AMERICAN BANKRUPTCY INSTITUTE

Winter Leadership Conference

WORKSHOP: Making the Mediation: What to Consider When Selecting the Neutral

Hosted by the Mediation Committee

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CONCURRENT WORKSHOP

2023

WORKSHOP: Making the Mediation: What to Consider When Selecting the Neutral

December 1, 2023

Presenters:

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Presentation Exhibits:

Ex. 1- Various local bankruptcy rules and standing orders with and without mediation requirements

Ex. 2- Sample procedures orders with mandatory or opt-out mediation procedures

Ex. 1: Examples of different local rules and/or standing orders with and without mediation requirements:

Local Rules for Bankruptcy Court for the District of Delaware **(excerpted) [mediation required]**

Bankruptcy Court, District of Delaware- Standing Order **[mediation required]**

General Order Regarding Procedures in Adversary Proceedings dated April 7, 2004 (as later revised on July 14, 2004 and amended on April 11, 2005) (the "General Order")

LOCAL RULES

FOR

THE UNITED STATES BANKRUPTCY COURT

DISTRICT OF DELAWARE

(Effective February 1, 2023)

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).

U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

AMENDMENT TO GENERAL ORDER

RE: PROCEDURES IN ADVERSARY PROCEEDINGS

AND NOW, this 11th day of April, 2005, the General Order signed on April 7, 2004, establishing procedures for all adversary proceedings under 11 U.S.C. §547 is hereby **Amended** as follows:

3. Mediation.

(a) No later than **one hundred twenty (120)** days after an answer or other responsive pleading is filed the parties shall file a Stipulation Regarding Appointment of Mediator unless prior to that date the parties have submitted a motion for order of dismissal or a stipulated judgment. If the parties fail to file a Stipulation Regarding Appointment of Mediator not later than ten (10) days after the deadline, the court will enter an order, without further notice or hearing, selecting and appointing a mediator for the adversary proceeding. The mediator shall be selected from the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 for the United States Bankruptcy Court, District of Delaware.

This Amendment to the General Order shall be effective for all adversaries filed 11 U.S.C. §547 on or after **April 11, 2005**.

Chief Judge

U. S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

GENERAL ORDER
RE: PROCEDURES IN ADVERSARY PROCEEDINGS

The court currently has pending over 15,000 adversary proceedings and expects another 10,000 adversary proceedings to be filed this year. The purpose of this general order is to modify certain adversary proceeding procedures in order to reduce the delay in disposition of adversary proceedings. Now therefore,

IT IS ORDERED that the following provisions shall apply to all adversary proceedings filed on or after May 1, 2004 that include a claim for relief to avoid a preferential transfer (11 U.S.C. § 547 and, if applicable, § 550) and such other adversary proceedings as the court may designate by order.

1. Responsive Pleading. Any extension of time to file a responsive pleading is not effective unless approved by order of the court. Any motion for extension of time to file a responsive pleading or stipulated order for such an extension must be filed with the court no later than ten (10) days before the initial pretrial conference in the adversary proceeding.]

2. Disclosures and Discovery Planning.

(a) The discovery planning conference described in Fed. R. Civ. P. 26(f), made applicable by Fed. R. Bankr. P. 7026, shall occur no later than thirty (30) days after the first answer is filed, or sixty (60) days after the adversary proceeding is commenced, whichever is earlier. Without limiting the responsibility of all attorneys of record and all unrepresented parties to arrange and complete the conference, it shall be the responsibility of counsel for plaintiff to propose a date, time and place for the conference within fourteen (14) days after being advised of the identity of counsel for the defendant(s) or that the defendant(s) is unrepresented. The discovery planning conference may be telephonic.

(b) Parties shall provide the initial disclosures under Fed. R. Civ. P. 26(a)(1) no later than fourteen (14) days after the initial discovery planning conference. Any extension of the deadline to provide initial disclosures must be by order of the court, and will only be granted for cause.

3. Mediation.

(a) No later than ninety (90) days after an answer or other responsive pleading is filed the parties shall file a Stipulation Regarding Appointment of Mediator unless prior to that date the parties have submitted a motion for order of dismissal or a stipulated judgment. If the parties fail to file a Stipulation Regarding Appointment of Mediator no later than ten (10) days after the deadline, the court will enter an order, without further notice or

hearing, selecting and appointing a mediator for the adversary proceeding. The mediator shall be selected from the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 for the United States Bankruptcy Court, District of Delaware.

(b) 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.

(c) The mediation shall be conducted, and be subject to, the provisions of Local Rule 9019-3 for the United States Bankruptcy Court, District of Delaware

4. Post-Mediation Procedures and Trial Date.

(a) Within sixty (60) days after entry of the Order Assigning Adversary to Mediation the mediator shall either (a) file the mediator's certificate of completion, or, (b) if the mediation is not concluded, file a status report that provides the projected schedule for completion of the mediation.

(b) Adversary proceedings will be set for trial ninety (90) days after entry of the Order Assigning Adversary Proceeding to Mediation, or as soon thereafter as the court's calendar permits.

Dated: April 7, 2004
(rev. July 14, 2004)

/s/ Mary F. Walrath
Chief Judge

Local Rules for Bankruptcy Court for the Southern District of New York **(excerpted)**
[mediation allowed via motion of Court or parties]

EFFECTIVE
August 14, 2023

REVISED: August 2, 2004
October 17, 2005
August 4, 2008
December 1, 2009
April 16, 2012
August 1, 2013
December 1, 2014
December 1, 2015
December 1, 2016
December 1, 2017
June 9, 2020
December 1, 2021
August 14, 2023

on the docket, and the documents to be sealed. The motion should include a redacted copy of the documents to be sealed. The time to file and serve the underlying motion for which purpose the motion to seal is being made should be in accordance with all applicable rules pertaining to service of the underlying motion.

Rule 9019-1 ALTERNATIVE DISPUTE RESOLUTION – Amended August 1, 2013

Alternative dispute resolution shall be conducted in the manner required by the Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, which shall be available on the Court's web site (http://www.nysb.uscourts.gov/content/mediation-procedures).

Comment

Procedures governing mediation programs in bankruptcy cases and adversary proceedings were promulgated by General Order M-390. This rule was amended in 2013 to specify the title of the procedures promulgated by General Order M-390 amended by General Order M-452 and to state in the rule the link to the Court's website where practitioners may access the governing procedures. The Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings, which also may be obtained from the Clerk, may be amended by the Court after giving notice and opportunity for comment as is appropriate.

