.

FOR THE MEDIATOR

_____ _____, 2020

Kevin J. Carey
Partner, Hogan Lovells

FOR BOY SCOUTS OF AMERICA

By: _____ _____, 2020
Steven P. McGowan
General Counsel

Exhibit 3

Gallagher Agreement

CONFIDENTIAL MEDIATION AGREEMENT

[INSURED] ("Party A") and [INSURER] ("Party B") (Party A and Party B are collectively "Parties" and individually "Party") agree to enter into a process of alternative dispute resolution by engaging in the mediation of those issues set forth in Paragraph 1 below, pursuant to this Confidential Mediation Agreement ("Agreement"). This Agreement sets forth the terms and conditions pertaining to the mediation, costs of the mediation, and the confidentiality of information shared among the Parties and Mediator as part of the mediation process.

1. **Scope of Mediation**: Party A asserts that it is entitled to insurance coverage under policies issued or allegedly issued to Party B, including comprehensive general liability policies Party B issued or is alleged to have issued to Party B [IDENTIFY POLICIES] (collectively, the "Party B Policies") for certain underlying lawsuits seeking damages from Party A's predecessors and affiliates, and/or certain lawsuits tendered to Party A relating to bodily injury allegedly caused by exposure to asbestos (the "Claims"). Party B disputes that Party A is entitled to coverage under the Party B Policies for the Claims.

2. **Mediation Process**: The mediation process includes all actions taken by any Party or the Mediator pursuant to this Agreement or in furtherance of settlement negotiations between the Parties, up to and including the termination date of this Agreement, and including, but is not limited to, the mediation scheduled for October 16, 2019.

3. **Termination**: Any Party may terminate this Agreement by giving notice to the other Party and the Mediator, provided however, that prior to providing notice of termination, the terminating Party shall contact the Mediator at least five (5) business days prior to any written notice of termination to discuss the reasons for termination. Termination of this Agreement shall be effective on the date that all Parties and the Mediator have received written notice of termination. Section 5 – Payment of the Mediator and Section 7 – Confidentiality shall survive termination of this Agreement.

4. **Mediator**: The Parties agree that Timothy Gallagher shall serve as the Mediator. The services provided by the Mediator pursuant to this Agreement do not create any attorney-client relationship between the Mediator and any Party. The Mediator shall provide invoices to the Parties monthly setting forth in reasonable detail the time and costs incurred for purposes of the mediation during that month. The Mediator shall be compensated by the Parties as follows:

(a) Mr. Gallagher's fees for mediation and facilitation services shall be $950 per hour.

(b) Mediation fees do not include the time required to travel to individual meetings or joint sessions unless actual mediation and facilitation services are being performed during such travel.

(c) Mr. Gallagher's necessary travel expenses, including airfare, lodging and subsistence, shall be reimbursed at actual cost as supported by a receipt.

5. **Payment of the Mediator**:

(a) Each Party shall pay 50% of the Mediator's fees, costs and expenses, which shall be invoiced by Mr. Gallagher to each Party separately.

(b) The Mediator, at his discretion, will invoice a Party separately for services performed that are specific to that Party.

(c) The Parties and the Mediator shall make best efforts to keep the cost of mediation process fair and reasonable.

(d) Each Party shall be independently responsible for its own expenses associated with the mediation process, including but not limited to, its respective share of the fees, costs and expenses for the Mediator, its own attorneys' fees, and any travel expenses.

6. **The Role of the Mediator**: In mediation, the Mediator shall act as a third-party neutral in a process in which the Parties, with the assistance of the Mediator, collaboratively and collectively seek to (l) identify issues; (2) develop potential alternatives and approaches to resolve those issues; (3) resolve those issues; and (4) achieve an appropriate resolution of matters in dispute. The Mediator shall assist the Parties to identify and communicate the interests underlying their dispute and help the Parties to develop their collaborative efforts into an overall settlement agreement. The Mediator shall have no liability for any act or omission in connection with the mediation process.

7. **Confidentiality**: To promote communication among the mediation participants and the Mediator, and to facilitate good faith negotiations, the Parties, including their representatives and agents, agree as follows:

(a) All statements made, information disclosed, and documents prepared in connection with the mediation process are confidential, are made without prejudice to any Party's legal or factual positions, are non-discoverable by any person from the Mediator, from the Party who prepared them, or from any Party or other person who obtained them in connection with or as a result of the mediation process, and shall be treated as compromise negotiations under Rule 408 of the Federal Rules of Evidence or any comparable provision of applicable state law, and shall be inadmissible for any purpose in any judicial, arbitral or other proceeding other than to the extent necessary to enforce the terms of this Agreement. The confidential character of any statement, information or document is not altered by disclosure to the Mediator. Without limiting the foregoing, all information provided by a Party to another Party or to the Mediator when marked or otherwise designated in writing as being subject to this Agreement or for purposes of the mediation process (e.g., "For Settlement Purposes" or "For Mediation Purposes") is for settlement purposes only and shall be governed by this Agreement. For the avoidance of doubt, information that is publicly available or non-confidential information that was known to a Party prior to the effective date of this Agreement shall not be rendered confidential, inadmissible or non-discoverable solely because of its disclosure or use in this mediation process.

(b) Except as otherwise provided for in this Agreement, the Parties shall not disclose to any person not the Mediator or a Party to this Agreement any information regarding the substance of the mediation process, including this Agreement, or the Parties' positions, negotiations, proposals, or settlement offers.

(c) The Mediator will not be compelled to disclose or testify in any proceeding about (i) any records, reports or other documents received or prepared by the Mediator, or (ii) information disclosed or statements made before, during or after the mediation process, regardless of whether in the presence of all Parties or in any separate caucus or conference.

(d) Since the participants are disclosing information generally in reliance upon an expectation and right of privacy and specifically in reliance on the confidentiality provisions of this Agreement, it is expressly acknowledged and agreed that any breach or attempted breach of these terms would cause irreparable injury for which monetary and other legal damages would be inadequate. Accordingly, any Party to this Agreement may obtain an injunction to prevent disclosure of any information in violation of this Agreement.

(e) Any Party breaching the confidentiality provisions of this Agreement shall be liable for and indemnify the non-breaching Party and the Mediator for all costs, expenses, liabilities, and fees, including attorney's fees, which may be incurred as a result of such breach.

(f) Nothing in this Agreement is intended to limit the Parties' prior or future agreements as it relates to the confidentiality of information and documents exchanged or communications made between the Parties, including settlement negotiations that have occurred or may occur outside of the mediation process.

8. **Agreement of the Parties**:

(a) No Party or counsel for that Party shall be bound by anything said or done during the mediation process unless and until a written settlement is reached, executed, and approved by the Parties to this Agreement, including counsel.

(b) The Parties make no admission of fact or law, responsibility, fault, or liability by entering into and participating in the mediation process, by entering into this Agreement, or by submitting any draft or final settlement agreement for approval.

(c) In the event that the Parties fail to reach an agreement prior to termination of this Agreement, either Party may request that the Mediator provide the Parties with a brief oral report detailing the positions of each of the Parties, the Mediator's understanding of the remaining issues, and the Mediator's perceived impediments to achieving agreement.

9. **Miscellaneous**:

(a) This Agreement shall become final and effective once all Parties, including the Mediator, have executed the Agreement.

(b) The descriptive headings of this Agreement are included for convenience only and shall not affect the interpretation of any provision herein.

(c) The provisions of this Agreement shall apply to and be binding upon each Party hereto, its officers, agents, employees, successors and assigns, and any person acting on its behalf.

(d) This Agreement may be executed in one or more counterparts, each of which shall be deemed an original, but all of which shall constitute one instrument.

(e) The Mediator and each of the undersigned representatives of the Parties to the mediation process attests that each representative is authorized to execute and bind that Party to this Agreement. By signature below, the Mediator and each representative acknowledges that they have read, understand and agree to this Agreement.

FOR THE MEDIATOR:

_____ _____, 2019

Timothy V.P. Gallagher, Esq. Date
1875 Century Park East, Suite 1550
Los Angeles, CA 90067-2728
(310) 203-2600 telephone
(310) 203-2610 fax

[PARTY A]:

By: _____ _____, 2019
Name Date

[PARTY B]:

By: _____ _____, 2019
Name Date

Exhibit 4

Commonwealth Mediation Agreement

COMMONWEALTH MEDIATION & CONCILIATION, INC.
FEE SCHEDULE
FOR
PAUL A. FINN

The Mediation fee for complex claims shall be billed at the rate of $1,500.00 per hour plus all expenses such as travel expenses. The above quoted hourly rate is for all time mediating with a party or parties in person; all preparation time; and all follow up time. There is no charge for administrative costs, which costs are included in the above quoted fee.

The fee for complex claims is subject to a minimum monthly rate. Any additional hours above the agreed upon minimum hours during a particular month shall be billed at the rate of $1,500.00 per hour.

AGREEMENT TO SUBMIT TO MEDIATION

CMCI FILE NO.:

Plaintiff:
Defendant:

Insurer:

Date of Incident:

1. The undersigned hereby agree to submit the above-captioned claim to non-binding mediation
2. The undersigned further agree that this claim shall be submitted to **Commonwealth Mediation and Conciliation, Inc. (CMCI)** for non-binding mediation in accordance with Massachusetts General Laws, Chapter 233, s. 23C* and CMCI's Mediation Rules, which rules are incorporated by reference herein.
3. All fees and expenses shall be in accordance with the fee schedule provided by CMCI.

Plaintiff **Defendant**

Plaintiff's Attorney **Defendant's Attorney**

DATE:

**Please note that Massachusetts Law only applies to claims mediated in Massachusetts. All other claims will reference the mediation statute in the State in which the mediation takes place.*

Rules for Mediation

Commonwealth Mediation and Conciliation, Inc. (CMCI) has rules for both mediation and arbitration. It is the duty of the parties to be familiar with the rules prior to the commencement of any hearing before a CMCI neutral.

---

1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation of existing or future disputes under the auspices of Commonwealth Mediation and Conciliation, Inc. (CMCI) or under these rules, they shall be deemed to have made these rules, as amended and in effect as of the date of the submission of the dispute, a part of their agreement.

2. Initiation of Mediation

Any part of parties to a dispute may initiate mediation by filing with CMCI a written request for mediation pursuant to these rules, together with the appropriate administration fee contained in the Fee Schedule. Where there is no submission to mediation or contract providing for mediation, a party may request CMCI to join in a submission to mediation. Upon receipt of such a request CMCI will contact the other parties involved in the dispute and attempt to obtain a submission to mediation.

3. Request for Mediation

A request for mediation shall be in a Case Outline, provided by CMCI, which contains a brief statement of the nature of the dispute and the names, addresses and telephone numbers of all parties to the dispute and those that will represent them, if any, in the mediation.

4. Appointment of Mediator

Upon receipt of a request for mediation, CMCI will appoint a qualified mediator to serve. Normally, a single mediator will be appointed unless the parties agree otherwise or CMCI determines otherwise. If the agreement of the parties names a mediator or specifies a method of appointing a mediator, that designation of method shall be followed.

5. Qualifications of Mediator

Any mediator appointed shall be a member of CMCI's Mediation Panel, with expertise in the area of the dispute and knowledgeable in the mediation process. No person shall serve as a mediator in any dispute in which that person has any financial or person interest in the result of the mediation, except by written consent of all parties. Prior to accepting an appointment, the prospective mediator shall disclose any circumstance likely to create a presumption of bias or prevent a prompt meeting with the parties. Upon receipt of such information, CMCI shall either replace the mediator or immediately communicate the information to the parties for their comments. In the event that the parties disagree as to whether the

mediator shall serve, CMCI will appoint another mediator. CMCI is authorized to appoint another mediator if the appointed mediator is unable to serve promptly.

6. Vacancies

If any mediator shall become unwilling or unable to serve, CMCI will appoint another mediator, unless the parties agree otherwise.

7. Representation

Any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to CMCI.

8. Date, Time and Place of Mediation

CMCI shall fix the date and time of each mediation session. The mediation session shall be held at CMCI, or at any other convenient location agreeable to the mediator and the parties, as CMCI shall determine.

9. Identification of Matters in Dispute

At least ten days prior to the first scheduled mediation session, each party shall provide the mediator with a brief memorandum setting forth its position with regard to the issues that need to be resolved. At the discretion of the mediator, such memoranda may be mutually exchanged by the parties. At the first session, the parties will be expected to produce all information reasonably required for the mediator to understand the issues presented. The mediator may require any party to supplement such information.

10. Authority of Mediator

The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. The mediator is authorized to conduct joint and separate meetings with the parties and to make oral and written recommendations for settlement. Whenever necessary, the mediator may also obtain expert advice concerning technical aspects of the dispute, provided that the parties agree and assume the expense of obtaining such advice. Arrangements for obtaining such advice shall be made by the mediator or the parties, as the mediator shall determine. The mediator is authorized to end the mediation whenever, in the judgment of the mediator further efforts at the mediation would not contribute to a resolution of the dispute between the parties.

11. Privacy Mediation sessions are private.

The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

12. Confidentiality

Confidential information disclosed to a mediator by the parties or by witnesses in the course of the mediation shall not be divulged by the mediator. All records, reports, or other documents received by a mediator while serving in such capacity shall be confidential. The mediator shall not be compelled to divulge such records or testify in regard to the mediation in any adversary proceeding or judicial forum. The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding: a) views expressed or suggestions made by another party with respect to a possible settlement of the dispute; b) admissions made by another party in the course of the mediation proceedings; c) proposals made or views expressed by the mediator; or d) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

13. No Stenographic Record

There shall be no stenographic record of mediation process.

14. Termination of Mediation

The mediation shall be terminated: a) by the execution of a settlement agreement by the parties; b) by written declaration of the mediator to the effect that further efforts at mediation are no longer worthwhile; or c) by a written declaration of a party or parties to the effect that the mediation proceedings are terminated.

15. Exclusion of Liability

Neither CMCI nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither CMCI nor any mediator shall be liable to any party for any act or omission in connection with any mediation conducted under these rules.

16. Interpretation and Application of Rules

The mediator shall interpret and apply these rules insofar as they relate to the mediator's duties and responsibilities. All other rules shall be interpreted and applied by CMCI.

17. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the mediation, including required traveling and other expenses of the mediator and representatives of CMCI, and the expense of any witness and the cost of any proofs or expert advice produced at the direct request of the mediator, shall be borne equally by the parties unless they agree otherwise.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC	)	Case No. 20-10343 (LSS)
	)	
	)	Re: D.I. 812
	)	
Debtors.	)	(Jointly Administered)
	)	

ORDER SUPPLEMENTING MEDIATION ORDER

WHEREAS, on June 9, 2020, the Court entered that certain Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief, dated June 9, 2020 [D.I. 812] (the "Mediation Order"); and

WHEREAS, the Court was advised on November 16, 2021, that Paul A. Finn has resigned from his position as mediator.

WHEREFORE, IT IS HEREBY ORDERED THAT:

1. Effective November 16, 2021, Paul A. Finn is no longer a Mediator as that term is defined in paragraph 2 of the Mediation Order; and
2. The remainder of the Meditation Order continues in effect.

Dated: November 17, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge

*Debtors are to serve a copy of this Order on Mr. Finn and the 2002 Service List.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re:	)	Chapter 11
	)	
BOY SCOUTS OF AMERICA AND DELAWARE BSA, LLC	)	Case No. 20-10343 (LSS)
	)	
	)	Re: D.I. 812
	)	
Debtors.	)	(Jointly Administered)
	)	

SECOND ORDER SUPPLEMENTING MEDIATION ORDER

WHEREAS, on June 9, 2020, the Court entered that certain Order (I) Appointing Mediators, (II) Referring Certain Matters to Mediation, and (III) Granting Related Relief, dated June 9, 2020 [D.I. 812] (the "Mediation Order").

NOW, WHEREFORE, for the reasons set forth from the bench on this date, IT IS HEREBY ORDERED THAT:

1. Effective immediately, Kevin J. Carey is no longer a Mediator as that term is defined in paragraph 2 of the Mediation Order; and
2. The remainder of the Meditation Order continues in effect.

Dated: December 7, 2021

Laurie Selber Silverstein
United States Bankruptcy Judge

*Debtors are to serve a copy of this Order on Mr. Carey and the 2002 Service List.

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re	:	
	:	Chapter 7
FYRE FESTIVAL LLC,	:	
	:	Case No. 17-11883 (MG)
Debtor.	:	

ORDER ESTABLISHING PROCEDURES GOVERNING ADVERSARY PROCEEDINGS PURSUANT TO 11 U.S.C. §§ 502, 547, 548 AND 550

Upon consideration of the motion of Gregory M. Messer, Chapter 7 trustee (the "Trustee") of the estate of Fyre Festival LLC (the "Debtor") for an Order Establishing Procedures Governing Adversary Proceedings[1] Pursuant to Sections 502, 547, 548 and/or 550 of the Bankruptcy Code (the "Motion")[2]; and the Court having jurisdiction to consider the Motion and to grant the relief requested therein pursuant to 28 U.S.C. §§ 157 and 1334; and the matter being a core proceeding under 28 U.S.C. § 157(b)(2); and venue being proper under 28 U.S.C. §§ 1408 and 1409; and due and proper notice having been given, and it appearing that no other or further notice need be provided; and approval of the Motion being in the best interests of the estate, creditors and all parties in interest; and after due deliberation and sufficient cause appearing therefor; it is hereby

[1] This Order applies to all adversary proceedings commenced by the Trustee in the Fyre Festival LLC bankruptcy case (collectively, the "Avoidance Actions") including, but not limited to, those Avoidance Actions commenced by the Trustee on August 28, 2019 against the following defendants (collectively, the "Defendants") and under the following adversary proceeding numbers: (i) Fyre Media Inc. and William Z. "Billy" McFarland (19-1340); (ii) American Express Company (19-1341); (iii) ASC Ticket Co., LLC (19-1342); (iv) Creative Artists Agency, LLC, Bring the Awesome, Inc., p/k/a Blink 182, Christoph Goesstch, p/k/a Claptone, Richard Hooban, d/b/a Zero Spaces, Rami Abousabe, Tamer Malki, p/k/a Bedouin and Lee Burridge (19-1343); (v) DNA Model Management, LLC, Emrata Inc. and Emily Ratajkowski (19-1344); (vi) Flight Centre Travel Group (USA) Inc. (19-1345); (vii) International Creative Management Partners, LLC, Lil Boats Sailing Team, LLC, p/k/a Lil Yachty, Migos Touring, Inc., p/k/a Migos, Sremm Touring, LLC, p/k/a Rae Sremmurd (19-1346); (viii) Kendall Jenner Inc. and Kendall Jenner (19-1347); (ix) NUE Agency, LLC, Tyga Touring, LLC, p/k/a Tyga, King Push Touring, Inc., p/k/a Pusha T, and L.O.D. Touring, Inc., p/k/a Desiigner (19-1348); (x) Constellation Culinary Group, f/k/a Galaxy Restaurant Catering Group, d/b/a Starr Catering Group (19-1349); (xi) Swift Air, LLC (19-1350); (xii) United Talent Agency, LLC and No Sleep Limited, p/k/a Skepta (19-1351); (xiii) Yachtlife Technologies, Inc. (19-1352); and (xiv) Yaron Lavi (19-1353).