Rule 9019-2 LOSS MITIGATION FOR INDIVIDUAL DEBTORS WITH RESIDENTIAL REAL PROPERTY AT RISK OF FORECLOSURE OR IMMINENT DEFAULT – Amended December 1, 2017

Loss mitigation procedures for the facilitation of consensual resolutions for individual debtors whose residential real property is at risk of loss to foreclosure or imminent default shall be governed by the Loss Mitigation Program Procedures promulgated by the Court, which shall be available on the Court's website (http://www.nysb.uscourts.gov/sites/default/files/LossMitigationProcedures.pdf).

Comment

This rule was promulgated in 2013 to include in the Local Bankruptcy Rules a reference to the Loss Mitigation Program Procedures established by General Order M-413 and modified by General Order M-451. These procedures, which also may be obtained from the Clerk, may be amended by the Court from time

Updated 06/27/13

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

PROCEDURES GOVERNING MEDIATION OF MATTERS AND THE USE OF EARLY NEUTRAL EVALUATION AND MEDIATION/ VOLUNTARY ARBITRATION IN BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS

The procedures governing the mediation of matters and the use of early neutral evaluation and mediation and voluntary arbitration in bankruptcy cases and adversary proceedings in the United States Bankruptcy Court, Southern District of New York (the "Mediation Procedures") are set forth in the following Rules:

1.0 Assignment of Matters to Mediation.

1.1 By Court Order. The Court may order assignment of a matter to mediation upon its own motion, or upon a motion by any party in interest or the U.S. Trustee. The motion by a party in interest must be filed promptly after filing the initial document in the matter. Notwithstanding assignment of a matter or proceeding to mediation, it shall be set for the next appropriate hearing on the Court docket in the normal course of setting required for such a matter.

1.2 Stipulation of Counsel. Any matter may be referred to mediation upon stipulated order submitted by counsel of record or by a party appearing pro se.

1.3 Types of Matters Subject to Mediation. Unless otherwise ordered by the presiding judge, any adversary proceeding, contested matter or other dispute may be referred by the Court to mediation.

1.4 Mediation Procedures. Upon assignment of a matter to mediation, these

Procedures shall become binding on all parties subject to such mediation.

2.0 The Mediator.

2.1 Mediation Register. The Clerk of the United States Bankruptcy Court for the Southern District of New York shall establish and maintain a Register of Persons Qualifying under Rule 2.1.A.

A. Application and Qualification Procedures for Mediation Register. To qualify for the Mediation Register of this Court, a person must apply and meet the following minimum qualifications:

(1) For General Services as a Mediator. A person must have been a member of the bar in any state or the District of Columbia for at least five (5) years; currently a member of the bar in good standing of any state or the District of Columbia; be admitted to practice in the Southern District of New York; and be certified by the Chief Judge to be competent to perform the duties of a mediator. Each person certified as a mediator should take the oath or affirmation prescribed by 28 U.S.C. § 453 before serving as a mediator.

(2) For Services as a Mediator where the Court Has Determined the Need for Special Skills.

(a) A person must have been authorized to practice for at least four (4) years under the laws of the State of New York as a professional, including but not limited to, an accountant, real estate broker, appraiser, engineer or other professional. Notwithstanding the requirement for authorization to practice under the laws of the State of New York, an investment banker professional who has been practicing for a period of at least four (4) years shall be eligible to serve as a mediator; and

(b) Be an active member in good standing, or if retired,

have been a member in good standing, of any applicable professional organization;

(c) Not have:

(i) Been suspended, or have had a professional license revoked, or have pending any proceeding to suspend or revoke such license; or

(ii) Resigned from applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment or professional license revocation was pending; or

(iii) Have been convicted of a felony.

B. Removal from Mediation Register. A person shall be removed from the Mediation Register either at the person's request or by Court order. If removed from the Register by Court order, the person shall not be returned to the Register absent a Court order obtained upon motion to the Chief Judge and affidavit sufficiently explaining the circumstances of such removal and reasons justifying the return of the person to the Register.

2.2 Appointment of the Mediator.

A. The parties will ordinarily choose a mediator from the Register for appointment by the Court. If the parties cannot agree upon a mediator within seven (7) days of assignment to mediation, the Court shall appoint a mediator and alternate mediator.

B. In the event of a determination by the Court that there are special issues presented which suggest reference to an appropriately experienced mediator other than the mediator chosen by the parties, then the Court shall appoint a mediator and an alternate mediator.

C. If the mediator is unable to serve, the mediator shall file within seven (7) days after receipt of the notice of appointment, a notice of inability to accept appointment and immediately serve a copy upon the appointed alternate mediator. The alternate

mediator shall become the mediator for the matter if such person fails to file a notice of inability to accept appointment within seven (7) days after filing of the original mediator's notice of inability. If neither can serve, the Court will appoint another mediator and alternate mediator.

2.3 Disqualification of a Mediator. Any person selected as a mediator may be disqualified for bias or prejudice as provided in 28 U.S.C. § 144 or if not, disinterested under 11 U.S.C. § 101. Any party selected as a mediator shall be disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a justice, judge or magistrate.

3.0 The Mediation.

3.1 Time and Place of Mediation. Upon consultation with all attorneys and pro se parties subject to the mediation, the mediator shall fix a reasonable time and place for the initial mediation conference of the parties with the mediator and promptly shall give the attorneys and pro se parties advance written notice of the conference. The conference shall be set as soon after the entry of the mediation order and as long in advance of the Court's final evidentiary hearing as practicable. To ensure prompt dispute resolution, the mediator shall have the duty and authority to establish the time for all mediation activities, including private meetings between the mediator and parties and the submission of relevant documents. The mediator shall have the authority to establish a deadline for the parties to act upon a proposed settlement or upon a settlement recommendation from the mediator.

3.2 Mediation Conference. A representative of each party shall attend the mediation conference, and must have complete authority to negotiate all disputed amounts and issues. The mediator shall control all procedural aspects of the mediation. The mediator shall also have the discretion to require that the party representative or a non-attorney principal of the party with settlement authority be present at any conference. The mediator shall also determine

when the parties are to be present in the conference room. The mediator shall report any willful failure to attend or participate in good faith in the mediation process or conference. Such failure may result in the imposition of sanctions by the Court.