[2] Terms capitalized but not defined herein shall have the meanings assigned to them in the Motion.

ORDERED, ADJUDGED AND DECREED THAT:

1. The Motion is GRANTED as set forth herein.

2. The procedures governing all parties to the Avoidance Actions, which procedures are attached hereto as Exhibit 1 (the "Avoidance Action Procedures"), are hereby approved and shall govern the Avoidance Actions, effective as of the date of this Order.

3. The procedures for obtaining this Court's approval of settlements of the Avoidance Actions, as set forth in the Avoidance Action Procedures, are approved.

4. The Trustee shall file a written status update ninety (90) days after entry of this Order and every ninety (90) days thereafter. Each written report shall list the status of each Avoidance Action and include the following information about each Avoidance Action, as applicable: (i) the case name and adversary proceeding number; (ii) the date the summons was served; (iii) the date a responsive pleading was filed or is due; (iv) the date a Notice of Mediator Selection (as defined in the Avoidance Action Procedures) was filed and the name of the selected Mediator (as defined in the Avoidance Action Procedures); (v) the date the Mediator's Report (as defined in the Avoidance Action Procedures) was filed; (vi) whether the Avoidance Action has been consensually resolved; and (vii) the date on which any pretrial scheduling conference is scheduled or was held.

5. The time periods set forth in this Order and the Avoidance Action Procedures shall be calculated in accordance with Bankruptcy Rule 9006(a).

6. Counsel for the Trustee shall serve a copy of this order upon the Defendant in any Avoidance Action either with the summons and complaint or as soon after service of the summons and complaint as possible.

7. The Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

IT IS SO ORDERED.

Dated: October 16, 2019
New York, New York

/s/ Martin Glenn
MARTIN GLENN
United States Bankruptcy Judge

EXHIBIT 1 TO ORDER

Avoidance Action Procedures

These procedures (the "Avoidance Action Procedures") apply to adversary proceedings (the "Avoidance Actions") commenced by Gregory M. Messer, as Chapter 7 trustee (the "Trustee") of the estate of Fyre Festival LLC (the "Debtor"), seeking to avoid and recover transfers pursuant to sections 502, 547, 548 and/or 550 of the Bankruptcy Code.

A. Stipulation to Extend Time for Defendants to Respond to the Complaint; Optional Mediation Upon Consent Before Response; Mandatory Mediation after Response

1. Without further order of the Court, the Trustee and any Avoidance Action defendant (each, a "Defendant" and, together with the Trustee, the "Parties") may stipulate in writing to up to three (3) separate extensions of time for a Defendant to respond (the "Response") to an Avoidance Action complaint (the "Response Due Date"), with each extension to be no more than thirty (30) days. The stipulation must be in writing, can be documented via electronic mail and shall not be filed.

2. If the Parties jointly agree in writing (which writing shall be filed in the adversary proceeding) to enter mediation prior to the Response Due Date, the Response Due Date shall be deferred while the mediation is pending. If the mediation does not resolve the Avoidance Action, the Response Due Date shall be extended for an additional thirty (30) days following the completion of mediation and the filing of the mediator's report (the "Mediator's Report").

3. Except as set forth above, further extensions of the Response Due Date shall not be granted except upon a motion or by stipulation of the Trustee and Defendant and approved by order of the Court.

4. To the extent an Avoidance Action has not been resolved and/or settled within thirty (30) days after a Response is filed, then such Avoidance Action shall be referred to mandatory mediation (unless such mediation already has occurred upon consent pursuant to Section A.2 hereof).

B. Stay of Requirement to Conduct Pretrial Conference

The conference required by Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016, shall be stayed until the completion of mediation and the filing of the Defendant's Response. If an Avoidance Action is not resolved through mediation or otherwise, then no later than ten (10) days following the later of (i) the filing of the Mediator's Report and (ii) the filing of the Defendant's Response, the Trustee shall file with the Court and serve on the Defendant a notice of pretrial scheduling conference (the "Pretrial Scheduling Conference") to take place in the adversary proceeding at the next-scheduled omnibus Hearing; provided, however, that a minimum of fourteen (14) days' notice of the Pretrial Scheduling Conference is required.

C. Stay of Requirement to Conduct Rule 26(f) Conference

The conference required by Federal Rule of Civil Procedure 26(f), made applicable pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan), shall be stayed until the completion of mediation and the filing of the Defendant's Response. If an Avoidance Action is not resolved through mediation or otherwise, then no later than ten (10) days following the later of (i) the filing of the Mediator's Report and (ii) the filing of the Defendant's Response, the Parties shall conduct a Rule 26(f) conference and then submit a proposed discovery scheduling order (the "Scheduling Order") to the Court prior to or at the Pretrial Scheduling Conference.

D. Stay of Discovery

1. All formal discovery, including Rule 26 disclosures, shall be stayed until after a Scheduling Order is entered and after the Pretrial Scheduling Conference has occurred in accordance with these Avoidance Action Procedures; provided, however, this stay of discovery shall in no way preclude the Parties from informally exchanging documents and other information in an attempt to resolve an Avoidance Action in advance of, or during, the mediation process.

2. Initial disclosures pursuant to Federal Rule of Bankruptcy Procedure 7026(a)(1) are not required in any Avoidance Action.

E. Settlement of Avoidance Actions

The Trustee's rights and ability to settle any Avoidance Actions shall be subject to the following procedures:

1. The Trustee shall file a statement of intent to settle an Avoidance Action with the Court setting forth: (i) a description of the claims asserted by the Trustee that are being compromised; (ii) a summary of the terms of the settlement, including any monetary exchange and any releases being proposed; (iii) the identity of all counter-parties and release parties with respect to the proposed compromise; and (iv) the time and method for objecting to the proposed settlement, which shall not be less than twenty (20) days from the date the statement is filed with the Court as set forth below (the "Settlement Statement");

2. The Settlement Statement shall be served upon all parties required to receive notice pursuant to Bankruptcy Rule 2002, in any manner for service provided for under the Bankruptcy Rules and Local Rules of the Court;

3. Parties may object to the proposals set forth in any Settlement Statement by filing with the Court a written objection setting forth the factual and legal grounds for the objection;

4. The Trustee shall endeavor to resolve any objections and provide any information reasonably requested to any objecting party with respect to any proposed settlement;

5. In the event that objections cannot be resolved, the Trustee and objecting party shall schedule with the Court a hearing on the proposed settlement and objection;

6. If no objections are timely filed to any Settlement Statement, then the Trustee shall file a certificate of no objection with the Court and request entry of an order approving the settlement (an "Approval Order");

7. If exigencies exist with respect to any proposed settlement, the Trustee shall have the right to apply to the Court for expedited consideration of any proposed settlement and entry of an Approval Order;

8. The Court may require a hearing with respect to any Settlement Statement, in which case the Trustee will provide notice of the hearing scheduled by the Court upon such notice as is required by the Court; and

9. Upon consummation of a settlement, the Trustee shall thereafter dismiss the Avoidance Action (a) if no answer has been filed, by the filing of a Notice of Dismissal pursuant to Bankruptcy Rule 7041(a)(1)(i) and (b) if an answer has been filed, by the filing of a Stipulation and Order of Dismissal pursuant to Bankruptcy Rule 7041(a)(1)(ii).

F. Dispositive Motions

Any Defendant may file a dispositive motion, including but not limited to any motions under Federal Rule of Civil Procedure 12(b)(1) to (7) (made applicable by Bankruptcy Rule 7012) and under Federal Rule of Civil Procedure 56 (made applicable by Bankruptcy Rule 7056), pursuant to the Federal Rules of Civil Procedure (made applicable to these adversary proceedings by the Federal Rules of Bankruptcy Procedure); however, if such dispositive motion is filed before mediation is concluded, the Trustee's time to respond to such dispositive motion is extended until 30 days after the filing of a Mediator's Report stating that the mediation has concluded and a settlement has not been reached, or such other time to which the parties mutually agree. Further, any party seeking to file a motion for Summary Judgment must comply with Local Bankr. R. 7056-1**.**

G. Mediation Procedures and Requirements

1. Within two (2) weeks after (i) an Avoidance Action has been referred to mediation pursuant to Section A.4 hereof or (ii) the Parties have agreed to enter mediation pursuant to Section A.2 hereof (the "Mediation Deadline"), the Parties shall jointly select a mediator (the "Mediator"). The Trustee consents to the selection of any of the mediators on the list of mediators (the "Mediator List") attached hereto as Exhibit A.[1] Any Defendant may propose a different meditator. If the Parties are unable to

[1] Upon notice to the Court, the Trustee may add one or more mediators to the Mediator List provided that (i) any additional mediator is on the register of mediators maintained by the United States Bankruptcy Court for the Southern District of New York and (ii) the Trustee represents in the notice that the proposed mediator has no conflict of interest that prevents him/her from serving as a mediator.

agree on a mediator on or before the Mediation Deadline, the Trustee shall request that the Court appoint a mediator from the register of mediators maintained by the United States Bankruptcy Court for the Southern District of New York. The Trustee shall file on the respective adversary proceeding docket a notice of mediator selection (the "Notice of Mediator Selection") on or before the Mediation Deadline.

2. Promptly after the filing of the Notice of Mediator Selection, the Trustee and Defendant's counsel (or the Defendant, if appearing *pro se*) shall jointly contact the selected Mediator to discuss the mediation. The mediation will be scheduled within sixty (60) days of the filing of the Notice of Mediator Selection.

3. The Parties shall provide the Mediator, and exchange with each other, a copy of their position statements ("Position Statements"), which may not exceed ten (10) pages double-spaced in 12 point type (exclusive of exhibits and schedules), at least ten (10) days prior to the scheduled mediation. The Mediator also may request that the Parties (i) provide to the Mediator any relevant papers and exhibits and (ii) exchange documents.

4. The mediation shall take place in New York, New York and shall be held at the law office of the Trustee's counsel, the Mediator's office, or at another location agreed upon by the Mediator, the Trustee and the Defendant (which can be outside of New York, New York if agreed to by the Parties and Mediator with costs split as set forth below).

5. Except as set forth herein, the mediation shall be conducted in accordance with General Order M-452 which is available on the Court's website (http://www.nysb.uscourts.gov/).

6. The Mediator will preside over the mediation with full authority to determine the nature and order of the Parties' presentations and with full authority to implement any additional procedures which are reasonable and practical under the circumstances.

7. The length of time necessary to effectively complete the mediation will be within the Mediator's discretion. The Mediator also may adjourn a mediation that has been commenced if the Mediator determines that an adjournment is in the best interests of the Parties.

8. The Parties shall participate in the mediation in good faith and with a view toward reaching a consensual resolution. The mediation(s) shall be attended in person by (i) a representative of the Defendant with full settlement authority (and if Defendant is represented by counsel, its counsel) and (ii) the Trustee and counsel for the Trustee (with full settlement authority subject to Court approval as set forth in Section E supra); provided that, upon the request of a Defendant, a Mediator, in his or her discretion, may allow a Defendant representative to appear telephonically while its

counsel appears in person, provided that any such request is made in writing (which may be electronic) ten (10) business days before the scheduled mediation date. Should a Defendant representative appear by telephone, counsel appearing in person for Defendant shall have full settlement authority. To the extent a Mediator grants a Defendant's request to appear telephonically, the requesting Defendant is responsible for arranging for and paying any fees associated with teleconference services. Should a dispute arise regarding a Mediator's decision on whether to allow a Defendant representative to appear telephonically rather than in person, Defendant may apply to the Court, at least three (3) days in advance of the mediation, by sending a letter outlining said issues to chambers. The Court may then schedule a conference call to discuss the issues.

9. The mediation shall be conducted so as to be completed within one hundred and twenty (120) days after the date the Notice of Mediator Selection is filed, which deadline may be extended by the mutual consent of the Trustee, the Defendant and the Mediator.

10. Within ten (10) days after the conclusion of each mediation, the Mediator shall file a Mediator's Report in the respective Avoidance Action, which shall be limited to stating only (i) whether the Avoidance Action settled or did not settle; (ii) the date or dates the mediation took place; and (iii) the names of the Parties and/or counsel who attended.

11. Upon notice and a hearing, a Party's failure (i) to submit the required Position Statement or other submissions as provided in these Avoidance Action Procedures or as may be agreed to by the Mediator or ordered by the Court, or (ii) to attend the mediation, may result in a default judgment being obtained against the Defendant or dismissal of the action, or the imposition of other sanctions as may be appropriate under the circumstances. The Mediator shall promptly file with the Court a notice when any Party fails to comply with the mediation provisions in these Avoidance Action Procedures.

12. The fees and reasonable and actual expenses of the Mediator shall be shared equally by the Parties on a per case basis. The Trustee is authorized to pay his allocable portion of the fees and expenses of a Mediator in an amount not to exceed $5,000 per Avoidance Action without further order of the Court.

13. Unless the Court orders otherwise for cause shown, the full fees and expenses of the Mediator shall be paid by any Party that cancels or fails to appear at mediation unless the Party notifies the Mediator of the cancellation by facsimile or electronic mail by 5:00 p.m. Eastern Time not less than seven (7) days prior to the scheduled mediation (*e.g.*, if the mediation is scheduled for a Monday, notice of cancellation must be given no later than the previous Monday at 5:00 p.m. Eastern Time).

14. Each Party shall pay its portion of the Mediator's fee at least five (5) days before the commencement of mediation. The Trustee shall be excused from this requirement to the extent that the estate is unable to pay the fee at the time of the commencement

of the mediation and the Mediator consents to defer payment. The Parties shall each pay half (50%) of the Mediator's reasonable and actual expenses, per case, within fourteen (14) days after billing by the Mediator; provided, however, that if a Party fails to timely pay a bill for a Mediator's fees or expenses, another Party may pay the bill and recover such sum as part of a judgment. The Parties and the Mediator may enter into an agreement for the Mediator to continue his or her efforts after the conclusion of the formal mediation session, on such terms as may be agreed upon among the Mediator and all Parties, and the rules governing confidentiality relating to the Mediation shall continue to apply.

15. Without the prior consent of both Parties, no Mediator shall mediate a case in which he/she or his/her law firm represents a Party. If a Mediator's law firm represents any Defendant in the Avoidance Actions, then: (i) the Mediator shall not personally participate in the representation of that Defendant; (ii) the law firm shall notate the file to indicate that the Mediator shall have no access to it; and (iii) any discussions concerning the particular Avoidance Action by employees of the law firm shall exclude the Mediator. The Mediator's participation in mediation pursuant to these Avoidance Action Procedures shall not create a conflict of interest with respect to the representation of such Defendants by the Mediator's law firm, provided these procedures are followed.

16. The Mediator shall not be called as a witness by any Party. No Party shall attempt to compel the testimony of, or compel the production of documents from, the Mediators or the agents, partners or employees of their respective law firms. Neither the Mediators nor their respective agents, partners, law firms or employees (i) are necessary parties in any proceeding relating to the mediation or the subject matter of the mediation, nor (ii) shall be liable to any Party for any act or omission in connection with any mediation conducted under these Avoidance Action Procedures. Any documents provided to the Mediator by the Parties shall be destroyed within thirty (30) days after the filing of the Mediator's Report, unless the Mediator is otherwise ordered by the Court. However, a Mediator may be called as witness by any Party and may be compelled to testify and/or answer discovery on a limited basis in proceedings where it is alleged that a Party failed to comply with mediation as is required in these Avoidance Action Procedures.

17. All proceedings and writings incident to the mediation will be considered privileged and confidential and subject to all the protections of Federal Rule of Evidence 408, and shall not be reported or admitted in evidence for any reason whatsoever. Nothing stated or exchanged during mediation shall operate as an admission of liability, wrongdoing or responsibility.

H. Avoidance Actions Omnibus Hearings

1. The Court will schedule regular omnibus hearing dates ("Omnibus Hearings") in the Fyre Festival LLC chapter 7 case (the "Bankruptcy Case"), on which dates any post-mediation Pretrial Scheduling Conferences will take place. Any pretrial motions

filed by the Parties in the Avoidance Actions must be set for hearing on one of the Omnibus Hearing dates unless otherwise ordered by the Court.

2. Defendants are not required to appear at any Omnibus Hearings unless: (a) a motion or conference pertaining to Defendant's Avoidance Action is calendared to be considered at the Omnibus Hearing; or (b) the Court has directed the Defendant to appear and Trustee's counsel has provided five (5) days prior written notice by email, facsimile transmission or overnight courier to Defendant or its counsel of its need to appear in such Omnibus Hearing.

3. Unless the Court orders otherwise, all motions, pleadings, requests for relief or other materials that purport to set a hearing on a date or time other than an Omnibus hearing date shall automatically, and without Court order, be scheduled to be heard at the next Omnibus Hearing that is at least 30 calendar days after such motion, pleading, request for relief or other materials are filed.

4. The Trustee shall file in the Bankruptcy Case an agenda at least three (3) days prior to each Omnibus Hearing setting out the status of each Avoidance Action scheduled to be heard at such Omnibus Hearing and shall contemporaneously deliver a copy to the Court's chambers.

I. Motions Affecting all Avoidance Actions

Any motions filed by the Trustee that affect all of the Avoidance Actions shall be filed in the Bankruptcy Case and shall not be separately docketed in each Avoidance Action; provided, however, that each Defendant shall receive notice of the filing of same.

J. Bankruptcy Court Can Modify Avoidance Action Procedures

Notwithstanding anything to the contrary herein, the Court may grant relief from compliance with these Avoidance Action Procedures for cause shown.

EXHIBIT A TO AVOIDANCE ACTION PROCEDURES

Mediator List

1. **Diana G. Adams**
2. **Rocco A. Cavaliere**
3. **Yann Geron**
4. **Eric J. Haber**

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	

ORDER (1) ESTABLISHING LITIGATION CASE MANAGEMENT PROCEDURES FOR AVOIDANCE ACTIONS AND (2) AMENDING THE FEBRUARY 16, 2010 PROTECTIVE ORDER

Upon the motion (the "Motion")[1] of Irving H. Picard (the "Trustee"), as trustee for the liquidation of the business of Bernard L. Madoff Investment Securities LLC ("BLMIS") under the Securities Investor Protection Act, 15 U.S.C. §§ 78aaa, *et seq.* ("SIPA"),[2] and the substantively consolidated estate of Bernard L. Madoff ("Madoff"), seeking entry of an order, (1) pursuant to section 105(a) of the United States Bankruptcy Code, 11 U.S.C. §§ 101 *et seq.* (the "Bankruptcy Code"), and Rules 7016, 7026 and 9006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), establishing Avoidance Procedures (as defined below) governing the litigation of certain avoidance actions to be commenced by the Trustee, and (2)

[1] All terms not defined herein shall have such meanings as subscribed to them in the Motion.

[2] For convenience, future reference to SIPA will not include "15 U.S.C."

amending the Protective Order (the "Global Protective Order") [Docket No. 1951] entered by this Court on February 16, 2010 in order to facilitate the implementation of the Avoidance Procedures; and the Court having jurisdiction to consider the Motion and the relief requested therein in accordance with section 78eee(b)(4) of SIPA, the Protective Decree, entered on December 15, 2008 by the United States District Court for the Southern District of New York in Case No. 08 CV 10791, and 28 U.S.C. §§ 157 and 1334; and it appearing that the relief requested in the Motion is in the best interests of the estate and its customers; and due notice of the Motion having been given, and it appearing that no other or further notice need be given; and the Court having determined that the legal and factual bases set forth in the Motion establish just cause for the relief granted herein; and upon the proceedings before the Court and after due deliberation, it is hereby

ORDERED, that the relief requested in the Motion is granted; and it is further

ORDERED, that the procedures set forth on Exhibit A hereto (the "Avoidance Procedures") are adopted and shall govern avoidance actions where a Notice of Applicability (as defined in the Avoidance Procedures) is filed ("Avoidance Actions"); and it is further

ORDERED, that the Global Protective Order is amended as follows:

A. To the extent a complaint (including exhibits) or other filings in any adversary proceeding related to this action contains Confidential Information or Confidential Account Material (each as defined in the Global Protective Order) which the Trustee obtained from the records and files of BLMIS, the Trustee shall be permitted, to the extent consistent with applicable law, to file publicly such complaints (including exhibits) and other filings. To the extent that such a complaint (including exhibits) or other filings in any adversary proceeding related to this action contains Confidential Information or Confidential Account Material obtained from a party other than BLMIS and such Confidential Information or Confidential Account Material was not in the records and files of BLMIS, the Trustee may give the defendant written notice of his intent to include such information in the complaint or other pleading and the defendant shall then have five days to notify the Trustee in writing of its objection to

the public filing of such complaint or other filing. The defendant's failure to so notify the Trustee within such five day period shall be deemed the defendant's consent to the public filing of such complaint (with exhibits) or other filing. If (i) the defendant notifies the Trustee of its objection to the public filing of the complaint (with exhibits) or other filing within such five day period or (ii) if the Trustee wishes to file the complaint (with exhibits) or other filing without giving the defendant prior notice or if notice has been given to defendant, before the expiration of the five-day objection period, the Trustee is hereby authorized without further Court order to file the complaint (with exhibits) or other filing under seal and/or publicly in redacted form, in each case, subject to the right of the Trustee or other parties-in-interest to subsequently move to have the complaint (and exhibits) and/or other filing unsealed or filed in unredacted form, as the case may be, and the right of the defendant to oppose any such motion.

B. Confidential Account Material (as defined in the Global Protective Order) relied upon by the Trustee's experts in forming their expert opinions and preparing their expert reports shall be designated "Professionals' Eyes Only". The Trustee may provide access to such Confidential Account Material to attorneys of record in one or more Avoidance Actions and other professionals working with that attorney on such Avoidance Action(s) provided that the attorney and/or professional executes a non-disclosure agreement substantially in the form annexed to the Avoidance Procedures as Exhibit 3; and it is further

ORDERED, that a violation of a party's obligations under a Non-Disclosure Agreement shall be treated as a violation of this Order and shall subject such party to such sanctions as the Court shall determine after notice and a hearing; and it is further

ORDERED, that this Court shall retain jurisdiction with respect to all matters relating to the interpretation or implementation of this Order.

Dated: New York, New York
November _10_, 2010

/s/Burton R. Lifland
HONORABLE BURTON R. LIFLAND
UNITED STATES BANKRUPTCY JUDGE

EXHIBIT A

The Avoidance Procedures

1. **Notice of Applicability:**

   A. The Avoidance Procedures apply only to Avoidance Actions commenced by the Trustee after the approval of these Avoidance Procedures in which (a) the amount demanded in the complaint commencing the Avoidance Action (the "Complaint") is $20 million or less and (b) the Trustee or the defendant files in such adversary proceeding a "Notice of Applicability" of these Avoidance Procedures (the form of which is annexed hereto as Exhibit 1). The Trustee or defendant may also file a Notice of Applicability in Adv. Pro. Nos. 10-3222 and 10-3223 pending in this Court (the "Bankruptcy Court"), in which case, the Avoidance Procedures will become applicable to such Avoidance Actions prospectively without extending any dates or deadlines that expired prior to the date such Notice of Applicability is filed. A Notice of Applicability may also be filed in Avoidance Actions where the amount demanded in the Complaint is more than $20 million by mutual consent of the Trustee and the defendant(s) in such Avoidance Action. For purposes of these Avoidance Procedures, "Avoidance Actions" shall mean adversary proceedings commenced by the Trustee seeking the avoidance and recovery of preferences or fictitious profits (but not principal) under sections 78fff(b), 78fff-1(a) and 78fff-2(c)(3) of SIPA, sections 541, 542, 544, 547, 548, 550 and 551 of the Bankruptcy Code, sections 273 to 279 of New York Debtor and Creditor Law, and other applicable law.

2. **Response:**

   A. Except as provided below, the defendant(s) shall file and serve an answer or response to the Complaint within 60 days from the date of the issuance of the summons (the "Response Due Date"). Where a defendant is located in a country outside the United States, the time allotted for the Trustee to serve the summons shall be the date that is 120 days after the date of the issuance of the summons and the Response Due Date for such defendant shall be 180 days after the date of the issuance of the summons.

   B. No initial pre-trial conference pursuant to Bankruptcy Rule 7016 will be held in the Avoidance Actions and, accordingly, the summons filed and served by the Trustee will not include a date for a pre-trial conference.

   C. Upon request by a defendant, the Trustee may agree to one or more extensions of the Response Due Date with the extension(s) totaling no more than 90 days without further Court order. A "Notice of Extended Response Due Date" shall be filed in the adversary proceeding by the Trustee memorializing such agreement (whereupon, thereafter, the Response Due Date shall be the date set forth in the Notice).

D. If a defendant files a motion under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim (a "Dismissal Motion"), made applicable by Bankruptcy Rule 7012, in response to the Complaint, the issues raised in such motion, together with the issues raised in the Complaint, are immediately referred to mediation; provided, however, that if the parties mutually agree that mediation is unlikely to resolve the issues raised by any such Dismissal Motion, that motion will not be referred to mediation and, instead, the parties will jointly request in a letter to the Court that the Court hear the Dismissal Motion on such schedule as the Court may determine. If a party brings any dismissal motion other than a motion under Federal Rule of Civil Procedure 12(b)(6), the Court will hear the matter on such schedule as the Court may determine.

E. If the parties jointly agree in writing (which agreement the Trustee will file in the adversary proceeding) to enter mediation prior to the Response Due Date, the Response Due Date shall be deferred while the mediation is pending. If the mediation does not resolve the Avoidance Action, the Response Due Date shall be the date that is 30 days following the completion of the mediation. A "Notice of Extended Response Due Date" shall be filed in the adversary proceeding by the Trustee upon the termination of mediation setting forth the new Response Due Date (whereupon, thereafter, the Response Due Date shall be the date set forth in the Notice of Extended Response Due Date).

F. Except as set forth above, further extensions of the Response Due Date shall not be granted except on motion upon a showing of good cause or by stipulation of the parties.

G. Within 30 days after a defendant or, if more than one, the last defendant, files an answer to the Complaint, the parties shall meet, either in person or by teleconference, and confer on a mediation, discovery and litigation plan (the "Initial Case Conference"). The parties may agree to alter the deadlines set forth below upon mutual consent. Following the Initial Case Conference, the Trustee shall file with the Court a case management notice (the "Case Management Notice") (substantially in the form annexed hereto as Exhibit 2) which sets forth the various deadlines that will apply to the proceeding. The parties, upon mutual consent, may agree to alter the dates set forth in the Case Management Notice. Any such modifications shall be the subject of an amended case management notice (the "Amended Case Management Notice") which the Trustee shall file with the Court in the adversary proceeding.

3. **Filing and Service of Pleadings:**

A. All pleadings shall be electronically filed with the Court in accordance with Superseding General Order M-399 which is available on the Bankruptcy Court's website: (www.nysb.uscourts.gov). A copy of such

order is also available on the Trustee's website: [(www.madofftrustee.com/_____)][1]

B. The Complaint and the summons must be served in accordance with the Bankruptcy Rules, unless the parties agree otherwise. If a defendant is known by the Trustee to be represented by counsel, the Trustee shall concurrently send to such counsel a courtesy copy of the summons and Complaint; provided, however, that the failure by the Trustee to provide such a courtesy copy shall not be deemed to constitute ineffective service of process if proper service was effected on the defendant in accordance with the Bankruptcy Rules. After a defendant has appeared, service of all pleadings in each Avoidance Action shall be made by email (i) to counsel of record or (ii) on the defendant if proceeding *pro se*. Except as set forth below with respect to *pro se* litigants, there shall be no obligation to serve paper copies of pleadings other than the Complaint and the summons.

C. Parties subject to these Avoidance Procedures who file a pleading with the Bankruptcy Court are not required to serve the Trustee with such pleading and the Trustee will be deemed to have received notice of and been served with such filing via the Court's ECF notification. If a defendant is appearing *pro se* and is not able to electronically file a pleading with the Bankruptcy Court, that defendant shall so notify the Trustee in writing (Baker & Hostetler LLP, Attention: Marc Hirschfield, 45 Rockefeller Plaza, New York, NY 10111) and may thereafter serve the Trustee via United States Mail.

D. Parties subject to these Avoidance Procedures who wish to serve the Trustee with a document not filed with the Bankruptcy Court (such as, for example, discovery requests) shall email such document to Trustee@MadoffLitigation.com and include the adversary proceeding number in the subject line of the email. Compliance with the foregoing shall be deemed effective service on the Trustee. If a defendant is appearing *pro se* and is not able to serve documents by email, that defendant shall so notify the Trustee in writing (Baker & Hostetler LLP, Attention: Marc Hirschfield, 45 Rockefeller Plaza, New York, NY 10111) and may thereafter serve the Trustee via United States Mail.

E. Each defendant shall file a notice with the Court, on or before the Response Due Date, specifying the email address(es) for service of pleadings and documents on it. If a defendant is appearing *pro se* and is not able to receive pleadings and documents by email, that defendant shall so notify the Trustee in writing (Baker & Hostetler LLP, Attention: Marc Hirschfield, 45 Rockefeller Plaza, New York, NY 10111) and the Trustee

[1] The actual jump cites to the Trustee's website will be provided at the time the Avoidance Procedures become effective.

shall thereafter serve such *pro se* defendant via United States Mail at such address as the defendant shall request.

F. All parties must send a courtesy copy, in paper form, of each motion, pleading or other filing to Judge Lifland at the following address: The Hon. Burton R. Lifland, United States Bankruptcy Court, One Bowling Green, New York, NY 10004-1408. The parties shall not, however, send to Chambers copies of discovery requests other than as a part of, and in connection with, a discovery motion.

4. **Discovery:**

A. The discovery provisions of the Federal Rules of Bankruptcy Procedure and this Court's Local Bankruptcy Rules shall govern the discovery to be conducted in the Avoidance Actions, unless otherwise provided herein.

B. Unless the parties agree to a different date, the initial disclosures provided by Rule 26(a)(1) of the Federal Rules of Civil Procedure (the "Federal Rules") shall be made within the later of (i) 60 days from the date of the Initial Case Conference or (ii) 180 days from the date the Complaint was filed (the "Initial Disclosure Date"). The parties shall have a continuing obligation to disclose discoverable information as well as to supplement all existing disclosures in accordance with Federal Rule 26(e)(1).

C. The Trustee or a defendant may produce discovery, including initial disclosures, on a CD-ROM, in an electronic data room, or other similar electronic format. Given the volume of documentation that may be subject to disclosure in this matter, the Trustee or a defendant may produce a summary report, such as an expert report, and provide access to the underlying documentation on which the summary report relies in an electronic data room or other medium for review by the defendants. With regard to documents produced or made available electronically:

1. Information and documents disclosed shall be text searchable;

2. Upon request, the Trustee or a defendant, as the case may be, shall provide data and image load files necessary to review documents on search platforms (i.e., Summation, Concordance, Relativity);

3. The Trustee and defendant(s) shall produce any system-created or non-privileged captured objective metadata, such as date fields, author fields, custodian fields, path to native file, etc.;

4. To the extent that documents are organized by date, custodian, or subject matter, either because they were so maintained or because the Trustee so organized them, the Trustee shall produce such documents as organized; and

5. Nothing herein shall preclude the parties from requesting additional formats of production, metadata, or native documents.

D. Notwithstanding the Global Protective Order dated February 16, 2010 [Docket No. 1951] (the "Global Protective Order"), materials containing non-public personal information and/or sensitive financial information, including, Confidential Account Material (as defined in the Global Protective Order) may be designated by the Trustee as "Professionals' Eyes Only." The Trustee will provide access to such Confidential Account Materials only to attorneys of record in one or more Avoidance Actions and other professionals working with that attorney on such Avoidance Action(s) provided that the attorney and/or the other professional executes a non-disclosure agreement in substantially the form attached hereto as Exhibit 3 (the "Non-Disclosure Agreement"). Copies of the Global Protective Order and Non-Disclosure Agreement are available on the Trustee's website: [(www.madofftrustee.com/_____)] Nothing herein or in the Global Protective Order shall prevent any defendant from sharing Confidential Account Material pertaining to that defendant with other defendants in other Avoidance Actions, with accountants, financial or other consultants, or as deemed appropriate by the defendant to whom the Confidential Account Material relates.

E. In the event of a discovery dispute between the parties, the parties shall meet and confer in an attempt to resolve the dispute. If not resolved, the parties shall comply with Local Bankruptcy Rule 7007-1 with respect to resolution of the dispute.

F. Unless the parties agree to a different schedule, all fact discovery in an Avoidance Action shall be completed within 210 days after the Initial Disclosure Date. No further fact discovery shall be conducted after that date absent order of the Court upon a showing of good cause.

G. Unless the parties agree to a broader scope, absent further order of the Court upon a showing of good cause, discovery will be limited solely and specifically to nonprivileged matters to the extent discoverable under Federal Rule 26(b)(1) which relate to: (a) the calculation of net equity for the defendant's BLMIS account; (b) the financial condition of BLMIS; (c) the activities of BLMIS, including both fraudulent conduct, including the Ponzi scheme, and legitimate operations; (d) the defendant's account documents and customer correspondence and interactions with BLMIS, its employees, agents and other investors or customers; (e) the internal

records of BLMIS; (f) transfers of money by and among BLMIS; (g) the defendant's good faith or lack thereof, including issues related to the defendant's actual or constructive notice of fraudulent activity by BLMIS or anyone acting on its behalf; (h) disclosures made by BLMIS under federal and/or state laws, such as disclosures to the SEC; and (i) the identity of other persons or entities that may be liable for the transfers at issue, whether as subsequent transferees or for some other reason.

H. The parties may take depositions of fact witnesses during the period for fact discovery after initial disclosures have been made. The Trustee shall make his financial professionals submitting expert evidence on behalf of the Trustee available for depositions and may coordinate such depositions in multiple Avoidance Actions to maximize efficiency and use of resources. The Trustee shall notify all interested parties of the proposed date, time and location of any such depositions to be coordinated in multiple Avoidance Actions. To the extent a deposition is so coordinated, the limitations set forth in Federal Rule 30(d)(1) shall not apply, and the parties shall agree on an appropriate duration for the deposition. Depositions of the Trustee are prohibited absent an order issued by this Court upon a showing of good cause.

I. Notwithstanding Local Bankruptcy Rule 7033-1(b), the parties are permitted to serve substantive interrogatories at any time prior to the date which is 90 days prior to the completion of fact discovery. Unless the parties otherwise agree or the Court otherwise orders upon a showing of good cause, each party will limited to propounding no more than 25 interrogatories (inclusive of subparts).

J. Unless the parties agree otherwise, Federal Rule 26(a)(2) disclosures of the experts on any issue a party must prove in connection with a claim or defense shall be made within 60 days after the deadline for completion of fact discovery.

K. Unless the parties agree otherwise, Federal Rule 26(a)(2) disclosures of the parties' rebuttal experts, if any, shall be made within 90 days after the deadline for completion of fact discovery or 30 days after receipt of the other party's corresponding expert report, whichever is later.

L. Unless the parties agree otherwise, all expert discovery shall be concluded within 180 days after the deadline for completion of fact discovery.

M. To the extent that the Trustee proffers an expert witness on an issue that is common to more than one Avoidance Action, the Trustee may coordinate such deposition in multiple Avoidance Actions to maximize efficiency and use of resources. The Trustee shall notify all interested parties of the proposed date, time and location of any such depositions to be coordinated in multiple Avoidance Actions. To the extent a deposition is so

coordinated, the limitations set forth in Federal Rule 30(d)(1) shall not apply, and the parties shall agree on an appropriate duration for the deposition. Depositions of the Trustee are prohibited absent an order issued by this Court upon a showing of good cause.