3.3 Recommendations of the Mediator. The mediator shall have no obligation to make written comments or recommendations; provided, however, that the mediator may furnish the attorneys for the parties and any pro se party with a written settlement recommendation. Any such recommendation shall not be filed with the Court.

3.4 Post-Mediation Procedures. Promptly upon conclusion of the mediation conference, and in any event no later than 3:00 P.M. two (2) days prior to the date fixed for hearing referred to in Rule 1.1, the mediator shall file a final report showing compliance or noncompliance with the requirements of this General Order by the parties and the mediation results. If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the Court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty-one (21) days of the conference. Failure to timely file such a stipulated order or judgment or motion when agreement is reached shall be a basis for the Court to impose appropriate sanctions. Absent such a stipulated order or judgment or motion, no party shall be bound by any statement made or action taken during the mediation process. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

3.5 Termination of Mediation. Upon receipt of the mediator's final report, the mediation will be deemed terminated, and the mediator excused and relieved from further responsibilities in the matter without further Court order.

3.6 Withdrawal from Mediation. Any matter referred pursuant to mediation

may be withdrawn from mediation by the judge assigned to the matter at any time upon determination for any reason the matter is not suitable for mediation. Nothing in these Mediation Procedures shall prohibit or prevent any party in interest, the U.S. Trustee or the mediator from filing a motion to withdraw a matter from mediation for cause.

4.0 Compensation of Mediators. The mediator's compensation shall be on such terms as are satisfactory to the mediator and the parties, and subject to Court approval if the estate is to be charged with such expense. In the event that the mediator and the parties cannot agree on terms of compensation, then the Court shall fix such terms as are reasonable and just.

5.0 Confidentiality.

5.1 Confidentiality as to the Court and Third Parties. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the Court or to any third party. All records, reports, or other documents received or made by a mediator while serving in such capacity shall be confidential and shall not be provided to the Court, unless they would be otherwise admissible. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the Court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the Court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.

5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by 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, any aspect of the mediation effort, including, but not limited to:

A. Views expressed or suggestions made by any party with respect to a possible settlement of the dispute;

B. Admissions made by the other party in the course of the mediation proceedings;

C. Proposals made or views expressed by the mediator.

6.0 Immunity. The Mediators shall be immune from claims arising out of acts or omissions incident to their service as Court appointees in this Mediation Program. See Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994).

7.0 Consensual Modification of Mediation Procedures. Additional rules and procedures for the mediation may be negotiated and agreed upon by the mediator and the parties at any time during the mediation process.

8.0 Compliance With the U.S. Code, Bankruptcy Rules, and Court Rules and Orders.

Nothing in these Procedures shall relieve any debtor, party in interest, or the U.S. Trustee from complying with this Court's orders or Local Rules, U.S. Code, or the Bankruptcy Rules, including times fixed for discovery or preparation for any Court hearing pending on the matter.

9.0 Assignment of Disputes to Mediation/Voluntary Arbitration.

9.1 Stipulation of Parties. The Court may refer a dispute pending before it to mediation, and, upon consent of the parties, to arbitration if and to the extent that the mediation is unsuccessful. At the conclusion of mediation, after the parties have failed to reach agreement and

upon voluntary stipulation of the parties, the mediator, if qualified as an arbitrator, may hear and arbitrate the dispute.

A. Referral to Arbitration pursuant to Bankruptcy Rule 9019 (c). Except as provided in subdivision (B) the Court may authorize the referral of a matter to final and binding arbitration under Bankruptcy Rule 9019 (c) if:

(1) The issue does not arise in an adversary proceeding; or

(2) The issue arises in an adversary proceeding in which the amount in controversy has a dollar value greater than $150,000, the issue is procedural or non- dispositive (such as a discovery dispute), and the Court retains jurisdiction to decide, after presentation of evidence, the adversary proceeding.

B. Referral of Adversary Proceeding to Arbitration pursuant to 28 U.S.C. § 654. With the consent of the parties, under 28 U.S.C. § 654, the Court may authorize the referral to arbitration of an adversary proceeding in which the matter in controversy has a dollar value that does not exceed $150,000, subject to the following provisions:

(1) Determination *De Novo* of Arbitration Awards under 28 U.S.C. § 654.

(a) Time for Filing Demand. Within 30 days after the filing of an arbitration award with the Clerk of Court in an adversary proceeding governed by Rule 9.1(B), any party may file a written demand for a determination *de novo* with the Court.

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

(c) 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 –

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

(ii) The parties have otherwise stipulated.

(2) Arbitration awards in a proceeding governed by Rule 9.1(B) shall be entered as the judgment of the Court after the time has expired for requesting a determination *de novo*. 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.

(a) Filing and Effect of Arbitration Award. The Clerk of the Court shall place under seal the contents of any arbitration award made under Rule 9.1 (B) of this Court Annexed Alternative Dispute Resolution Program 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.

C. Safeguards in Consent to Voluntary Arbitration. Matters referred to mediation where the parties do not reach agreement are allowed to proceed to voluntary arbitration under Rule 9.1(A) or Rule 9.1(B) by consent expressly reflected and filed with the Court where –

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

(2) No party or attorney is prejudiced for refusing to participate

in arbitration.

10.0 The Arbitrator.

10.1 Powers of Mediator/Arbitrator. A mediator/arbitrator to whom an action is referred shall have the power, after a good faith attempt to mediate, and upon consent of the parties, to –

A. Conduct arbitration hearings consistent with Rule 9.1 above;

B. Administer oaths and affirmations; and

C. Make awards.

10.2 Standards for Certification as an Arbitrator. In addition to fulfilling the requirements found in Rule 2.0 The Mediator, a person qualifying as a Mediator/Arbitrator shall be certified as an arbitrator through a qualifying mediation/ arbitration program which includes an ethics component on how to retain neutrality when changing the process.

10.3 Immunity. All individuals serving as Mediator/Arbitrator in the Court Annexed Alternative Dispute Resolution Program are performing quasi-judicial functions and are entitled to the immunities and protections that the law accords to persons serving in such capacity.

10.4 Subpoenas. The Federal Rules of Civil Procedure and Bankruptcy Procedure apply to subpoenas for the attendance of witnesses and the production of documents at a Voluntary Arbitration hearing.

11.0 Arbitration Award and Judgment.

11.1 An arbitration award made by a Mediator/Arbitrator, along with proof of service of such award on the other party by the prevailing party, shall be filed promptly after the arbitration hearing is concluded with the Clerk of the Court.