N. All depositions of the Trustee's fact and expert witnesses shall occur at the offices of Baker & Hostetler LLP, 45 Rockefeller Plaza, New York, NY 10111, or such other location as the Trustee may agree. Depositions of other parties' expert and fact witnesses shall occur at such place as the parties shall mutually agree.

O. Any party seeking to make a discovery-related motion shall comply with Local Bankruptcy Rule 7007-1.

P. Except as specifically set forth in these Avoidance Procedures, the Global Protective Order shall apply to all discovery in the Adversary Proceedings. Notwithstanding the applicability of the Global Protective Order, nothing therein or herein shall prevent any defendant from sharing Confidential Information with codefendants or defendants named in other Avoidance Actions, or with accounting, financial, or other consultants retained in the litigation, provided that such persons have executed the Non-Disclosure Agreement. A copy of the Global Protective Order is available on the Trustee's website: [(www.madofftrustee.com/_____)].

5. **Mediation Procedures:**

A. All of the Avoidance Actions are referred to mandatory mediation. Except as set forth above or unless the parties opt for mediation at an earlier stage of the litigation, each Avoidance Action shall be referred to mediation upon the completion of discovery. The Trustee shall file in the adversary proceeding a notice of mediation referral (the "Notice of Mediation Referral") at the time the litigation is being referred to mediation.

B. Except as is set forth herein, the mediation shall be conducted in accordance with General Order M-390 (the "Mediation Order") which is available on the Bankruptcy Court's website: (www.nysb.uscourts.gov). A copy of such order is also available on the Trustee's website: [(www.madofftrustee.com/_____)].

C. Within 14 calendar days after the filing of the Notice of Mediation Referral, the Trustee and defendant(s) shall choose a mediator in accordance with the Mediation Order. If the parties are unable to agree on a mediator, the Court shall appoint one in accordance with the Mediation Order.

D. Promptly after the filing of the Notice of Mediator Selection, the Trustee and defendant's counsel (or the defendant if appearing *pro se*) shall jointly contact the selected Mediator to discuss the mediation.

E. The parties shall exchange position statements, which may not exceed twenty pages double-spaced in 12 point type (exclusive of exhibits and schedules), at least 10 days prior to the scheduled mediation. The Mediator may also require the parties to provide to the Mediator any relevant papers and exhibits, and a settlement proposal.

F. All mediations must be concluded within 120 days of the date of the Notice of Mediator Selection, which deadline may be extended by the mutual consent of the parties to the mediation and the Mediator.

G. The parties shall participate in the mediation in good faith and with a view toward reaching a consensual resolution. The mediation(s) shall be attended by a representative for each of the parties with full settlement authority and, if a defendant is represented, their counsel, as well as counsel for the Trustee (who shall have settlement authority). Any defendant shall be able to participate in the mediation telephonically and if a defendant is unable to attend the mediation in person or telephonically because of advanced age or poor health, the mediation may be attended by the defendant's counsel only, provided that he or she has settlement authority.

H. In mediations where the allegedly fraudulent transfers or preferences sought in the Complaint total $20 million or less, the Trustee shall pay the reasonable fees and reasonable expenses of the Mediator. Fees and expenses in all other mediations will be apportioned as set forth in the Mediation Order, unless otherwise agreed by the parties.

I. No Mediator shall mediate a case in which he/she or his/her law firm currently represents a party with respect to the BLMIS proceeding without the prior written consent of all parties to the mediation. Prior to accepting an Avoidance Action for mediation, the Mediator shall disclose to the Trustee and the defendant(s) any such representations. If a Mediator's law firm represents any defendant in the Avoidance Actions or other avoidance actions brought by the Trustee, then (a) the Mediator shall not personally participate in the representation of that defendant and (b) the Mediator's law firm shall impose an ethical wall which ensures that the Mediator will not have access to the defendant's file and/or communicate about the defendant's case or the mediation with anyone working on the defendant's case. The Mediator's participation in mediation pursuant to the Avoidance Procedures shall not create a conflict of interest with respect to the representation of such defendant by the Mediator's law firm.

6. **Motion Practice:**

A. Prior to the close of discovery, no motions may be made without the Court's prior approval, which may be sought, on notice to other parties to the action, by letter to the Court; provided, however, that (i) motions to dismiss, motions for withdrawal of the reference, and motions for default judgment may be made without the Court's prior approval, and (ii) routine procedural motions (e.g., motions to intervene or to amend a pleading) may be made without the Court's prior approval only if the moving party obtains the consent of all other parties to the action. Notwithstanding anything contained herein to the contrary, a letter request for a pre-motion conference with the Court shall be sufficient to be deemed compliant with the requisite time period for the motion or answer.

B. Any party seeking to file a summary judgment motion shall comply with Local Bankruptcy Rule 7056-1.

C. All matters concerning any Avoidance Action shall, barring exigent circumstances, only be heard on an omnibus hearing date before the Honorable Burton R. Lifland (collectively, the "Avoidance Action Omnibus Hearings"). The initial Avoidance Actions Omnibus Hearings shall be held on January 26, 2011, February 16, 2011, March 23, 2011, April 27, 2011, May 25, 2011 and June 29, 2011. Thereafter, Avoidance Actions Omnibus Hearings shall be scheduled approximately every thirty (30) days at the convenience of the Court. The Trustee shall file and serve notices of the scheduling of the omnibus hearings in the Avoidance Actions and post the scheduled dates on the Trustee's website [(www.madofftrustee.com/_____)]

D. The Trustee shall file a report in the main SIPA proceeding (Adv. Pro. No. 08-01789) at least one week prior to each Avoidance Action Omnibus Hearing setting forth the status of each of the Avoidance Actions scheduled to be heard at the Avoidance Action Omnibus Hearing. The Trustee shall also deliver a copy of the report to Judge Lifland's Chambers and serve each of the applicable defendants.

7. **Pre-trial Conference / Trial:**

A. After all discovery has been completed and after the completion of mediation without a settlement, the parties to the Avoidance Action shall so inform the Court at the next scheduled Avoidance Actions Omnibus Hearing. At such time, the Court will address any additional issues, set additional deadlines, if necessary, establish a due date by which the parties must file a joint pre-trial order, and schedule a trial. The parties to an Avoidance Action in which discovery has been completed need not await the completion of discovery in all Avoidance Actions before scheduling trial.

8. **Miscellaneous:**

A. These Avoidance Procedures shall control with respect to the Avoidance Actions to the extent of any conflict with other applicable rules and orders.

B. Nothing herein shall prevent the Trustee or any defendant in an Avoidance Action from seeking relief from the provisions of these Avoidance Procedures, upon a showing of good cause, by appropriate application to the Court in accordance with the procedures set forth herein.

C. Nothing herein shall prevent the parties to any Avoidance Action from voluntarily exchanging information or engaging in settlement discussions at any time; provided, however, that any such voluntary exchange of information shall in no way be construed as a waiver of any of the requirements or limitations contained in these Avoidance Procedures.

D. Noncompliance with the Avoidance Procedures may result in such sanctions as the Court deems appropriate on the non-complying party after notice and a hearing.

E. The Trustee shall serve a copy of the Order approving these Avoidance Procedures on each defendant in the Avoidance Action at the time he serves the summons and Complaint.

F. The Trustee shall post and maintain a copy of these Avoidance Procedures (together with any amendments or modifications thereto) on his website: [(www.madofftrustee.com/_____)].

EXHIBIT 1

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Marc E. Hirschfield
Richard J. Bernard
Elyssa S. Kates

Attorneys for Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. _____, Defendant(s).	Adv. Pro. No. 10-_____ (BRL)

NOTICE OF APPLICABILITY OF THE ORDER APPROVING LITIGATION CASE MANAGEMENT PROCEDURES FOR AVOIDANCE ACTIONS

PLEASE TAKE NOTICE, that the Order Approving Litigation Case Management Procedures for Avoidance Actions entered by the Bankruptcy Court in the above captioned SIPA liquidation, Adv. Pro. No. 08-01789 (BRL), on November 4, 2010 is hereby made applicable to and governs this adversary proceeding.

Dated: New York, New York
November __, 2010

BAKER & HOSTETLER LLP

By:_____

David J. Sheehan
Marc E. Hirschfield
Richard J. Bernard
Elyssa S. Kates
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

Attorneys for Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

EXHIBIT 2

BAKER & HOSTETLER LLP
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201
David J. Sheehan
Marc E. Hirschfield
Richard J. Bernard
Elyssa S. Kates

Attorneys for Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, Defendant.	Adv. Pro. No. 08-01789 (BRL) SIPA Liquidation (Substantively Consolidated)
In re: BERNARD L. MADOFF, Debtor.	
IRVING H. PICARD, Trustee for the Liquidation of Bernard L. Madoff Investment Securities LLC, Plaintiff, v. _____, Defendant(s).	Adv. Pro. No. 10-_____ (BRL)

CASE MANAGEMENT NOTICE

PLEASE TAKE NOTICE, that pursuant to the Order Approving Litigation Case Management Procedures for Avoidance Actions [Docket No. _____] entered by the Bankruptcy Court in the above captioned SIPA liquidation, Adv. Pro. No. 08-01789 (BRL), on _____, 2010 the following deadlines are hereby made applicable to this adversary proceeding:

1. The Initial Disclosures shall be due:_____2011 [Within the later of (i) sixty (60) days of the Initial Case Conference and (ii) one hundred eighty (180) days after the date the Complaint was filed]

2. Fact Discovery shall be completed by: _____2011 [Must be completed within 210 days after the Initial Case Conference]

3. The Deadline for Service of Substantive Interrogatories shall be: _____2011 [Ninety (90) days prior the completion of fact discovery]

4. The Disclosure of Case-in-Chief Experts shall be due: _____2011 [Within sixty (60) days after the deadline for completion of fact discovery]

5. The Disclosure of Rebuttal Experts shall be due: _____2011 [Within ninety (90) days after the deadline for completion of fact discovery]

6. The Deadline for Completion of Expert Discovery shall be: _____2011 [Within 180 days after the deadline for completion of fact discovery]

7. The Deadline to Choose a Mediator and File a Notice of Mediator Selection shall be: _____2011 [Within 14 days after the filing of the Notice of Mediation Referral]

8. The Deadline for Conclusion of Mediation shall be: _____2011 [Within 120 days of the date of the Notice of Mediator Selection, which deadline may be extended by the mutual consent of the parties to the mediation and the mediator]

Dated: New York, New York
_____ __, 201__

BAKER & HOSTETLER LLP

By:_____
David J. Sheehan
Marc E. Hirschfield
Richard J. Bernard
Elyssa S. Kates
45 Rockefeller Plaza
New York, NY 10111
Telephone: (212) 589-4200
Facsimile: (212) 589-4201

Attorneys for Irving H. Picard, Esq., Trustee for the Substantively Consolidated SIPA Liquidation of Bernard L. Madoff Investment Securities LLC and Bernard L. Madoff

095879, 000021, 300099385.1

EXHIBIT 3

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES INVESTOR PROTECTION CORPORATION, Plaintiff, v. BERNARD L. MADOFF INVESTMENT SECURITIES LLC, SIPA LIQUIDATION Defendant,	SIPA LIQUIDATION No. 08-01789 (BRL) (Substantively Consolidated) **UNDERTAKING AND CONSENT TO BE BOUND**
In re: BERNARD L. MADOFF, Debtor.	

WHEREAS this non-disclosure agreement (the "agreement") supplements the *Securities Investor Protection Corporation v. Bernard L. Madoff Investment Securities, LLC, et al.,* Adv. Pro. No. 08-01789 (BRL) Protective Order entered on February 16, 2010 (the "Protective Order").

WHEREAS this agreement shall govern all materials produced in connection with the BLMIS Avoidance Actions, which have been or subsequent hereto shall be designated as containing CONFIDENTIAL material (as defined in the Protective Order).

WHEREAS the parties may designate certain discovery material or testimony of a highly confidential and/or proprietary nature as "CONFIDENTIAL – PROFESSIONALS' EYES ONLY."

All parties in the BLMIS Avoidance Actions, by and through their respective undersigned counsel, hereby agree to the following:

1. My address is

_____,

and the name of my present employer is _____.

2. I represent as counsel the following party(ies): _____

_____.

3. I have received a copy of the Protective Order (the "Order") in this action.

4. I have carefully read and understand the provisions of the Order and this agreement and I am authorized to bind _____, which agrees to be bound by both the Order and this agreement.

5. Specifically _____ agrees that its employees, agents, or staff will not use or disclose any confidential documents nor the information contained therein to any person, including its clients.

6. _____ will never use any confidential material, directly or indirectly, for any purpose other than for purpose of this litigation, except as otherwise permitted by the Order or this agreement.

7. Absent further Court order, _____ will only use the information in the Avoidance Action for which it is retained.

8. _____ will file under seal any pleadings containing confidential information received under the protection of the Order or this agreement.

9. _____ understands that its employees, agents and staff are to retain all copies of any of the materials that they receive which have been so designated as confidential in a container, cabinet, drawer, room or other safe place in a manner consistent with the Order and that all copies are to remain in my custody until they have completed their assigned or legal duties.

10. I understand that violation of this agreement is the equivalent of violation of a court order.

11. _____ consents to the exercise of personal jurisdiction by this Court in connection with this agreement and its obligations under the Order.

12. I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

_____
Name

_____
Date

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: Comcar Industries, Inc. *et al.*,[1] Debtors.	Chapter 11 Case No. 20-11120 (LSS) Jointly Administered
Patrick J. O'Malley, Liquidating Trustee of the Comcar Liquidating Trust, Plaintiff, vs. Defendants Listed on Exhibit "A," Defendants.	

ORDER GRANTING MOTION FOR ORDER ESTABLISHING STREAMLINED PROCEDURES GOVERNING ADVERSARY PROCEEDINGS BROUGHT BY PLAINTIFF PURSUANT TO SECTIONS 502, 547, 548 AND 550 OF THE BANKRUPTCY CODE

Upon the *Motion for Order Establishing Streamlined Procedures Governing Adversary Proceedings Brought by Plaintiff Pursuant to Sections 502, 547, 548, and 550 of the Bankruptcy Code,* (the "Procedures Motion")[2] dated May 22, 2022, filed by Patrick J. O'Malley, Liquidating Trustee of the Comcar Liquidating Trust, (the "Plaintiff" or "Trustee"), by and through his undersigned counsel, for entry of a procedures order (the "Procedures Order") pursuant to sections

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: 9th Place Newberry, LLC (0359); 16th Street Pompano Beach, LLC (0278); CCC Spotting, LLC (0342); CCC Transportation, LLC (1058); Charlotte Avenue Auburndale, LLC (2179); Coastal Transport, Inc. (2918); Coastal Transport Logistics, LLC (7544); Comcar Industries, Inc. (8221); Comcar Logistics, LLC (2338); Comcar Properties, Inc. (9545); Commercial Carrier Corporation (8582); Commercial Carrier Logistics, LLC (7544); Commercial Truck and Trailer Sales Inc. (0722); Cortez Blvd. Brooksville, LLC (2210); CT Transportation, LLC (0997); CTL Distribution, Inc. (7383); CTL Distribution Logistics, LLC (7506); CTL Transportation, LLC (0782); Detsco Terminals, Inc. (9958); Driver Services, Inc. (3846); East Broadway Tampa, LLC (2233); East Columbus Drive Tampa, LLC (3995); Fleet Maintenance Services, LLC (1410); MCT Transportation, LLC (0939); Midwest Coast Logistics, LLC (7411); Midwest Coast Transport, Inc. (0045); New Kings Road Jacksonville, LLC (4797); Old Winter Haven Road Auburndale, LLC (4738); W. Airport Blvd. Sanford, LLC (0462); Willis Shaw Logistics, LLC (7341); WSE Transportation, LLC.

[2] Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them as in the Procedures Motion.

102(1) and 105 of title 11 of the United States Code (the "Bankruptcy Code"), Rules 7016, 7026 and 9006 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and Rules 7016-1, 7016-2, and 9019-5 of the Local Rules of Bankruptcy Practice and Procedure of the United States Bankruptcy Court for the District of Delaware (the "Local Rules"), establishing streamlined procedures governing all adversary proceedings brought by Plaintiff under sections 502, 547, 548, and 550 of the Bankruptcy Code, which are identified in **Exhibit 1** attached hereto (each an "Avoidance Action," collectively, the "Avoidance Actions"); and this Court having jurisdiction to consider and determine the Procedures Motion as a core proceeding in accordance with 28 U.S.C. §§ 157, 1331 and 1334; and any objections raised and heard at a hearing at which all parties were permitted to present their arguments and contentions; and it appearing that the relief requested by the Procedures Motion is necessary and in the best interests of the parties; and due notice of the Procedures Motion having been provided; and it appearing that no other or further notice of the Procedures Motion need be provided; and sufficient cause appearing therefore, it is hereby:

ORDERED, that the Procedures Motion be, and hereby is, granted in all respects as set forth herein; and it is further

ORDERED, the procedures governing all parties to the Avoidance Actions are as follows:

A. Effectiveness of the Procedures Order

1. This Procedures Order approving the Procedures Motion shall apply to all Defendants in the Avoidance Actions.

2. This Order will not alter, affect or modify the rights of Defendants to seek a jury trial or withdraw the reference, or otherwise move for a determination on whether the Court has authority to enter a final judgment, or make a report and recommendation, in an adversary proceeding under 28 U.S.C. § 157, and all such rights of the Defendants shall be preserved unless otherwise agreed to in a responsive pleading.

B. Extensions to Answer or File Other Responsive Pleading to the Complaint

3. The time to file an answer or other responsive pleading to a complaint filed in an Avoidance Action shall be extended by 60 days such that an answer or other responsive pleading is due within 90 days after the issuance of the summons rather than 30 days after the issuance of the summons.

C. Waiver of Requirement to Conduct Pretrial Conference

4. Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016 and Local Rules 7004-2 and 7016-1 (i.e., pretrial conferences), is hereby waived and not applicable with respect to the Avoidance Actions. Neither the Plaintiff nor any Defendant shall be required to appear at the initial pretrial conference, including any pretrial originally scheduled for June 28, 2022 or any subsequently scheduled pretrial conferences.

D. Waiver of Requirement to Conduct Scheduling Conference

5. Federal Rule of Civil Procedure 26(f), made applicable herein pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/ discovery plan), is hereby waived and is not applicable to the Avoidance Actions except as otherwise set forth in Paragraph 6(i) and (ii) of this Order. Thus, the parties to the Avoidance Actions shall not be required to submit a written report as may otherwise be required under Federal Rule of Civil Procedure 26(f).

E. Discovery, Mediation, and Dispositive Motion Schedule

6. The parties' obligation to conduct formal discovery in each Avoidance Action shall be, and hereby is, stayed until the Mediation Process is concluded; provided that the stay of formal discovery shall in no way preclude, with respect to any Avoidance Action, the Plaintiff and applicable Defendant from informally exchanging documents and information in an attempt to resolve such Avoidance Action in advance of, or during, the Mediation Process; provided further, that the proposed stay also will not preclude either party from requesting pre-mediation formal discovery. If any party to an Avoidance Action requests pre-mediation formal discovery, then:

i. Should the non-requesting party consent to pre-mediation formal discovery, the parties shall conduct a Rule 26(f) conference and submit a discovery scheduling order to the Court (each such order, a "Scheduling Order") that will provide for the completion of fact and expert discovery in advance of mediation; and

ii. If the non-requesting party does not consent to pre-mediation formal discovery:

a. The requesting party may request relief from the stay of discovery by filing with the Court (with copy to chambers and to the other party to the Avoidance Action) a letter, not to exceed two pages including exhibits, outlining the dispute;

b. Any reply to such letter (if any) must be filed with the Court (with copy to chambers and to the other party to the Avoidance Action) within two business days after the filing of the letter set forth in Paragraph 6.ii.a. above and shall also be no longer than two pages, including exhibits;

c. The Court will inform the parties if it will require a conference call or formal motion to resolve the dispute; and

d. Upon resolution of the dispute, either by agreement of the parties or at the direction of the Court, the parties shall either (a) continue with informal discovery and the Mediation Process; or (b) conduct a Rule 26(f) conference and submit a Scheduling Order to the Court.

7. Any open Avoidance Actions that have not been resolved and/or settled by August 31, 2022 (the "Remaining Avoidance Actions"), shall be referred to mandatory mediation (except with respect to any Avoidance Action as to which a Scheduling Order has been entered as provided in Paragraph 6 of this Order).

8. Between September 1, 2022 and September 15, 2022, Defendants in the Remaining Avoidance Actions shall choose a mediator from the list of proposed mediators (each a "Mediator," collectively, the "Mediators") qualified to handle these types of Avoidance Actions and are listed on the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 (the "Mediator List"), attached to the Procedures Motion as **Exhibit C**. Concurrently, Defendants in the Remaining Avoidance Actions shall notify Plaintiff's counsel of the Defendant's choice of Mediator by contacting Plaintiff's counsel's paralegal, Laurie N. Miskowiec, in writing, via email at **lmiskowiec@askllp.com** or via letter correspondence addressed to ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121. If a Defendant in a Remaining Avoidance Action does not timely choose a Mediator from the Mediator List and notify Plaintiff's counsel of the same, Plaintiff will assign such Remaining Avoidance Action to one of the Mediators from the Mediator List.

9. Upon notification of such selection or assignment, the selected Mediator shall have an opportunity to run conflicts checks on the Defendant(s) and, in the event of a conflict, may abstain from acting in the particular mediation. Once the mediator selection period closes and a Mediator is selected or assigned, as applicable, the Plaintiff will file a notice of mediation indicating which mediator was selected.

10. On September 16, 2022, Plaintiff, working with the Mediators, will commence scheduling mediations. Each Mediator will provide to Plaintiff the dates on which the Mediator is available for mediation and the parties shall cooperate with the Mediators and each other regarding the scheduling of mediations. Plaintiff's counsel shall contact Defendant or Defendant's counsel with a list of proposed dates for mediation provided by the mediator. Mediation will then be scheduled on a first-come, first-served basis.

11. Plaintiff will give at least 21 days written notice of the first date, time and place of the mediation in each Remaining Avoidance Action (the "Mediation Notice"), which notice shall be served on the applicable defendant

12. Within 14 calendar days after the conclusion of the mediation, the Mediator shall file a report (the "Mediator's Report") in the Remaining Avoidance Action, which shall be limited to stating only whether the Remaining Avoidance Action settled or did not settle.

13. All mediations of the Remaining Avoidance Actions must be concluded by January 31, 2023.

14. Any open Avoidance Actions shall be required to provide the disclosures required under Rule 7026(a)(1) (the "Initial Disclosures") on or before February 28, 2023.

15. All written interrogatories, document requests and requests for admission, if any, may be served upon the adverse party any time after the Mediator's Report is filed. All written interrogatories, document requests and requests for admission, if any, must be served upon the adverse party concurrently with the deadline to provide Initial Disclosures or no later than March 31, 2023. Local Rule 7026-2(b)(ii) shall be modified to allow the counsel for Plaintiff and each Defendant serving the discovery request or response to be the custodian of such discovery material.

16. The parties to the Avoidance Actions shall have through and including June 30, 2023 to complete non-expert fact discovery, including depositions of fact witnesses.

17. The standard provisions of Federal Rule of Civil Procedure 33, made applicable herein pursuant to Bankruptcy Rule 7033, shall apply to the Avoidance Actions.

18. The standard provisions of Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, including F.R.C.P. 34(b)(2)(E) regarding production of electronically stored information and Local Rule 7026-3, shall apply to the Avoidance Actions.

19. The standard provisions of Federal Rule of Civil Procedure 36, made applicable herein pursuant to Bankruptcy Rule 7036, shall apply to the Avoidance Actions.

20. Should a discovery dispute arise, the complainant shall file with the Court a letter outlining said issues and forward a copy to chambers. Respondent must reply within two (2) business days. The letter, excluding exhibits, shall be no longer than two (2) pages. The Court shall then inform the parties if it will require a conference call or formal motion.

21. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' case-in-chief experts, if any, shall be made to the adverse party on or before April 30, 2023.

22. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' rebuttal experts, if any, shall be made to the adverse party on or before May 31, 2023.

23. All expert discovery, including expert witness depositions, shall be concluded on or before July 15, 2023.

24. The standard provisions of Federal Rule of Civil Procedure 26(e), made applicable herein pursuant to Bankruptcy Rule 7026, shall apply to the Avoidance Actions with respect to supplementation of discovery responses.

25. All dispositive motions shall be filed and served by October 1, 2023. The Local Rules governing dispositive motions in adversary proceedings, including Local Rules 7007-1 – 7007-4, shall apply.

F. Mediation Procedures and Requirements

26. Because the Remaining Avoidance Actions are proceedings before this Court, Delaware is the proper forum for mediation, except as otherwise agreed to by the parties, including to hold mediations via video conference. Local Rule 9019-5 and the Court's mediation order, Delaware Bankruptcy Court General Order re Procedures in Adversary Proceedings, dated April 7, 2004, as amended April 11, 2005 (establishing mediation procedures for all adversary proceedings), shall govern the mediations, except as otherwise set forth herein.

27. The Mediators shall be required to file disclosures prior to the scheduling of mediation. Local Rule 9019-2(e)(iii)(B) shall apply.

28. The parties in each Remaining Avoidance Action will participate in the mediation, as scheduled and presided over by the chosen Mediator, in good faith and with a view toward reaching a consensual resolution. At least one *counsel for each party and a representative of each party having full settlement authority* shall attend the mediation in person *except* that, in light of the ongoing Covid-19 pandemic, the parties may by consent and with the Mediator's approval agree to appear by video conference, and further, that the Mediator, in his or her sole discretion, by request of one of the parties, may allow a party representative to appear via video while its counsel appears in person, and except where the parties otherwise agree. **Any such request must be made prior to ten (10) business days before the scheduled mediation date, and thereafter, subject to the discretion of the Mediator.** Should a party representative appear via video while counsel is in person, counsel appearing in person for that party shall have full settlement authority. Should a dispute arise regarding a Mediator's decision on whether to allow a party representative to appear via video rather than in person, a party may apply to the Court, in advance of the mediation, by sending a letter outlining said issues to chambers. The Court may then schedule a conference call to address the issues.

29. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties' presentations, and the rules of evidence will not apply. Each Mediator may implement additional procedures which are reasonable and practical under the circumstances.

30. The Mediator, in the Mediation Notice (by language provided to Plaintiff by the Mediator) or in a separate notice that need not be filed, may require the parties to provide to the Mediator any relevant papers and exhibits, a statement of position, and a settlement proposal. In the Mediator's discretion, upon notice (which need not be filed), the Mediator may adjourn a mediation or move a mediation to a different location within the same jurisdiction. The Mediator may also continue a mediation that has been commenced if the Mediator determines that a continuation is in the best interest of the parties.

31. The parties must participate in the scheduling of mediation and mediate in good faith. If the mediator feels that a party to the mediation is not attempting to schedule or resolve the mediation in good faith, the mediator may file a report with the Court. The Court may, without need for further motion by any party, schedule a hearing. If the Court determines that the party is not cooperating in good faith with the mediation procedures, the Court may consider the imposition of sanctions. Additionally, if either party to the mediation is not attempting to schedule or resolve the mediation in good faith, the opposite party reserves all rights to seek the appropriate relief, including sanctions.

32. Upon notice and a hearing, a party's failure to appear at the mediation or otherwise comply with the Procedures Order with respect to mediation, may result in an entry of default being obtained against the party failing to comply with the mediation provisions. The Mediator shall promptly file with the Court a notice when any party fails to comply with the mediation provisions set forth in the Procedures Order.

33. The fees of the Mediator shall be paid by the Plaintiff on a per case basis. The Mediator's fees shall be fixed as follows:

    a. cases with a claim amount (as reflected in the complaint) of less than $250,000: $3,000.00 per case;

    b. cases with a claim amount (as reflected in the complaint) equal to or greater than $250,000 and less than $1,000,000: $4,000 per case; and

    c. cases with a claim amount (as reflected in the complaint) equal to or greater than $1,000,000: $6,000 per case.

34. In addition to the fixed fee, the Plaintiff shall pay the Mediator a $250.00 administrative fee upon acceptance of appointment.

35. Defendants that have multiple Avoidance Actions in the underlying bankruptcy cases against them may mediate all related Avoidance Actions at one time and, in such event, the Mediation Fee shall be based upon the combined total claim amount for all related Avoidance Actions.

36. Mediation statements are due seven (7) calendar days prior to the mediation to the Mediator. Unless otherwise directed by the Mediator, the mediation statements shall be shared with the opposing party, except that any party that has confidential information may share the same solely with the Mediator. The Mediator will direct the parties as to further instructions regarding the mediation statements.

37. Without the prior consent of both parties, no Mediator shall mediate a case in which he/she or his/her law firm represents a party. If a Mediator's law firm represents any Defendant in the Avoidance Actions, then: (a) the Mediator shall not personally participate in the representation of that Defendant; (b) the law firm shall notate the file to indicate that the Mediator shall have no access to it; and (c) any discussions concerning the particular Avoidance Action by employees of the law firm shall exclude the Mediator. The Mediator's participation in mediation pursuant to the Procedures Order shall not create a conflict of interest with respect to the representation of such Defendants by the Mediator's law firm.

38. The Mediator shall not be called as a witness by any party except as set forth in this paragraph. Unless the Mediator's firm also represents a Defendant, in which case discovery is subject to otherwise applicable bankruptcy law, no party shall attempt to compel the testimony of, or compel the production of documents from, the Mediators or the agents, partners or employees of their respective law firms. Neither the Mediators nor their respective agents, partners, law firms or employees (a) are necessary parties in any proceeding relating to the mediation or the subject matter of the mediation, nor (b) shall be liable to any party for any act or omission in connection with any mediation conducted under the Procedures Order. Any documents provided to the Mediator by the parties shall be destroyed 30 days after the filing of the Mediator's Report, unless the Mediator is otherwise ordered by the Court. However, subject to court order, a Mediator may be called as witness by any party and may be compelled to testify on a limited basis in proceedings where it is alleged that a party failed to comply with mediation as is required in the foregoing paragraphs of this Procedures Order. Local Rule 9019-5(d) shall apply.

39. All proceedings and writing incident to the mediation shall be privileged and confidential, and shall not be reported or placed in evidence. Local Rule 9019-(5)(d) shall apply.

G. Avoidance Actions Omnibus Hearings

40. The initial pretrial conference shall have been deemed to be held on June 28, 2022 at 11:00 a.m. (ET). Thereafter, except as otherwise ordered by the Court, the pretrial conference shall be adjourned to quarterly status conferences. Except as otherwise ordered by the Court, all matters concerning any Avoidance Actions shall be heard only at status conferences before the Honorable Laurie Selber Silverstein (collectively, the "Avoidance Actions Omnibus Hearings"), at which there may be status conferences, final pre-trial conferences and hearings on motions, if any.

41. Defendants are not required to appear at any Avoidance Actions Omnibus Hearings unless: (a) a motion pertaining to the Defendant's Avoidance Action is calendared to be considered at the Avoidance Actions Omnibus Hearing; or (b) the Court has directed such Defendant to appear. To the extent a Defendant in any Avoidance Action wishes to appear at an Avoidance Actions Omnibus Hearing, and it has not otherwise notified the Plaintiff through a notice of motion, the Defendant or its counsel must notify Plaintiff's counsel of the same, in writing, 10 days prior to said hearing so that Plaintiff may properly prepare to address any issues or concerns at the Avoidance Actions Omnibus Hearing or in advance thereof.

42. Unless the Court orders otherwise, all motions, pleadings, requests for relief or other materials that purport to set a hearing on a date or time other than an Avoidance Actions Omnibus Hearing shall automatically, and without Court order, be scheduled to be heard at the next Avoidance Actions Omnibus Hearing that is at least 30 calendar days after such motion, pleading, request for relief or other materials are filed and served.

43. Plaintiff shall file a report one week prior to each Avoidance Actions Omnibus Hearing setting out the status of each of the Avoidance Actions and shall contemporaneously deliver a copy of the report to the Court's chambers.

44. If, after all discovery has been completed in an Avoidance Action and mediation has concluded but was not successful, and any issues of fact or law remain after dispositive motions, if any, have been decided, the parties to the applicable Avoidance Action shall so inform the Court at the next scheduled Avoidance Actions Omnibus Hearing. At such time, the Court will address additional issues arising subsequent to the Procedures Order, set additional deadlines, if necessary, establish a due date by which the parties must file a joint pretrial order, and schedule a trial on the Avoidance Action that is convenient to the Court's calendar.

H. Miscellaneous

45. The Local Rules shall apply, except that the Procedures Order shall control with respect to the Avoidance Actions to the extent of any conflict with other applicable rules and orders.

46. The deadlines and/or provisions contained in the Procedures Order may be extended and/or modified by the Court upon written motion and for good cause shown or consent of the parties pursuant to stipulation, which stipulation needs to be filed with the Court; and it is further

ORDERED, that this Court retains jurisdiction with respect to all matters arising from or related to the implementation of this Order.

LAURIE SELBER SILVERSTEIN
UNITED STATES BANKRUPTCY JUDGE

Dated: June 13, 2022
Wilmington, Delaware

EXHIBIT 1

Defendant Name	Adversary Number
3 H Investments of Louisiana, Inc. dba Delta Trailer, Inc.	22-50274
AAA Trailer Services of Illinois, LLC	22-50275
Admin America, Inc.	22-50276
Alpha Bulk Logistics LLC	22-50277
American Express Company	22-50316
Black Hills Corporation dba Black Hills Energy	22-50279
Bridgestone Americas Tire Operations, LLC	22-50280
Buck Lumber & Supply Longwood, Inc.	22-50281
Bulk Manufacturing of Florida, Inc.	22-50282
CDW Direct, LLC	22-50283
Corporation Service Company dba CSC	22-50284
Datum Computing Systems LLC	22-50285
David W. Demarteleare aka Dave Demarteleare Trucking	22-50286
Delta Dental Insurance Company	22-50287
HireRight, LLC	22-50288
Imperial Supplies LLC	22-50289
Innovative Business Technologies LLC	22-50290
KelohTech, LLC	22-50291
Lincoln Life Assurance Company of Boston	22-50292
Low Country Loading Service, Inc.	22-50293
M.B.T. Transport, Inc.	22-50294
Maryland Transportation Authority dba E-Z Pass Maryland Service Center	22-50295
MBL Transport LLC	22-50296
Metro Trailer, Inc.	22-50315
New Life Transport Parts Center, Inc.	22-50297
Omnitracs, LLC	22-50298
Premier Dissolution, LLC fdba Premier Container Services, LLC	22-50301
Robert Jellis Trucking, Inc.	22-50303
Royalty Capital Inc. dba ARAX	22-50304
Scopelitis, Garvin, Light, Hanson & Feary, Professional Corproration	22-50305
Service Express, LLC dba Service Express, Inc.	22-50306
Sunshine Tag LLC dba SunShine State Tag Agency LLC dba SunShine State Fleet Management	22-50308
Tank Trailer Cleaning, Inc.	22-50309
Transflo Express, LLC	22-50310
Trimble Transportation Enterprise Solutions Inc. dba TMW Systems, Inc.	22-50311
Tri-State Trailer Rentals, LLC	22-50312
Xenolytic Dana Solutions, LLC	22-50313

DELAWARE BKR MEDIATION AND ARBITRATION RULES 2023

Rule 9019-2 Mediator and Arbitrator Qualifications and Compensation.

(a) Register of Mediators and Arbitrators/ADR Program Administrator. The Clerk shall establish and maintain a register of persons (the "Register of Mediators") qualified under this Local Rule and designated by the Court to serve as mediators or arbitrators in the Mediation or Voluntary Arbitration Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court, the Clerk or a person qualified under this Local Rule who is a member in good standing of the Bar of the State of Delaware to serve as the Alternative Dispute Resolution ("ADR") Program Administrator. Aided by a staff member of the Court, the ADR Program Administrator shall receive applications for designation to the Register of Mediators, maintain the Register of Mediators, track and compile reports on the ADR Program and otherwise administer the program.

(b) Application and Certification.