12.0 Compensation of Mediator/Arbitrator. The Mediator/Arbitrator's compensation shall be consistent with Rule 4.0 Compensation of Mediator as described above.

12.1 Transportation Allowances. Subject to Court approval, if the estate is to be charged with such expense, the Mediator/Arbitrator may be reimbursed for actual transportation expenses necessarily incurred in the performance of duties.

13.0 Notice of Court Annexed Alternate Dispute Resolution Program. The Court, at the first scheduled pre-trial conference, shall give notice of dispute resolution alternatives substantially in compliance with Form I.

Local Rules for Bankruptcy Court for the Central District of California **(excerpted) [pro bono mediation program is provided for assignment by court or consent of parties]**

APPENDIX III

ADOPTION OF MEDIATION PROGRAM FOR BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS (Third Amended General Order No. 95-01)

1.0 PURPOSE AND SCOPE

The United States Bankruptcy Court for the Central District of California (the "Court") recognizes that formal litigation of disputes in bankruptcy cases and adversary proceedings frequently imposes significant economic burdens on parties and often delays resolution of those disputes. The procedures established herein are intended primarily to provide litigants with the means to resolve their disputes more quickly, at less cost, and often without the stress and pressure of litigation.

The Court also notes that the volume of cases, contested matters and adversary proceedings filed in this district has placed substantial burdens upon counsel, litigants and the Court, all of which contribute to the delay in the resolution of disputed matters. A Court-authorized mediation program, in which litigants and counsel meet with a mediator, offers an opportunity for parties to settle legal disputes promptly, less expensively, and to their mutual satisfaction. The judges of the Court hereby adopt the Mediation Program for Bankruptcy Cases and Adversary Proceedings (the "Mediation Program") for these purposes.

It is the Court's intention that the Mediation Program shall operate in such a way as to allow the participants to take advantage of and utilize a wide variety of alternative dispute resolution methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation and settlement facilitation. The specific method or methods employed will be those that are appropriate and applicable as determined by the mediators and the parties, and will vary from matter to matter.

Nothing contained herein is intended to preclude other forms of dispute resolution with the consent of the parties.

2.0 CASES ELIGIBLE FOR ASSIGNMENT TO THE MEDIATION PROGRAM

Unless otherwise ordered by the judge handling the particular matter (the "Judge"), all controversies arising in an adversary proceeding, contested matter, or other dispute in a bankruptcy case are eligible for referral to the Mediation Program.

3.0 PANEL OF MEDIATORS

3.1 Selection

a. The Court shall establish and maintain a panel ("Panel") of qualified professionals who have volunteered and been chosen to serve as a mediator ("Mediator") for the possible resolution of matters referred to the Mediation Program. The Panel shall be comprised of both attorneys and non-attorneys.

b. Applicants shall submit an Application (in the form attached) (the "Application") to the judge appointed as the administrator of the Mediation Program (the "Mediation Program Administrator"), setting forth their qualifications as described in Paragraph 3.3 below.

c. The judges of the Court will select the Panel from the applications submitted to the Mediation Program Administrator. The judges will consider each applicant's training and experience in mediation or other alternative dispute resolution, if any, as well as the applicant's professional experience and location. Appointments may be limited to keep the Panel at an appropriate size and to ensure that the Panel is comprised of individuals who have broad based experience, superior skills, and qualifications from a variety of legal specialties and other professions.

3.2 Term. Mediators shall serve as members of the Panel for a term of three years unless the Mediator is advised otherwise by the Court or submits a written request to withdraw from the Panel to the Mediation Program Administrator. Reappointment will occur at the judges' discretion, and an application for reappointment is not required.

3.3 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 5 years;

2. Is a member in good standing of the federal courts for the Central District of California;

3. Has served as a principal attorney of record in at least 3 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 a party in interest in at least 3 adversary proceedings or contested matters from commencement to conclusion or, if the case is still pending, to the date of the Application; and

4. Is willing to undertake to evaluate or mediate at least one matter each quarter of each year, subject only to unavailability due to conflicts, personal or professional commitments, or other matters which would make such service inappropriate.

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 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 Panel. Non-attorney applicants shall make the same certification required of attorney applicants contained in Paragraph 3.3.a.4.

3.4 Geographic Areas of Service. Applicants shall indicate on the Application all counties within the Central District in which they are willing to serve. Applicants must be willing to travel to all such counties to conduct Mediation Conferences.

4.0 ADMINISTRATION OF THE MEDIATION PROGRAM

The Chief Judge will appoint a judge of the Court to serve as the Mediation Program Administrator. The Mediation Program Administrator will be aided by assigned staff members of the Court, who will maintain and collect applications, maintain the roster of the Panel, track and compile results of the Mediation Program, and handle such other administrative duties as are necessary.

5.0 ASSIGNMENT OF MATTERS TO THE MEDIATION PROGRAM

5.1 Assignment by Request of Parties. A contested matter in a case, adversary proceeding, or other dispute (hereinafter collectively referred to as "Matter" or "Matters") may be assigned to the Mediation Program if requested in writing by the parties in the form attached as Official Forms 701 and 702.

5.2 Assignment by Judge. Matters may also be assigned by order of the Judge at a status conference or other hearing. While participation by the parties in the Mediation Program is generally intended to be voluntary, the Judge, acting *sua sponte* or on the request of a party, may designate specific Matters for inclusion in the Mediation Program. The Judge may do so over the objections of the parties. If a Matter is assigned to the Mediation Program by the Judge at a status conference or other hearing, the parties will be presented with an order assigning the Matter to the Mediation Program, and with a current roster of the Panel. The parties shall normally be given the opportunity to confer and to select a mutually acceptable Mediator and an Alternate Mediator from the Panel. If the parties cannot agree, or if the Judge deems selection by the Judge to be appropriate and necessary, the Judge shall select a Mediator and an Alternate Mediator from the Panel.

5.3 Assignment of Non-Panel Mediators. The Judge may, in his or her sole discretion, appoint individuals who are not members of the Panel as the Mediator and Alternate Mediator at the request of the parties and for good cause shown.