(i) Application. Each applicant shall submit to the ADR Program Administrator a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant should be designated to

the Register of Mediators. The applicant shall submit the statement substantially in compliance with Local Form 110A. The statement also shall set forth whether the applicant has been removed from any professional organization, or has resigned from any professional organization while an investigation into allegations of professional misconduct was pending and the circumstances of such removal or resignation. This statement shall constitute an application for designation to the ADR Program. Each applicant shall certify that the applicant has completed appropriate mediation or arbitration training or has sufficient experience in the mediation or arbitration process and that he/she satisfies the qualifications set forth in 9019-2(b)(ii). If requested by the Court, each applicant hereunder shall agree to accept at least one pro bono appointment per year. If after serving in a pro bono capacity insufficient matters exist to allow for compensation, credit for pro bono service

shall be carried into subsequent years in order to qualify the mediator or arbitrator to receive

compensation for providing service as a mediator or arbitrator. In order to be eligible for appointment by the ADR Program Administrator, each applicant shall meet the qualifications sent forth in 9019-2(b)(ii).

(ii) Qualifications.

(A) Attorney Applicants. An attorney applicant shall certify to the Court in the Application that the applicant:

(1) Is, and has been, a member in good standing of the bar of any state or of the District of Columbia for at least five (5) years;

(2) Has served as a principal attorney of record in at least three bankruptcy cases (without regard to the party represented) from case commencement to conclusion or, if the case is still pending, to the date of the Application, or has served as the principal attorney of record for any party in interest in at least three (3) adversary proceedings or contested matters from commencement to conclusion or, if the case is still pending, to the date of the Application; and

(3) Is willing to undertake to evaluate or mediate at least one matter each year, subject only to unavailability due to conflicts, or personal or professional commitments, on a pro bono basis.

(B) Non-Attorney Applicants. A non-attorney applicant shall certify to the Court in the Application that the applicant has been a member in good standing of the applicant's particular profession for at least five (5) years, and shall submit a statement of professional qualifications, experience, training and other information demonstrating, in the applicant's opinion, why the applicant

should be appointed to the Register of Mediators. Non-attorney applicants shall make the same certification required of attorney applicants contained in Local Rule 9019-2(b)(ii)(A).

(iii) Court Certification. The Court in its sole and absolute determination on any reasonable basis shall grant or deny any application submitted under this

Local Rule. If the Court grants the application, the applicant's name shall be added to the Register of Mediators, subject to removal under these Local Rules.

(iv) Reaffirmation of Qualifications. Each applicant accepted for designation to the Register of Mediators shall reaffirm annually the continued existence and accuracy of the qualifications, statements and representations made in the application. The annual reaffirmation shall be submitted to the ADR Program Administrator in conformity with Local Form 125 by March 31st of each year, and shall include a certification of such mediator's acceptance of, or availability to perform, one pro bono appointment for the prior calendar year, and whether the mediator has been selected or appointed as a mediator in a dispute within the preceding three (3) calendar years for this Court.

(c) Oath. Before serving as a mediator or arbitrator, each person designated as a mediator or arbitrator shall take the following oath or affirmation:

"I, _____, do solemnly swear (or affirm) that I will faithfully and impartially discharge and perform all the duties incumbent upon me in the

Mediation or Voluntary Arbitration Program of the United States Bankruptcy Court for the District of Delaware without respect to persons and will do so equally and with respect."

(d) Removal from Register of Mediators. A person shall be removed from the Register of Mediators (i) at the person's request, (ii) by Court order entered on the sole and absolute determination of the Court, or (iii) by the ADR

Program Administrator if the person (1) has failed to timely submit the annual reaffirmation as required in 9019-2(b)(iv), or (2) has not been selected or appointed as a mediator in a dispute for three (3) consecutive calendar years. If removed from the Register of Mediators, the person shall be eligible to file an application for reinstatement after the passage of one year from the date of removal.

(e) Appointment.

(i) Selection. Upon assignment of a matter to mediation or arbitration in accordance with these Local Rules and unless special circumstances exist as determined by the Court, the parties shall select a mediator or arbitrator. If the parties fail to make such

selection within the time as set by the Court, then the Court shall appoint a mediator or arbitrator. A mediator or arbitrator shall be selected from the Register of Mediators, unless the parties stipulate and agree to a mediator or arbitrator not on the Register of Mediators.

(ii) Inability to Serve. If the mediator or arbitrator is unable to or elects not to serve, he or she shall file and serve on all parties, and on the ADR Program Administrator, within fourteen (14) days after receipt of notice of appointment, a notice of inability to accept the appointment. In such event, the parties shall select an alternate mediator or arbitrator.

(iii) Disqualification.

(A) Disqualifying Events. Any person selected as a mediator or arbitrator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 44. Any person selected as a mediator or arbitrator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

(B) Disclosure. Promptly after receiving notice of appointment, the mediator or arbitrator shall

make an inquiry sufficient to determine whether
there is a basis for disqualification under

this Local Rule. The inquiry shall include,
but shall not be limited to, a search for
conflicts of interest in the manner prescribed
by the applicable rules of professional conduct
for attorneys and by the applicable rules
pertaining to the profession of the mediator or
arbitrator.
(C) Objection Based on Conflict of Interest. A
party to the mediation or arbitration who
believes that the assigned mediator or
arbitrator has a conflict of interest promptly
shall bring the issue to the attention of the
mediator or arbitrator, as applicable, and to
the other parties. If the mediator or
arbitrator does not withdraw, and the movant is
dissatisfied with this decision, the issue
shall be brought to the attention of the ADR
Program Administrator by the mediator,
arbitrator or any of the parties. If the
movant is dissatisfied with the decision of the

ADR Program Administrator, the issue shall be brought to the Court's attention by the ADR Program Administrator or any party. The Court shall take such action as it deems necessary or appropriate to resolve the alleged conflict of interest.

(iv) Liability. Aside from proof of actual fraud or unethical conduct, there shall be no liability on the part of, and no cause of action shall arise against, any person who is appointed as a mediator or arbitrator under these Local Rules on account of any act or omission in the course and scope of such person's duties as a mediator or arbitrator.

(f) Compensation. A person will be eligible to be a paid mediator or arbitrator if that person has been admitted to the Register of Mediators maintained by the Court or otherwise has been appointed by the Court. Once eligible to serve as a mediator or arbitrator for compensation, which shall be at reasonable rates, the mediator or arbitrator may require compensation and reimbursement of expenses as agreed by the parties; and such compensation and reimbursement of expenses shall be paid without Court Order. If any party to the mediation or arbitration

objects to the compensation or expenses required by the mediator or arbitrator, such dispute may be presented to the Court by the party or the mediator or arbitrator for disposition. If the mediator or arbitrator consents to serve without compensation and at the conclusion of the first full day of the mediation conference or arbitration proceeding it is determined by the mediator or arbitrator and the parties that additional time will be both necessary and productive in order to complete the mediation or arbitration, then:

(i) If the mediator or arbitrator consents to continue to serve without compensation, the parties may agree to continue the mediation conference or arbitration.

(ii) If the mediator or arbitrator does not consent to continue to serve without compensation, the fees and expenses shall be on such terms as are satisfactory to the mediator or arbitrator and the parties, subject to Court approval. Where the parties have agreed to pay such fees and expenses, the parties shall share equally all such fees and expenses unless the parties agree to some other allocation. The Court may determine a different allocation, if the parties cannot agree to an allocation.

(iii) If the estate is to be charged with such expense,

the mediator or arbitrator may be reimbursed for actual transportation expenses necessarily incurred in the performance of duties.

(g) Administrative Fee. The mediator or arbitrator shall be entitled to an administrative fee of $250, payable upon his or her acceptance of the appointment, in every dispute referred to mediation, except a proceeding or matter in a consumer case. The administrative fee shall be a credit against any fee actually paid to the mediator or arbitrator in such proceeding or matter.

(h) Party Unable to Afford. If the Court determines that a party to a matter assigned to mediation or arbitration cannot afford to pay the fees and costs of the mediator or arbitrator, the Court may appoint a mediator or arbitrator to serve pro bono as to that party.

Rule 9019-3 Assignment of Disputes to Mediation or Voluntary Arbitration.

(a) Stipulation of Parties. Notwithstanding any provision of law to the contrary, the Court may refer a dispute pending before it to mediation and, upon consent of the parties, to arbitration. During a mediation, the parties may stipulate to allow the mediator, if qualified as an arbitrator, to

hear and arbitrate the dispute.

(b) Safeguards in Consent to Voluntary Arbitration. Matters may proceed to voluntary arbitration by consent where

(i) Consent to arbitration is freely and knowingly obtained; and

(ii) No party is prejudiced for refusing to participate in arbitration.

Rule 9019-4 Arbitration.

(a) Referral to Arbitration under Fed. R. Bankr. P. 9019(c). The Court may allow the referral of a matter to final and binding arbitration under Fed. R. Bankr. P. 9019(c).

(b) Referral to Arbitration under 28 U.S.C. § 654. The Court may allow the referral of an adversary proceeding to arbitration under 28 U.S.C. § 654.

(c) Arbitrator Qualifications and Appointment. In addition to fulfilling the qualifications of a mediator found in Local Rule 9019-2(b), a person qualifying as an arbitrator hereunder must be certified as an arbitrator through a qualifying program. An arbitrator shall be appointed (and may be disqualified) in the same manner as in Local Rule 9019-2(e). The arbitrator shall be liable only to the extent provided in Local Rule 9019-2(e)(iv).

(d) Powers of Arbitrator.

(i) An arbitrator to whom an action is referred shall have the power, upon consent of the parties, to

(A) Conduct arbitration hearings;

(B) Administer oaths and affirmations; and

(C) Make awards.

(ii) The Fed. R. Civ. P. and the Fed. R. Bankr. P. apply to subpoenas for the attendance of witnesses and the production of documents at a voluntary arbitration hearing.

(e) Arbitration Award and Judgment.

(i) Filing and Effect of Arbitration Award. An arbitration award made by an arbitrator, along with proof of service of such award on the other party by the prevailing party, shall be filed with the Clerk promptly after the arbitration hearing is concluded. The Clerk shall place under seal the contents of any arbitration award made hereunder and the contents shall not be known to any Judge who might be assigned to the matter until the Court has entered a

final judgment in the action or the action has otherwise terminated.

(ii) Entering Judgment of Arbitration Award. Arbitration awards shall be entered as the judgment of the Court after the time has expired for requesting a determination de novo, with no such request having been filed. The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the Court, except that the judgment shall not be subject to review in any other court by appeal or otherwise.

(f) Determination De Novo of Arbitration Awards.

(i) Time for Filing Demand. Within twenty-eight (28) days after the filing of an arbitration award under Local Rule 9019-4(e) with the Clerk, any party may file a written demand for a determination de novo with the Court.

(ii) Action Restored to Court Docket. Upon a demand for determination de novo, the action shall be restored to the docket of the Court and treated for all purposes as if it had not been referred to arbitration.

(iii) Exclusion of Evidence of Arbitration. The Court shall not admit at the determination de novo any evidence that there has been an arbitration proceeding, the nature or amount of any award or any other matter concerning the conduct of the

arbitration proceeding, unless

(A) The evidence would otherwise be admissible in the Court under the Federal Rules of Evidence; or

(B) The parties have otherwise stipulated.

(g) This Local Rule shall not apply to arbitration under 9 U.S.C. § 3, if applicable.

Rule 9019-5 Mediation.

(a) Types of Matters Subject to Mediation. The Court may assign to mediation any dispute arising in an adversary proceeding, contested matter or otherwise in a bankruptcy case. Except as may be otherwise ordered by the Court, all adversary proceedings filed in a business case shall be referred to mandatory mediation, except an adversary proceeding in which (i) the United States Trustee is the plaintiff; (ii) one or both parties are pro se; or (iii) the plaintiff is seeking a preliminary injunction or temporary restraining order. Parties may also stipulate to mediation, subject to Court approval.

(b) Effects of Mediation on Pending Matters. The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or

applicable provisions of the Code, the Fed. R. Bankr. P. or these Local Rules. Unless otherwise ordered by the Court, the assignment to mediation does not delay or stay discovery, pretrial hearing dates or trial schedules.

(c) The Mediation Process.

(i) Cost of Mediation. Unless otherwise ordered by the Court, or agreed by the parties, (1) in an adversary proceeding that includes a claim to avoid and recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 544, 547, 548 and/or 550, the bankruptcy estate (or if there is no bankruptcy estate, the plaintiff in the adversary proceeding) shall pay the fees and costs of the mediator and (2) in all other matters, the fees and costs of the mediator shall be shared equally by the parties.

(ii) Time and Place of Mediation Conference. After consulting with all counsel and pro se parties, the mediator shall schedule a time and place for the mediation conference that is acceptable to the parties and the mediator. Failing agreement of the parties on the date and location for the mediation conference, the mediator shall establish the time and place of the mediation conference on no less than twenty-one (21) days' written notice to all counsel and pro se parties.

(iii) Submission Materials. Unless otherwise instructed by the mediator, not less than seven (7) days before the mediation conference, each party shall submit directly to the mediator and serve on all counsel and pro se parties such materials (the "Submission") in form and content as the mediator directs. Any instruction by the mediator regarding submissions shall be made at least twenty-one (21) days in advance of a scheduled mediation conference. Prior to the mediation conference, the mediator may talk with the participants to determine what materials would be helpful. The Submission shall not be filed with the Court and the Court shall not have access to the Submission.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(ix)(A) herein, or unless excused by the Mediator upon a showing of hardship, which, for purposes of this subsection shall mean serious or disabling illness to a party or party representative; death of an immediate family member of a party

or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

(2) If the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) If the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of

whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

(5) Other interested parties, such as insurers or indemnitors or one or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(B) Failure to Attend. Willful failure to attend any mediation conference, and any other material violation of this Local Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of Local Rule 9019-5(d).

(v) Mediation Conference Procedures. The mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach a settlement in principle after the matter has been assigned to mediation but prior to the mediation conference, the plaintiff shall advise the mediator in writing within one (1)

business day of the settlement in principle.

(d) Confidentiality of Mediation Proceedings. Confidentiality is necessary to the mediation process, and mediations shall be confidential under these rules and to the fullest extent permissible under otherwise applicable law. The provisions of this Local Rule 9019-5(d) shall apply to all mediations occurring in cases, contested matters and adversary proceedings pending before the Court, whether such mediation is ordered or referred by the Court or voluntarily undertaken by the parties provided that such mediation is approved by the Court. Without limiting the foregoing, except as may be otherwise ordered by the Court,

the following provisions shall apply to any mediation under these rules:

(i) F.R.E. 408. To the fullest extent applicable, Rule 408 of the Federal Rules of Evidence (and any applicable federal or state statute, rule, common law or judicial precedent relating to the protection of settlement communications) shall apply to the mediation conference and any communications with the mediator related thereto. In addition to the limitations of admissibility of evidence under Rule

408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this Court in connection with the referred matter, whether oral or written, (i) views expressed or suggestions made by a party with respect to a possible settlement of the dispute, including whether another party had or had not indicated a willingness to accept a proposal for settlement, (ii) proposals made or views expressed by the mediator, or (iii) admissions made by a party in the course of the mediation.

(ii) Protection of Information Disclosed to the Mediator or During Mediation. Subject to subparagraph (iv) herein, the mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or witnesses to or in the presence of the mediator, or between the parties during any mediation conference.

(iii) Confidential Submissions to the Mediator. Subject to subparagraph (iv) herein, any submission of information or documents to the mediator, including any Submission (as defined in Del. Bankr. L.R. 9019-5(c)(iii)), prepared by or on behalf of any participant in mediation and intended to be

confidential shall not be subject to disclosure, regardless of whether such Submission is shared with other participants in the mediation during a mediation conference.

(iv) Information Otherwise Discoverable. Information, facts or documents otherwise discoverable or admissible in evidence do not become exempt from

discovery or inadmissible in evidence merely by being disclosed or otherwise used in the mediation conference or in any Submission to the mediator.

(v) Discovery from the Mediator. The mediator shall not be compelled to disclose to the Court or to any person outside the mediation any records, reports, summaries, notes, communications, Submissions, recommendations made under subpart (e) of this Local Rule, or other documents received or made by or to the mediator while serving in such capacity. The mediator shall not testify, be subpoenaed or compelled to testify regarding the mediation in connection with any arbitral, judicial or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation.

Nothing contained in this paragraph shall prevent the mediator from reporting the status, but not the substance, of the mediation effort to the Court in writing, from filing a Certificate of Completion as required by Local Rule 9019-5(f), or from otherwise complying with the obligations set forth in this Local Rule.

(vi) Protection of Confidential Information. For the avoidance of doubt, nothing in this sub-part 9019-5(d) is intended to or shall modify any rights or obligations any entity has in connection with confidential information or information potentially subject to protection under Section 107 of the Bankruptcy Code.

(vii) Preservation of Privileges. Notwithstanding Rule 502 of the Federal Rules of Evidence, the disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

(e) Recommendations by Mediator. The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or pro se litigants, but not to the Court.

(f) Post-Mediation Procedures.
(i) Filings by the Parties. If a settlement is reached at a mediation, the plaintiff shall file a Notice of Settlement or, where required, a motion and proposed order seeking Court approval of the settlement within twenty-eight (28) days after such settlement is reached. Within sixty (60) days after the filing or the Notice of Settlement or the entry of an order approving the settlement, the parties shall file a Stipulation of Dismissal dismissing the action on such terms as the parties may agree. If the plaintiff fails to timely file the Stipulation of Dismissal, the Clerk's office will close the case.
(ii) Mediator's Certificate of Completion. No later than fourteen (14) days after the conclusion of the mediation conference or receipt of notice from the parties that the matter has settled prior to the mediation conference, unless the Court orders otherwise, the mediator shall file with the Court a certificate in the form provided by the Court ("Certificate of Completion") showing compliance or noncompliance with the mediation conference requirements of this Local Rule and whether or not a

settlement has been reached. Regardless of the outcome of the mediation conference, the mediator shall not provide the Court with any details of the substance of the conference.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the Court at any time.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 9019-5(f)(ii) or the entry of an order withdrawing a matter from mediation under Local Rule 9019-5(g), the mediation will be deemed terminated and the mediator excused and relieved from further responsibilities in the matter without further order of the Court. If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing under the Court's scheduling orders.