5.4 Use of Official Court Order Assigning Matter to Mediation Program. The order appointing the Mediator and Alternate Mediator and assigning a Matter to the Mediation Program shall be in the form attached as Official Form 702 ("Mediation Order"). The original Mediation Order shall be docketed and retained in the case or adversary proceeding file and copies shall be mailed, by the party so designated by the Judge, to the Mediator, the Alternate Mediator, the Mediation Program Administrator, and to all other parties to the dispute.

5.5 Existing Case Deadlines Not Affected by Assignment to Mediation. Assignment to the Mediation Program shall not alter or affect any time limits, deadlines, scheduling matters or orders in the case, any adversary proceeding, contested matter or other proceeding, unless specifically ordered by the Judge.

5.6 Disclosure of Conflicts of Interest. No Mediator may serve in any Matter in violation of the standards regarding judicial disqualification set forth in 28 U.S.C. § 455.

a. Disclosure by Attorney Mediators. An attorney Mediator shall promptly determine all conflicts or potential conflicts in the manner prescribed by the California Rules of Professional Conduct and disclose same to all parties in writing. If the attorney Mediator's firm has represented one or more of the parties, the Mediator shall promptly disclose that circumstance to all parties in writing.

b. Disclosure by Non-Attorney Mediators. A non-attorney Mediator shall promptly determine all conflicts or potential conflicts in the same manner as a non-attorney would under the applicable rules pertaining to the non-attorney Mediator's profession and disclose same to all parties in writing. If the Mediator's firm has represented one or more of the parties, the Mediator shall promptly disclose that circumstance to all parties in writing.

c. Report of Conflict Issue by Parties. A party 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 shall disclose same to all parties in writing.

d. Resolution of Conflict Issue by Judge. If the Mediator and/or the Alternate Mediator does not withdraw from the assignment, the issue shall be brought to the attention of the Judge in writing by the Mediator, the Alternate Mediator, or any of the parties in the form attached as Official Form 704. The notice shall be filed with the Court, and copies of the notice shall be mailed to the Judge, all of the parties to the dispute, their counsel, if any, the Mediator, the Alternate Mediator, and the Mediation Program Administrator. The Judge will then take whatever action(s) he or she deems necessary and appropriate under the circumstances to resolve the conflict of interest issue.

6.0 CONFIDENTIALITY

6.1 In General. No written or oral communication made, or any document presented, by any party, attorney, Mediator, Alternate Mediator or other participant in connection with or during any Mediation Conference, including the written Mediation Conference statements referred to in Paragraph 7.8 below, may be disclosed to anyone not involved in the Mediation, nor may any such communication be used in any pending or future proceeding in this Court or any other court. All such communications and documents shall be subject to all of the protections afforded by FRBP 7068. Such communication(s) may be disclosed, however, if all participants in the Mediation, including the Mediator, agree in writing to such disclosure. In addition, nothing contained herein shall be construed to prohibit parties from entering into written agreements resolving some or all of the Matter(s), or entering into or filing procedural or factual stipulations based on suggestions or agreements made in connection with a Mediation Program conference ("Mediation Conference").

6.2 Non-Confidentiality of Otherwise Discoverable Evidence. Notwithstanding the foregoing, nothing herein shall require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of a Mediation Conference.

6.3 Written Confidentiality Agreement Required. The parties and the Mediator shall enter into a written confidentiality agreement in the form attached as Official Form 708.

6.4 Effect of Recorded Settlement Agreement on Confidentiality. An oral agreement reached in the course of a Mediation Conference is not made inadmissible or protected from disclosure if all of the following conditions are satisfied:

a. The oral agreement is recorded by a court reporter, tape recorder, or other reliable means of sound recording;

b. The terms of the oral agreement are recited on the record in the presence of the parties and the Mediator, and the parties express on the record that they agree to the terms recited;

c. The parties to the oral agreement expressly state on the record that the agreement is enforceable or binding or words to that effect; and

d. The recording is reduced to writing and the writing is signed by the parties and their counsel, if any, within 3 days after it is recorded.

6.5 Effect of Written Settlement Agreement on Confidentiality. A written settlement agreement prepared in the course of a Mediation Conference is not made inadmissible or protected from disclosure if the agreement is signed by the settling parties and their counsel, if any, and either of the following conditions are satisfied:

a. The agreement provides that it is admissible or subject to disclosure, or words to that effect; or

b. The agreement provides that it is enforceable or binding or words to that effect.

6.6 Court Evaluation of Mediation Program Not Precluded by Confidentiality Provisions. Nothing contained herein shall be construed to prevent Mediators, parties, and their counsel, if any, from responding in absolute confidentiality to inquiries or surveys by persons authorized by the Court to evaluate the Mediation Program.

6.7 Confidentiality of Suggestions and Recommendations of Mediator. The Mediator shall have no obligation to make any written suggestions or recommendations but may, as a matter of discretion, provide counsel for the parties (or the parties, where proceeding in *pro per*), with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Court or made available, in whole or in part, directly or indirectly, to the Judge.

7.0 MEDIATION PROCEDURES

7.1 Selection of Mediator. Counsel for the parties (or the parties, where proceeding in *pro per*), are encouraged to contact the proposed Mediator and Alternate Mediator as soon as practicable (preferably before submitting the Mediation Order to the judge for approval, if possible) to determine the availability of the Mediator and Alternate Mediator to serve in the Matter.

7.2 Availability of Mediator. If the Mediator is **not** available to serve in the Matter, the Mediator shall notify the parties, the Alternate Mediator, and the Mediation Program Administrator of that unavailability by mail in the form attached as Official Form 703 as soon as possible, but no later than 7 days from the date of receipt of notification of appointment. **Upon notification of the Mediator's unavailability to serve, the Alternate Mediator shall automatically serve as the Mediator without the necessity for further court order.**

7.3 Availability of Alternate Mediator. If the Alternate Mediator is **not** available to serve in the Matter, the Alternate Mediator shall notify the parties and the Mediation Program Administrator of that unavailability by mail in the form attached as Official Form 703 as soon as possible, but no later than 7 days from the receipt of notification by the Mediator, pursuant to Paragraph 7.1 above, of the Mediator's unavailability to serve.