(i) Modification of ADR Procedure. Any party seeking to deviate from, or propose procedures or obligations in addition to, the Local Rules governing ADR shall comply with Local Rule 7001-1(a)(i).

(j) Alternative Procedures for Certain Avoidance Proceedings.

(i) Applicability. This subsection (j) shall apply to any adversary proceeding that includes a claim to avoid and/or recover any alleged avoidable transfer pursuant to 11 U.S.C. §§ 547, 548 and/or 550 from one or more defendants where the amount in controversy from any one defendant is equal to or less than $75,000.

(ii) Service of this Rule with Summons. The plaintiff shall serve with the Summons a copy of this Del. Bankr. L.R. 9019-5(j) and the Certificate (as defined hereunder) and file a certificate of service within seven (7) days of service.

(iii) Defendant's Election. On or within twenty-eight (28) days after the date that the Defendant's response is due under the Summons, the Defendant may opt-in to the procedures provided under this subsection (j) by filing with the Court on the docket of the adversary proceeding and serving on the Plaintiff, a certificate in the form of Local Form 118 ("Certificate"). The time period provided hereunder to file the Certificate is not extended by the parties' agreement to extend the Defendant's response deadline under the Summons.

(iv) Mediation of All Claims. Unless otherwise agreed by the parties, the Defendant's election to proceed to

mediation under subsection (j)(iii) operates as a referral of all claims against the Defendant in the underlying adversary proceeding.

(v) Appointment of Mediator. On or within fourteen (14) days after the date that the Certificate is filed, Plaintiff shall file either: (i) a stipulation (and proposed order) regarding the appointment of a mediator from the Register of Mediators approved by the Court; or (ii) a request for the Court to appoint a mediator from the Register of Mediators approved by the Court. If a stipulation or request

to appoint is not filed as required hereunder, then the Clerk of Court may appoint in such proceeding a mediator from the Register of Mediators approved by the Court.

(vi) Election in Cases Where Amount Exceeds $75,000. In any adversary proceeding that includes a claim to avoid and/or recover an alleged avoidable transfer(s) from one or more defendants where the amount in controversy from any one defendant is greater than $75,000, the plaintiff and defendant may agree to opt-in to the procedures provided under

this subsection (j) by filing a certificate in the form of Local Form 119 ("Jt. Certificate") on the docket of the adversary proceeding within the time provided under subsection (j)(iii) hereof that includes the parties' agreement to the appointment of a mediator from the Register of Mediators; provided, however, that in a proceeding that includes more than one defendant, only the defendant who agrees to opt-in is subject to the provisions hereof. The use of the term "Defendant" in this subsection (j) shall include any defendant who agrees with plaintiff to mediation hereunder.

(vii) Participation. The parties shall participate in mediation in an effort to consensually resolve their disputes prior to further litigation.

(viii) Scheduling Order.

(A) Effect of Scheduling Order. Any scheduling order entered by the Court at the initial status conference or otherwise shall apply to the parties and claims which are subject to mediation under this subsection; provided, however, that: (1) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of any requirement under Fed. R. Bankr. Proc. 7026

to serve initial disclosures, and a stay as
against the parties to the mediation of such
parties' right and/or obligation (if any) to
propound, object or respond to written
discovery requests or other discovery demands
to or from the parties to the mediation; and

(2) as further provided in subsection
(j)(ix)(B) hereof, after the conclusion of
mediation the time frames set forth in the
scheduling order entered by the Court shall be
adjusted so that such time frames are
calculated from the date of completion of
mediation (as evidenced by the date of entry on
the adversary docket of the Certificate of
Completion). The stay provided for under this
subsection shall automatically terminate upon
the filing of the Certificate of Completion.
(B) Agreement to and Filing of Scheduling Order
after Conclusion of Mediation. If the
mediation does not result in the resolution of
the litigation between the parties to the
mediation, then within fourteen (14) days after

the entry of the Certificate of Completion on the adversary docket, the parties to the mediation shall confer regarding the adjustment of the date and time frames set forth in the scheduling order entered by the Court so that such dates and time frames are calculated from the date of completion of mediation. The parties shall further agree to a related form of scheduling order or stipulation and proposed order, and the plaintiff shall file such proposed scheduling order or stipulation and proposed order on the docket of the adversary proceeding under certification of counsel. If the parties do not agree to the form of scheduling order or stipulation as required hereunder and the timely filing thereof, then the parties shall promptly contact the Court to schedule a hearing to consider the entry of an amended scheduling order.

(C) Absence of Scheduling Order. The terms of this subsection (viii) apply only if the Court enters a form of scheduling order in the underlying adversary proceeding prior to the conclusion of mediation.

(ix) The Mediation Conference.

(A) Persons Required to Attend. A representative of each party who has full authority to negotiate and settle the matter on behalf of the party must attend the mediation in person. Such representative may be the party's attorney of record in the adversary proceeding. Other representatives of the party or the party (if the party is not the representative appearing in person at the mediation) may appear by telephone, videoconference or other similar means. If the party is not appearing at the mediation in person, the party shall appear at the mediation by telephone, videoconference or other similar means as directed by the mediator.

(B) Mediation Conference Procedures. The mediator may establish other procedures for the mediation conference.

(x) Other Terms. Unless otherwise provided hereunder, the provisions of Del. Bankr. L.R. 9019-5 (including subsections (b), (c) (iv)(B), and (d) – (h)) shall apply to any mediation conducted under this

subsection (j).

Rule 9019-6 Other Alternative Dispute Resolution Procedures.

The parties may employ any other method of alternative dispute resolution.

ILNB (Chicago) Bankruptcy Court Local Rules

As amended, effective April 19, 2022

RULE 9060-1 MEDIATION AND ARBITRATION

A. Generally

Except to the extent required by the Bankruptcy Code or Federal Rules of Bankruptcy Procedure, parties to an adversary proceeding or contested matter need not request court approval before pursuing mediation or arbitration. Parties must promptly file a motion with the court requesting any scheduling changes that the proposed mediation or arbitration may necessitate.

B. Assignment of Matters to Mediation

On the motion of any party in interest, the court may order the mediation of any dispute, whether it arises in an adversary proceeding, contested matter, or otherwise.

B. Mediation Order

The order for mediation must address these subjects:

• the identity of the mediator

• the subject of the mediation

• the time and place of the mediation

• who may attend the mediation and who must attend

• the costs of the mediation and who will bear them

• the confidentiality and admissibility of statements made during or in connection with

Rule 9019-2 SCOPE AND EFFECT OF MEDIATION

(a) The Court may assign any matter to the Mediation Program for the Western District of Pennsylvania (the "Mediation Program") sua sponte, upon motion or stipulation of the parties to the matter or the United States trustee. The Court may order additional parties to participate in the mediation as necessary.

(b) The Court may assign to mediation any dispute arising in the bankruptcy case or in any adversary proceeding, contested matter, or otherwise. Fed. R. Bankr. P. 7016 is hereby made applicable to all matters in which mediation is requested in accordance with the Mediation Program.

(c) The assignment of a matter to mediation does not relieve the parties to that matter from complying with any other Court orders or applicable provisions of the Bankruptcy Code, the Federal Rules of Bankruptcy Procedure, or the Local Bankruptcy Rules of this Court. The assignment to mediation stays all discovery, pretrial, hearing dates, and trial schedules. The Court will issue a scheduling order and set deadlines for the mediation to conclude and for the discovery, pretrial, and trial to resume.

Rule 9019-3 MEDIATORS

(a) The Clerk shall establish and maintain a register of persons (the "Register") qualified and designated by the Court to serve as mediators in the Mediation Program. The Chief Bankruptcy Judge shall appoint a Judge of this Court to serve as the "Mediation Program Administrator." The Mediation Program Administrator or designee shall receive applications for designation to the Register, maintain the Register, track and compile reports on the Mediation Program, and otherwise administer the program.

(b) Each applicant shall submit to the Mediation Program Administrator a statement of professional qualifications, experience, training, and other information relevant to designation to the Register, using Local Bankruptcy Form 31 (Application for Admission to Bankruptcy Mediation Program Register). Each applicant shall submit to the Mediation Program Administrator documentary confirmation that the applicant has completed forty (40) hours of mediation training, including training in the facilitative method of mediation with at least sixteen (16) hours of such training being in the form of simulated facilitative mediations.

(c) Each applicant shall agree to serve in a pro bono capacity for his or her initial mediation appointment. Thereafter, recognizing that the commitment to perform pro bono services is aspirational in nature, the applicant shall serve in a pro bono capacity when asked to do so by the Court, on average, at least one (1) out of every five (5) subsequent appointments as a mediator.

(d) Not later than March 1 of every year using Local Bankruptcy Form 31 (Application for Admission to Bankruptcy Mediation Program Register), each applicant accepted for designation to the Register shall reaffirm the continued existence and accuracy of the qualifications, statements, and representations made in the application, and file amendments as needed, and certify that such applicant has completed at least two (2) Continuing Legal Education (CLE) credits in the preceding year period ending on December 31st with substantially mediation-related content. In meeting this minimum CLE threshold for each year, the applicant may use accumulated relevant credits not previously exhausted toward this

requirement. In the event an applicant fails to meet the required CLE threshold in any one year, the applicant will be immediately removed from the Mediation Panel until the requisite CLE requirement is met.

(e) The Court in its sole and absolute determination on any basis shall grant or deny an application. If the Court grants the application, the applicant's name shall be added to the Register.

(f) A person shall be removed from the Register either at the person's request or by Court order entered on the sole and absolute determination of the Court. If removed by Court order, the person shall be eligible to file an application for reinstatement after one (1) year.

(g) Before serving as a mediator, each person designated as a mediator shall take the following oath or affirmation:

"I, _____, do solemnly swear [or affirm] that I will faithfully and impartially discharge and perform all the duties incumbent upon me as a mediator in the Mediation Program of the United States Bankruptcy Court for the Western District of Pennsylvania without respect to persons and will do so equally with respect to the poor and to the rich."

(h) Upon assignment of a matter to mediation and unless special circumstances exist as determined by the Court, the parties shall select a mediator and may choose an alternate mediator from the Register whose appointment shall be authorized by the Court. If the parties fail to make such selection within the time frame as set by the Court, then the Court shall appoint a mediator and may appoint an alternate mediator.

(i) If the mediator is unable or elects not to serve, the mediator shall file and serve on all parties to the mediation and on the alternate mediator, within seven (7) calendar days after receipt of a Notice of Appointment, a Notice of Inability or Election Not to Accept the Appointment. The alternate mediator then shall become the mediator, if the alternate does not file and serve on all parties to the mediation a Notice of Inability or Election Not to Accept the Appointment within seven (7) calendar days after receipt of the original mediator's Notice of Inability or Election Not to Accept the Appointment. If neither the mediator nor the alternate mediator can serve, the Court shall appoint another mediator and alternate mediator.

(j) Any person selected as a mediator may be disqualified for bias or prejudice in the same manner that a Judge may be disqualified under 28 U.S.C. § 144. Any person selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a Judge.

(k) Promptly after receiving Notice of Appointment, the mediator shall make inquiry sufficient to determine whether there is a basis for disqualification under W.PA.LBR 9019-3(j). The inquiry shall include, but shall not be limited to, a search for conflicts of interests in the manner prescribed by the applicable rules of professional conduct for attorney mediators, and by the applicable rules pertaining to the mediator's profession for nonattorney mediators. Within seven (7) calendar days after receiving Notice of Appointment, the mediator shall file with the Court and serve on the parties to the mediation either (1) a statement that there is no basis for disqualification under W.PA.LBR 9019-3(j), and that the mediator has no actual potential conflict of interest, or (2) a Notice of Withdrawal.

(l) A party to the mediation who believes that the assigned mediator and/or the alternate mediator has a conflict of interest shall promptly bring the issue to the attention of the mediator and/or the alternate mediator, as applicable, and to the other parties to the mediation. If the mediator does not withdraw, and the movant is dissatisfied with this decision, the issue shall be brought to the Court's attention by the mediator or any of the parties to the mediation. The Court shall take such action as the Court deems necessary or appropriate to resolve the alleged conflict of interest.

(m) Aside from proof of actual fraud or unethical conduct, there shall be no liability on the part of, and no cause of action shall arise against, any person who is appointed as a mediator pursuant to this Local Bankruptcy Rule on account of any act or omission in the course and scope of such person's duties as a mediator.

(n) Once eligible to serve as a mediator for compensation, which shall be at reasonable rates and subject to judicial review, the mediator may require compensation or reimbursement of expenses as agreed by the parties to the mediation. Prior Court approval shall also be required if the estate is to be charged. If the mediator consents to serve without compensation, and at the conclusion of the first full day of the mediation conference, it is determined by the mediator and the parties to the mediation that additional time will be both necessary and productive in order to complete the mediation, then:

(1) if the mediator consents to continue to serve without compensation, the parties to the mediation may agree to continue the mediation conference; and

(2) if the mediator does not consent to continue to serve without compensation, the mediator's fees and expenses shall be on such terms as are satisfactory to the mediator and the parties to the mediation, subject to Court approval.

(o) Where the parties have agreed to pay mediation fees and expenses, they shall share equally all such fees and expenses unless the parties to the mediation agree to some other allocation. The Court may, in the interest of justice, determine a different allocation.

(p) If the Court determines that a party to a matter assigned to mediation cannot afford to pay the fees and costs of the mediator, the Court may appoint a mediator to serve pro bono as to that party.

Rule 9019-4 THE MEDIATION PROCESS

(a) After consulting with all counsel and *pro se* parties, the mediator shall schedule a convenient time and place for the mediation conference, and promptly give all counsel and *pro se* parties written notice of the time and place of the mediation conference. The mediator shall schedule the mediation to begin as soon as practicable.

(b) Unless the mediator directs otherwise, not less than seven (7) calendar days before the mediation conference, each party shall submit directly to the mediator any materials the mediator directs to be prepared or assembled. The mediator shall so direct not less than fourteen (14) calendar days before the mediation conference. Prior to the mediation conference, the mediator may confer with the participants to determine what materials would be helpful. The submissions shall not be filed with the Court, and the Court shall not have access to them. The

mediator will not share one party's materials with another party unless expressly authorized to do so by the party providing the materials to the mediator.

(c) The following persons personally shall attend the mediation conference:

(1) each party that is a natural person;

(2) if the party is not a natural person, including a governmental entity, a representative who is not the party's attorney of record and who has full authority to negotiate and settle the matter on behalf of the party;

(3) if the party is a governmental entity that requires settlement approval by an elected official or legislative body, a representative who has authority to recommend a settlement to the elected official or legislative body;

(4) the attorney who has primary responsibility for each party's case; and

(5) other interested parties such as insurers or indemnitors or one (1) or more of their representatives, whose presence is necessary for a full resolution of the matter assigned to mediation.

(d) A person required to attend the mediation is excused from personal appearance if all parties and the mediator agree that the person need not attend. The Court for cause may excuse a person's attendance. The mediator may require telephonic attendance in lieu of personal appearance.

(e) Willful failure to attend any mediation conference, and any other material violation of this Local Bankruptcy Rule, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the Court. Any such report of the mediator shall comply with the confidentiality requirement of W.PA.LBR 9019-5.

(f) The mediator may establish procedures for the mediation conference.

Rule 9019-5 CONFIDENTIALITY OF MEDIATION PROCEEDINGS

(a) The mediator and the participants in mediation are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the parties or by witnesses in the course of the mediation. No person may rely on or introduce, as evidence in any arbitral, judicial, or other proceedings, evidence pertaining to any aspect of the mediation effort, including, but not limited to:

(1) views expressed or suggestions made by a party with respect to a possible settlement of the dispute;

(2) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator;

(3) proposals made or views expressed by the mediator;

(4) statements or admissions made by a party in the course of the mediation; and

(5) documents prepared for the purpose of, in the course of, or pursuant to the mediation.

(b) Without limiting the foregoing, Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions, mediation, or other alternative dispute resolution procedure shall apply.

(c) Information otherwise discoverable or admissible in evidence, however, does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in a mediation.

(d) The mediator shall not be compelled to disclose to the Court or to any person outside the mediation conference any of the records, reports, summaries, notes, communications, or other documents received or made by a mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation in connection with any arbitral, judicial, or other proceeding. The mediator shall not be a necessary party in any proceedings relating to the mediation.

(e) The parties, the mediator, and all mediation participants shall protect proprietary information and in-camera submissions. All such materials shall be kept confidential and shall not be used outside the mediation by any adverse party.

(f) The disclosure by a party of privileged information to the mediator does not waive or otherwise adversely affect the privileged nature of the information.

Rule 9019-6 POSTMEDIATION PROCEDURES

(a) The mediator is not required to prepare written comments or recommendations to the parties. Mediators may present a written settlement recommendation memorandum to attorneys or pro se litigants, but not to the Court.

(b) If a settlement is reached at a mediation, a party designated by the mediator shall submit a fully executed stipulation and proposed order to the Court within seven (7) calendar days after the end of the mediation. If the party fails to prepare the stipulation and order, the Court may impose appropriate sanctions against the parties to the mediation. All stipulations and proposed orders required pursuant to this Local Rule shall include a provision that requires the payment of the mediator's fees and expenses.

(c) Promptly after the mediation conference, the mediator shall file with the Court, and serve on the parties and the Mediation Program Administrator, Local Bankruptcy Form 32 (Mediator's Certificate of Completion of Mediation Conference) showing compliance or noncompliance with the mediation conference requirements of this Local Bankruptcy Rule and whether or not a settlement has been reached. Regardless of the outcome of the mediation

conference, the mediator shall not provide the Court with any details of the substance of the conference.

(d) Whether or not the mediation conference results in a settlement, within seven (7) days of the conclusion of the mediation the mediator shall file on the docket of the case the Mediator's Certificate of Completion of Mediation Conference (Local Bankruptcy Form 32) and submit to the Mediation Administrator the Report of Mediation Conference & Mediator Survey through the Court's website at: http://www.pawb.uscourts.gov/bankruptcy-mediators-upload.

Rule 9019-7 TERMINATION OF MEDIATION

(a) Any matter assigned to mediation may be withdrawn from mediation by the Court at any time.

(b) Upon the filing of Local Bankruptcy Form 32 (Mediator's Certificate of Completion of Mediation Conference) or the entry of an order withdrawing a matter from mediation pursuant to W.PA.LBR 9019-7(a), the mediation will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further Court order.