7.4 Selection of Successor Mediator.

a. By Parties. Within 7 days of receipt of the Alternate Mediator's notification

of unavailability, the parties shall choose a mutually acceptable Successor Mediator and Successor Alternate Mediator by mail in the form attached as Official Form 702. (This is the same Official Form which is used to appoint the original Mediator and Alternate Mediator, as described in Paragraph 5.4 above. However, the word "Successor" **must** be inserted in the caption of the Mediation Order in front of the words "Mediator" and "Alternate Mediator"). The parties shall file such form with the Court and provide a courtesy copy to the Judge and the Mediation Program Administrator.

b. **By Judge.** If the parties are unable to agree on a choice of Successor Mediator and Successor Alternate Mediator, they shall notify the Judge and the Mediation Program Administrator of their inability to do so by mail in the form attached as Official Form 704. In that event, the Judge shall appoint the Successor Mediator and Successor Alternate Mediator.

c. **Use of Official Court Order Assigning Successor Mediator.** When the Successor Mediator and Successor Alternate Mediator have been chosen by the parties and/or appointed by the Judge, the Judge shall execute an order appointing the Successor Mediator and Successor Alternate Mediator in the form attached as Official Form 702. (This is the same Official Form which is used to appoint the original Mediator and Alternate Mediator, as described in Paragraph 5.4 above. However, the word "Successor" **must** be inserted in the caption of the Mediation Order in front of the words "Mediator" and "Alternate Mediator").

7.5 **Initial Telephonic Conference.** Promptly, but no later than 14 days of receipt of notification of appointment, the Mediator shall conduct a telephonic conference with counsel for the parties (or the parties, where appearing in *pro per*) to discuss ((a) fixing a convenient date and place for the Mediation Conference, (b) the procedures that will be followed during the Mediation Conference, (c) who shall attend the Mediation Conference on behalf of each party, (d) what material or exhibits should be provided to the Mediator before the Mediation Conference, and (e) any issues or maters that it would be especially helpful to have the parties address in their written Mediation Conference Statements.

7.6 **Mediation Conference Scheduling.** Also within 14 days of receipt of notification of appointment, the Mediator shall give notice to the parties of the date, time and place for the Mediation Conference. The Mediation Conference shall commence no later than 30 days following the receipt of notification by the Mediator, and shall be held in a suitable neutral setting such as the office of the Mediator, or at a location convenient and agreeable to the parties and the Mediator.

a. **Continuance of Mediation Conference.** The date for the Mediation Conference may be continued for a period not to exceed 30 days upon written stipulation between the Mediator and the parties. The stipulation need not be filed with the Court but the parties must mail a copy of it to the Judge and the Mediation Program Administrator.

b. **Additional Continuance.** At the written request of the parties and for good cause shown, the Judge may, in his or her sole discretion, approve an additional continuance of the Mediation Conference beyond the period specified in Paragraph 7.6.a.

7.7 **Mandatory Service of Mediation Order Prior to Mediation Conference.** Prior to the Mediation Conference, the parties' counsel shall serve a copy of the Mediation Order on the Mediator, Alternate Mediator, Mediation Program Administrator, and all parties to the dispute.

7.8 **Mediation Conference Statements.** Each party shall submit a written Mediation Conference statement ("Mediation Statement") directly to the Mediator and to the parties to the Mediation Conference no less than 7 days prior to the date of the initial Mediation Conference, unless modified by the Mediator.

a. **Format.** Mediation Statements shall not exceed 10 pages, excluding exhibits and attachments. Mediation Statements shall comply with all of the requirements of Court Manual Section 2-5, unless such compliance is excused by the Mediator.

b. **Confidentiality.** Mediation Statements shall be subject to all of the protections afforded by the confidentiality provisions contained herein and by FRBP 7068.

c. **Statements Not Filed with Court.** The Mediation Statements shall **not** be filed with the Court, and the Judge shall not have access to them. In addition, the phrase **"CONFIDENTIAL -- NOT TO BE FILED WITH THE COURT"** shall be typed on the first page of the Mediation Statements.

d. **Mandatory Contents.** Mediation Statements must:

1. Identify the person(s), in addition to counsel, who will attend the Mediation Conference as representative(s) of the party, who have authority to make decisions;

2. Describe briefly the substance of the dispute;

3. Address any legal or factual issue(s) that might appreciably reduce the scope of the dispute or contribute significantly to settlement;

4. Identify the discovery that could contribute most to preparing the parties for meaningful discussions;

5. Set forth the history of past settlement discussions, including disclosure of any prior and any presently outstanding offers and demands;

6. Make an estimate of the cost and time to be expended for further discovery, pretrial motions, expert witnesses and trial;

7. Indicate presently scheduled dates for further status conferences, pretrial conferences, trial, or otherwise; and

8. Attach copies of the document(s) from which the dispute has arisen (*e.g.*, contracts), or the document(s) whose availability would materially advance the purposes of the Mediation Conference.

e. Recommended Additional Contents. Parties may identify in the Mediation Statements the person(s) connected to a party opponent (including a representative of a party opponent's insurance carrier) whose presence at the Mediation Conference would substantially improve the prospects for making the session productive. The fact that a person has been so identified shall not, by itself, result in an order compelling that person to attend the Mediation Conference.

f. Additional Mediation Statements for Mediator Only. Each party may submit directly to the Mediator, for his or her eyes only, a separate confidential Mediation Statement describing any additional interests, considerations, or matters that the party would like the Mediator to understand before the Mediation Conference begins. Such Mediation Statements shall not exceed 10 pages, excluding exhibits and attachments, and shall comply with all of the requirements of Court Manual Section 2-5 unless such compliance is excused by the Mediator.

7.9 Mandatory Attendance at Mediation Conference.

a. By Counsel. Counsel for each party who is primarily responsible for the Matter (or the party, where proceeding in *pro per*) shall personally attend the Mediation Conference and any adjourned session(s) of that conference, unless excused by the Mediator for cause. Counsel for each party shall come prepared to discuss all liability issues, all damage issues, and the position of the party relative to settlement, in detail and in good faith.

b. By Parties. All individual parties, and representatives with authority to negotiate and to settle the Matter on behalf of parties other than individuals, shall personally attend the Mediation Conference and any adjourned session(s) of that conference, unless excused by the Mediator for cause. Each party shall come prepared to discuss all liability issues, all damage issues, and the position of the party relative to settlement, in detail and in good faith.

c. By Governmental Agencies. A unit or an agency of government satisfies

this attendance requirement if represented by a person who has, to the greatest extent feasible, authority to settle, and who is knowledgeable about the facts of the case, the governmental unit's position, and the procedures and policies under which the governmental unit decides whether to accept proposed settlements.

d. **Telephonic Appearance.** Any party or lawyer who is excused by the Mediator from appearing in person at the Mediation Conference may be required by the Mediator to participate by telephone. This decision is within the Mediator's sole discretion.