(c) If the mediation conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall proceed to trial or hearing pursuant to the Court's scheduling orders.

Circuit Mediation Office

Welcome to the Circuit Mediation Program of the U. S. Court of Appeals for the Seventh Circuit.

The Seventh Circuit Court of Appeals conducts confidential mediations in fully–counseled civil appeals in accordance with Federal Rule of Appellate Procedure 33 and Circuit Rule 33. The purpose of Rule 33 mediations is to help litigants resolve appeals without the need for a judicial decision.

Most types of civil appeals are eligible for mediation. Pro se appeals are not eligible, nor are habeas corpus, sentencing or mandamus appeals. The Court spontaneously schedules Rule 33 mediations in hundreds of appeals each year. If your appeal is eligible, you may confidentially request that a mediation be conducted.

To learn more about the mediation program or request mediation, call the **Circuit Mediation Office** at 312-435-6883, or write to us at:

Circuit Mediation Office
United States Court of Appeals for the Seventh Circuit
219 South Dearborn Street - Room 1120
Chicago, Illinois 60604-2024.

You are also welcome to call or email any of us directly. We look forward to working with you.

NOTE TO PARTICIPANTS IN FRAP RULE 33 MEDIATIONS:

For the safety of litigants, counsel, court personnel and the community-at-large, all FRAP Rule 33 mediations will be conducted by telephone until further notice.

Please advise the Circuit Mediation Office if your contact information should change.
Thank you for your cooperation and understanding in a challenging time.

- **Joel N. Shapiro** - *Chief Circuit Mediator* joel_shapiro@ca7.uscourts.gov 312-582-7381
- **Rocco J. Spagna** - *Circuit Mediator* rocco_spagna@ca7.uscourts.gov 312-582-7385
- **Jillisa Brittan** - *Circuit Mediator* jillisa_brittan@ca7.uscourts.gov 312-582-7382
- **Stephanie Jackson** - *Mediation Coordinator* stephanie_jackson@ca7.uscourts.gov 312-582-7384

Directions to the courthouse

These resources may be helpful preparing for a Rule 33 mediation or deciding whether to request one:

Frequently Asked Questions About the Mediation Program

"***An Interest-Based Approach to Practicing Law***"

"***Advocacy in Mediation: One Mediator's View***"

Federal Rule of Appellate Procedure 33

RULE 33. Appeal Conferences

The court may direct the attorneys-and, when appropriate, the parties-to participate in one or more conferences to address any matter that may aid in disposing of the proceedings, including simplifying the issues and discussing settlement. A judge or other person designated by the court may preside over the conference, which may be conducted in person or by telephone. Before a settlement conference, the attorneys must consult with their clients and obtain as much authority as feasible to settle the case. The court may, as a result of the conference, enter an order controlling the course of the proceedings or implementing any settlement agreement.

CIRCUIT RULE 33. Prehearing Conference

At the conference the court may, among other things, examine its jurisdiction, simplify and define issues, consolidate cases, establish the briefing schedule, set limitations on the length of briefs, and explore the possibility of settlement.

U.S. COURT OF APPEALS FOR THE SEVENTH CIRCUIT
CIRCUIT MEDIATION OFFICE

In accordance with Rule 33 of the Federal Rules of Appellate Procedure and Circuit Rule 33, the Court schedules mediations in civil appeals so that clients and counsel can fully consider their alternatives at this stage of litigation. Rule 33 mediations are conducted by three full-time Circuit Mediators. With the exception of habeas corpus, sentencing, mandamus and pro se appeals, all types of civil appeals are eligible for mediation. The Court spontaneously issues notices of mediation in the majority of eligible appeals, but attorneys for one or more parties may also confidentially request that an eligible appeal be mediated. Regardless of how a mediation comes to be scheduled, participation is mandatory.

Experience has shown that many cases can be settled at the appellate stage, substituting a certain and acceptable outcome for the risk, expense and delay of further litigation. The following information explains how mediations are conducted in the Seventh Circuit and how counsel and clients can make best use of the opportunity for settlement.

- **How are counsel notified that a Rule 33 mediation will be conducted?** A Notice of Rule 33 Mediation is posted to the docket, usually two to three weeks ahead of the mediation date. The Notice is an order of the Court. It advises counsel of the date and time of the mediation, whether it is to be in person or by telephone, whether clients are required to attend, and how counsel and clients are expected to prepare.

- **Can counsel request a Rule 33 mediation?** Counsel in mediation-eligible appeals are invited to request a Rule 33 mediation by contacting the Circuit Mediation Office, U.S. Court of Appeals for the Seventh Circuit, 219 S. Dearborn, Room 1120, Chicago, Illinois 60604, (312) 435-6883, or one of the Circuit Mediators. A mediation will be scheduled if the mediation calendar permits, and a Notice of Mediation will issue.

- **Can a request for mediation be confidential?** Yes. If a party wishes to keep its request confidential, the Circuit Mediation Office will not disclose to other parties or to the Court that mediation was requested.

- **Is it mandatory to participate in Rule 33 mediation?** Yes. When a Rule 33 mediation is scheduled, participation is mandatory.

- **Are clients required to attend?** Clients and insurance representatives are required to attend Rule 33 mediations whenever the mediator so directs. If clients or insurance representatives are not directed to attend the initial mediation session, they must be available – with full settlement authority – to be consulted by phone for the duration of the mediation session.

- **Is it mandatory to settle?** No. Whether to settle is for the parties and their counsel to decide. However, counsel and parties are required to participate with the utmost diligence and good faith. Experience shows that settlements can often be achieved when neither side thought it possible.

- **Who conducts Rule 33 mediations?** The Court has delegated the responsibility for conducting Rule 33 mediations to three full-time Circuit Mediators – Joel N. Shapiro, Rocco J. Spagna, and Jillisa Brittan. All were civil litigators in private practice prior to their appointment by the Court.

- **Is there a fee for the services of the Court's mediators?** No. The assistance of the Circuit Mediators is available to appellate litigants at no charge.

- **Are the parties' lead attorneys required to attend the mediation?** Ordinarily, yes. It is essential that each party be represented at the mediation by an attorney who not only is conversant with the case but is the attorney on whose advice the party relies. If more than one attorney meets these criteria, any of them may represent the client in the mediation.

- **When are Rule 33 mediations conducted in person and when by telephone?** When counsel and clients reside in the Chicago metropolitan area, Rule 33 mediations are held in the Circuit Mediation Office at the United States Courthouse. Otherwise, mediations are most often conducted by telephone. The Court's internet-based teleconferencing system can accommodate as many as a dozen or more separate lines and join them in joint or private sessions.

- **Are in-person mediations ever held outside Chicago?** Because the resources of the Mediation Office are limited, in-person mediations cannot routinely be held throughout the Circuit. However, if participants believe an in-person mediation would be more productive than a mediation by telephone, they are welcome to suggest it.

- **Are Rule 33 mediations confidential?** Yes. The Court requires all participants to keep what is said in these mediations strictly confidential. Oral and written communications that take place in the course of Rule 33 mediations may not be disclosed to anyone other than the litigants, their counsel, and the mediator.

- **Are judges of the Court of Appeals informed of what has happened in a Rule 33 mediation?** No. Participants in Rule 33 mediations, including the mediator, are forbidden to disclose to judges or other court personnel, at the Court of Appeals or elsewhere, what has been communicated during these mediations.

- **What occurs during a Rule 33 mediation?** Rule 33 mediations are official proceedings of the Court but are off-the-record and relatively informal. Discussion is intended to be conversational rather than argumentative. The focus is on realistically assessing the prospects of the appeal, the risks and costs of further litigation, the interests of the parties, and the benefits each side can gain through settlement. The mediator ordinarily meets with counsel both together and separately. Settlement proposals are discussed. A resolution may or may not be reached during the initial mediation session. Often, follow-up sessions or "shuttle" negotiations are conducted. Letters or draft proposals may be exchanged. By the conclusion of the Rule 33 process, the parties will either have reached an agreement to settle or learned how far apart they are and what the remaining obstacles to settlement are.

- **Is discussion of settlement limited to the appeal itself?** Not necessarily. If settlement of the appeal will not dispose of the entire case, or if related litigation is pending in other forums, the parties are invited and encouraged to explore the possibility of a global settlement.

- **Is the briefing schedule modified when a Notice of Rule 33 Mediation issues?** Briefing is usually deferred until after the initial mediation session. If further modification of the briefing schedule would be conducive to settlement, an order to that effect may later be entered.

- **What preparation is required of counsel?** In preparation for the Rule 33 mediation, attorneys are required to consult rigorously with their clients and obtain as much authority as feasible to settle the case. Counsel must also review their legal and factual contentions so as to be able to discuss candidly the prospects of the appeal and the case as a whole. Pre-mediation submissions are not required, but counsel are free to contact the mediator in advance, by phone or in writing, if they wish.

- **What is the role of the mediator?** Because the format of Rule 33 mediations is flexible and each appeal is approached on its own terms, the mediator plays a variety of roles. He or she acts as moderator, facilitator, and intermediary; as a neutral evaluator and a reality check. The mediator may suggest terms of settlement. Without being coercive, he or she acts as a determined advocate for settlement.

- **What can participants expect of the mediator?** Before the initial mediation session, the mediator will have familiarized him or herself with the history of the litigation, the posture of the case, and the issues on appeal. During the mediation, the mediator will seek additional information about the background of the dispute and the parties' interests, claims and defenses in order to explore all possibilities for a voluntary resolution. The mediator is strictly impartial. He or she does not advocate for any party and avoids making comments that could advantage one side or another in arguing the issues on appeal. The mediator will disclose any affiliation or prior representation of which he or she is aware that could call his or her neutrality into question. The mediator does not force any party to settle or to accept terms it is not willing to accept. While the mediator urges parties to take advantage of opportunities to settle favorably, he or she recognizes that whether and how to settle is for the parties to decide, and that settlement is not always possible.

- **How can counsel make best use of the Rule 33 mediation to benefit their clients?** Recognize that the Rule 33 mediation is an opportunity to achieve a favorable outcome for your client. Without laying aside the advocate's responsibility, approach the mediation as essentially cooperative rather than adversarial. Help your client make settlement decisions based not on overconfidence or wishful thinking, but on a realistic assessment of the case; not on emotion – however justified it may be – but on rational self-interest. Suggest terms of settlement that maximize the benefits of settlement for all parties. Take advantage of the opportunity to talk confidentially and constructively with counsel for the other parties. If clients are present, address them respectfully but convincingly. Let the mediator know how he or she can help you obtain a satisfactory resolution. Be candid. Don't posture. Listen closely to what other participants have to say. Give the process a chance to work.

H. Record Preparation

Within 14 days of the filing of the notice of appeal, the clerk of the district court is required to prepare for viewing the entire record; exhibits not available electronically and confidential filings are prepared and held. Cir. R. 10(a)(1), (2). And within 21 days of the appeal's filing, counsel must ensure that all electronic and non-electronic documents necessary for appellate review are on the district court docket. Cir. R. 10(a)(3). The court reporter must file later prepared transcripts with the district clerk and notify the circuit clerk of the filing. Fed. R. App. P. 11(b)(1)(C). All records transmitted electronically can be viewed through PACER (public access to court electronic records).

I. Case Management Conferences

Occasionally, after the appeal has been docketed in the court of appeals, the court may hold a case management conference to set a schedule for filing any unprepared transcripts and briefs, examine jurisdiction, simplify and define issues, and consolidate appeals and establish joint briefing schedules. Counsel may request such a conference by filing a motion with the court. These conferences are generally conducted by senior court staff, usually Counsel to the Circuit Executive. Note that case management conferences are different from "settlement conferences" or "mediations", which are conducted by the court's circuit mediators. Fed. R. App. P. 33.

J. Circuit Mediation Program

After the appeal has been docketed in the court of appeals, the court may direct counsel, and often the litigants, to meet with one of the court's circuit mediators to discuss the possibility of resolving the appeal by agreement. Fed. R. App. P. 33.

K. Counsel of Record

There can be only one counsel of record for a party. The attorney for a party whose name appears on the first document filed with the clerk of this court will be entered on the docket as counsel of record unless otherwise identified. Counsel of record may not withdraw without consent of the court unless another attorney simultaneously substitutes as counsel of record. Cir. R. 3(d).

L. Disclosure Statements

Every attorney for a non-governmental party or amicus curiae, and every private attorney representing a governmental party, must file a disclosure statement containing the information required by Cir. R. 26.1. And, if the party that the attorney represents is a corporate entity, the statement must identify all

XV. GENERAL DUTIES OF COUNSEL IN THE COURT OF APPEALS

Cases in the court of appeals are governed by the Federal Rules of Appellate Procedure, the Circuit Rules of the United States Court of Appeals for the Seventh Circuit, and procedural orders of the court issued in most appeals.

Consistent and strict compliance with these rules and court orders is required of all attorneys handling appeals in this court. This enables the court to handle its cases effectively and smoothly, while lack of compliance causes needless delay and can result in dismissal of appeals or disciplinary action. Therefore, it should go without saying — do not ignore court orders. *See, e.g., In re Boyle-Saxton*, 668 F.3d 471 (7th Cir. 2012).

Counsel receives court-issued documents electronically via a "Notice of Docket Activity". The "Docket Text" of the Notice describes the content of the court's order. Importantly, that description may not completely reflect the content of the court's written order. Counsel, therefore, should always read the text of the order itself.

A. Settlement

Counsel, as an officer of the court, has a professional obligation to discuss with the client and opposing counsel the possibility of settling or otherwise disposing of the appeal without the need of a court decision. An agreed settlement is often superior to the remedy provided by a court decision since it provides a quicker, more certain resolution of the dispute and conserves the resources of both court and litigants. Counsel should keep the court informed of the progress of all settlement negotiations, especially for appeals under advisement or set for oral argument, by filing status reports with the clerk. When settlement becomes reasonably certain, counsel must so advise the clerk so that the court can decide whether to suspend its consideration of the appeal in anticipation of the appeal becoming moot. *See Selcke v. New England Insurance* Co., 2 F.3d 790, 791 (7th Cir. 1993). Once settlement is complete, counsel should immediately file an appropriate motion with the clerk.

On its own initiative, the court schedules confidential mediations in most types of fully-counseled civil appeals. Counsel in such appeals also may request that a mediation be scheduled. Fed. R. App. P. 33; Cir. R. 33; *see also* this Handbook, "B. Mediations" at Chapter XIX, *infra* at 141-42.

B. Appearance of Counsel

When an appeal is docketed by the court of appeals, the clerk will designate the counsel of record based on the first filed document from a party. *See* Cir. R. 3(d). That document should include counsel's post office address, email address, and telephone number.

XIX. CASE MANAGEMENT CONFERENCES AND MEDIATIONS

Few transactions between counsel and the court take place in "real time", and few involve "face time" with court personnel. For counsel, appellate practice consists mainly of writing and filing motions, briefs, notices, reports and memoranda. For the court, it consists mainly of making decisions, large and small, that are entered on the docket.

The most familiar exception to this remote style of interaction is oral argument, which brings judges and counsel face-to-face. In addition, counsel have the opportunity to engage in two other kinds of live dialogue with the court — case management conferences and mediations. Both are governed by Fed. R. App. P. 33 and Cir. R. 33. Case management conferences are held to streamline appeals. Mediations are conducted to dispose of appeals by agreement. Generally, the court schedules case management conferences and mediations on its own initiative. However, counsel may request that one or the other — or both — be scheduled if they believe such a proceeding could be helpful.

A. Case Management Conferences

Case management conferences are held to address administrative and procedural complications in an appeal or set of related appeals, usually complex civil appeals and multi-defendant criminal appeals. Such conferences are generally conducted by the Counsel to the Circuit Executive and may be held at the court or by telephone. The items on the agenda for a case management conference may include requests to consolidate related appeals; to resolve record issues; to work out a schedule for filing the transcript and briefs; or to examine the court's jurisdiction. Counsel wishing to request a case management conference should do so by motion, explaining why it would be helpful and whether they propose that it be conducted in person or by telephone.

B. Mediations

The court schedules mediations in most types of fully-counseled civil appeals. Counsel (and often clients) are directed to meet with one of the court's mediators for the purpose of exploring a voluntary resolution of the appeal. The mediation may be conducted in person or by telephone. Attendance is mandatory.

Before the mediation, counsel are required to review the case thoroughly with their clients and obtain maximum feasible settlement authority. Whether, and on what terms, to settle is ultimately for the parties to decide with advice of counsel.

The mandate to participate in an appellate mediation is one that many parties and counsel welcome but that others are initially skeptical of. How likely is it that a case can be settled on appeal, when one side has "won" and the other "lost"? When previous settlement efforts have failed? When years of litigation have

deepened the antagonism and mistrust between parties and between counsel? In the face of such doubts, experience has shown that appeals can often be resolved through discussions with a circuit mediator, even in cases which neither side expected to settle. So, the requirement to participate is not so much a burden as it is an opportunity — to substitute a certain and mutually acceptable result for the delay, expense and uncertainty of a decision by the court.

The court has delegated the responsibility for conducting appellate mediations to three full-time, court-employed attorneys who are mediators — neutral settlement facilitators. They play no part in deciding appeals on the merits. Their role is to encourage each side to be realistic in its assessment of the case and its expectations of settlement, and to ensure that the needs and interests of the parties are fully considered. If the appeal is not resolved at the initial session and additional conversations are warranted, a follow-up conference may be arranged for all participants, or the circuit mediator may conduct further discussions, in person or by phone, with one side at a time. While active discussions are taking place, the briefing schedule may be modified or suspended to allow counsel and clients to focus on settlement. If an agreement is eventually reached, counsel prepare and finalize the settlement documents. If intractable issues arise in documenting the settlement, the circuit mediator may be called upon to assist in resolving them.

Mediation participants, including the circuit mediator, are forbidden to disclose the content of their settlement discussions to the judges of any court or to the public. Thus, participants are assured that they may speak freely and make every effort to settle the case without fear that what they say or propose might later be used against them.

Counsel may confidentially request that a mediation be scheduled. Such a request should be made directly to the Circuit Mediation Office, and not by motion. It may be initiated by letter, by email or by telephone. For further information, counsel are invited to visit the Circuit Mediation page on the court's website.