7.10 **Consequences of Failure to Attend Mediation Conference and Other Violations of Mediation Program Procedures.** Willful failure to attend the Mediation Conference and/or other violations of the Mediation Program procedures shall be reported to the Judge by the Mediator by written notice in the form attached as Official Form 705, and may result in the imposition of sanctions by the Judge. The Mediator's notice shall be filed with the Court and copies of the notice shall be mailed to the Judge, all of the parties to the dispute, their counsel, if any, and the Mediation Program Administrator. The Judge will then take whatever action(s) he or she deems necessary and appropriate under the circumstances to resolve the issue of such willful failure to attend the Mediation Conference and/or other violations of the Mediation Program procedures.

7.11 **Conduct at the Mediation Conference.** The Mediation Conference shall proceed informally. Rules of evidence shall not apply. There shall be no formal examination or cross-examination of witnesses. The Mediator may conduct continued Mediation Conferences after the initial session where necessary. As appropriate, the Mediator may:

a. Permit each party (through counsel or otherwise) to make an oral presentation of its position;

b. Help the parties identify areas of agreement and, where feasible, enter into stipulations;

c. Assess the relative strengths and weaknesses of the parties' contentions and evidence, and explain as carefully as possible the reasoning of the Mediator that supports these assessments;

d. Assist the parties, through separate consultation or otherwise, in settling the dispute;

e. Estimate, where feasible, the likelihood of liability and the dollar range of damages;

f. Help the parties devise a plan for sharing the important information and/or conducting the key discovery that will assist them as expeditiously as possible to participate in meaningful settlement discussions or to posture the case for disposition by other means; and

g. Determine whether some form of follow up to the Mediation Conference would contribute to the case development process or to settlement.

7.12 Suggestions and Recommendations of Mediator. If the Mediator makes any oral or written suggestions as to the advisability of a change in any party's position with respect to settlement, the attorney for that party shall promptly transmit that suggestion to the client. The Mediator shall have no obligation to make an written comments or recommendations, but may, as a matter of discretion, provide the parties with a written settlement recommendation memorandum. No copy of any such memorandum shall be filed with the Court or made available in whole or in part directly or indirectly, to the Judge.

8.0 PROCEDURE UPON COMPLETION OF MEDIATION CONFERENCE

8.1 Upon the conclusion of the Mediation Conference the following procedures shall be followed:

a. If Matter Settled. If the parties have reached an agreement regarding the disposition of the Matter, the parties, with the advice of the Mediator, shall determine who shall prepare the writing to dispose of the Matter. If necessary, the parties may, with the Mediator's consent, continue the Mediation Conference to a date convenient for all parties and the Mediator. Where required, they shall promptly submit a fully executed settlement stipulation to the Judge for approval, and shall mail a copy to the Mediation Program Administrator. The Judge will accommodate parties who desire to place any resolution of a Matter on the record during or following the Mediation Conference.

b. Mediator's Certificate of Completion of Conference. Within 14 days of the Mediation Conference, the Mediator shall file with the Court and serve on the parties and the Mediation Program Administrator a certificate in the form attached as Official Form 706, which shows whether there has been compliance with the Mediation Conference requirements and whether or not a settlement has been reached. Regardless of the outcome of the Mediation Conference, the Mediator will **not** provide the Judge with any details of the substance of the Mediation Conference.

c. Confidential Evaluation. In order to assist the Mediation Program Administrator in compiling useful data to evaluate the Mediation Program and aid the Court in assessing the efforts of the members of the Panel, the Mediator shall provide a Mediation Conference Report to the Mediation Program Administrator in the form attached as Official Form 709. The Mediation Conference Report shall **not** be filed with the Court and the Judge shall not have access to it. In addition, the phrase **"CONFIDENTIAL -- NOT TO BE FILED WITH THE COURT"** shall be typed on the first page of the Mediation Conference Report.

9.0 *PRO BONO* AND COMPENSATED SERVICE OF MEDIATORS

9.1 Mandatory *Pro Bono* Service. The Mediator shall serve on a *pro bono* basis and shall not require compensation or reimbursement of expenses for the first full day of at least one Mediation Conference per quarter per year. If, at the conclusion of the first full day of the Mediation Conference, it is determined by the parties that additional time will be both necessary and productive in order to complete the Mediation Conference, then:

a. If the Mediator consents to continue to serve on a *pro bono* basis, the parties may agree to continue the Mediation Conference; or

b. If the Mediator does not consent to continue to serve on a *pro bono* basis, the Mediator's compensation shall be on such terms as are satisfactory to the Mediator and the parties, and shall be subject to the prior approval of the Judge if the estate is to be charged with such expense.

9.2 Compensated Service Upon Completion of Mandatory *Pro Bono* Service. After a Mediator has concluded at least one *pro bono* mediation for the particular quarter, nothing herein shall prohibit the Mediator and the parties from agreeing that the Mediator may be compensated for services rendered by the Mediator. The amount of such compensation and the terms governing the amount and payment shall be as agreed upon among the parties. If applicable, any party or parties to the mediation may apply to the Judge for authorization to compensate the Mediator from property of the estate. Nothing in this provision, however, shall require any party to compensate a Mediator other than as may be mutually agreed upon among the parties and the Mediator.

10.0 IMPLEMENTATION

10.1 The Mediation Program became effective on July 1, 1995.

10.2 Judge Barry Russell is appointed the Mediation Program Administrator.

Local Rules for Bankruptcy Court for the Northern District of Illinois **(excerpted) [mediation allowed via agreement of parties without need for motion]**

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.

C. 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 the mediation

Ex. 2- Sample procedures orders with mandatory or opt-out mediation procedures

In re Remington Outdoor Company, Inc., et al., Bankr. Case No. 20-81688 (Bankr. N.D. Ala.) (one procedures order, defendants can *opt into* the mediation-first schedule, otherwise default deadlines apply).

In re Armstrong Flooring, Inc., et al., Bankr. Case No. 22-10426 (Bankr. D. Del.) (one procedure order only, all go to mediation prior to discovery)

In re Sears Holding Corporation., et al., Case No. 18-23538 (Bankr. S.D.N.Y.) (two procedures orders, one for cases under $500,0000 (mediation first) and one for over $500,000 (discovery first))

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
NORTHERN DIVISION

In re: REMINGTON OUTDOOR COMPANY, INC., *et al.*[1] Debtors.	Chapter 11 Case No. 20-81688-CRJ11 Jointly Administered
Eugene I. Davis, as Plan Administrator for the Remington Outdoor Company Creditor Trust, Plaintiff, vs. Defendants Listed on Exhibit "A," Defendants.	

ORDER ESTABLISHING STREAMLINED PROCEDURES GOVERNING ADVERSARY PROCEEDINGS BROUGHT BY PLAINTIFF PURSUANT TO SECTIONS 502, 542, 547, 548, AND 550 OF THE BANKRUPTCY CODE

This matter came before the Court for hearing on March 3, 2022 upon the motion (the "Motion")[2] of Eugene I. Davis, as the plan administrator (the "Plaintiff" or "Plan Administrator") supervising the Remington Outdoor Company Creditor Trust (the "Trust"), by and through his undersigned counsel, for entry of an order (the "Order") establishing procedures in connection with the prosecution of the Avoidance Actions, all as more fully set forth in the Motion; and the Court having jurisdiction consider the relief requested therein matters raised in the Motion pursuant to

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, as applicable, are: Remington Outdoor Company, Inc. (4491); FGI Holding Company, LLC (9899); FGI Operating Company, LLC (9774); Remington Arms Company, LLC (0935); Barnes Bullets, LLC (8510); TMRI, Inc. (3522); RA Brands, L.L.C. (1477); FGI Finance, Inc. (0109); Remington Arms Distribution Company, LLC (4655); Huntsville Holdings LLC (3525); 32E Productions, LLC (2381); Great Outdoors Holdco, LLC (7744); and Outdoor Services, LLC (2405).
[2] Capitalized terms used but not otherwise defined herein shall have the meanings ascribed to them in the Motion.

28 U.S.C. § 1334; and the Court having found that this is a core proceeding pursuant to 28 U.S.C. § 157; and this Court having found that it may enter a final order consistent with Article III of the United States Constitution; and this Court having found that venue of this proceeding and the Motion in this District is proper pursuant to 28 U.S.C. §§ 1408 and 1409; and due, proper, and adequate notice of the Motion under Bankruptcy Rule 6004(a) and opportunity for objection to and a hearing on the Motion having been given to the parties listed therein, and it appearing that no other or further notice need be provided; and the Court having reviewed and considered the Motion; and the Court having determined that the legal and factual bases set forth in the Motion and at the hearing (if any) establish just cause for the relief granted herein; and the Court having found that the relief requested in the Motion being in the best interests of the Debtors, their creditors, their estates, the Plan Administrator, and all other parties in interest, including, among others, the Defendants; and upon all of the proceedings had before the Court; and all objections to the Motion, if any, having been withdrawn, resolved, or overruled; and after due deliberation and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1. The Motion is APPROVED as set forth herein.

2. The procedures attached hereto as Exhibits 1 and 2 (the "Avoidance Action Procedures") and incorporated herein by reference are hereby approved in their entirety. Avoidance Actions and all parties to the Avoidance Actions shall be governed by the Avoidance Action Procedures effective as of the date of this Order.

3. Participation in the Avoidance Action Procedures will not alter, affect, or modify the rights of any Defendant to seek a jury trial, withdraw the reference, or otherwise move for a

determination on whether the Court has the authority to enter a final judgment unless expressly waived.

4. Defendants to Avoidance Actions shall have **thirty (30) days** following service of this Order to affirmatively opt into the Avoidance Action Procedures with voluntary mediation provided for in Exhibit 2, or the default deadlines provided for in Exhibit 1 shall apply. Thereafter, a Defendant may only opt into the procedures in Exhibit 2 with consent of Plaintiff or further order of the Court.

5. The Court waives the requirement for a Rule 26(f) report in all Avoidance Actions. The Court will not conduct an initial schedule conference in any Avoidance Action. Any party may, however, file a request for a status hearing at any time.

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

Dated this the 3rd day of March, 2022.

/s/ Clifton R. Jessup, Jr.
Clifton R. Jessup, Jr.
United States Bankruptcy Judge

EXHIBIT 1

Scheduling Order (for Defendants NOT Opting Into Voluntary Mediation Program)

The procedures (the "Avoidance Action Procedures") governing the Avoidance Actions for Defendants who do NOT affirmatively opt-in to the voluntary mediation schedule (Exhibit 2) are as follows:

1. Defendant's time to file an answer or other responsive pleading to a complaint file in an Avoidance Action shall be extended by 60 days such that an answer or other responsive pleading shall be due within a total of 90 days after the issuance of the summons.

2. The Plaintiff's and Defendants' initial disclosures shall be made no later than **35 days** after service of this Order.

3. All discovery shall be completed by September 30, 2022.

4. Any motions for summary judgment shall be filed after the close of discovery and prior to October 29, 2022. The parties may seek relief from this paragraph upon a showing of cause.

5. The party with the burden of proof shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on June 30, 2022. The responding party shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on August 15, 2022.

6. The parties shall file a Joint Pretrial Statement by November 30, 2022. All counsel and unrepresented parties shall be responsible for the filing of the jointly prepared document.

7. A Pretrial Conference shall be held on December 15, 2022 at 10:00 A.M. (prevailing Central Time). All counsel and unrepresented parties must attend the Pretrial Conference. A trial date will be assigned at the Pretrial Conference.

8. Any changes in this schedule will only be made by further order of the Court, either orally at a hearing or in writing.

EXHIBIT 2

Scheduling Order (for Defendants Opting Into the Voluntary Mediation Program)

Any Defendant that wishes to opt into the Scheduling Order with Voluntary Mediation must do so by notifying the Plaintiff **no later than thirty (30) days after service of this Order** in writing, either via email at lmiskowiec@askllp.com or via letter correspondence addressed to ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121, Attn: Laurie Miskowiec. After the 30-day period expires, the default deadlines of the Scheduling Order set forth in Exhibit 1 to the Order shall apply, unless Plaintiff consents to, or the Court orders, an extension of time to opt into the Voluntary Mediation Program schedule provided below. The procedures governing the Avoidance Actions for Defendants who DO affirmatively opt into the voluntary mediation schedule (Exhibit 2) are as follows (the "Avoidance Action Procedures"):

A. **Extensions To Answer or File Other Responsive Pleading to the Complaint**. Each Defendant's 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 shall be due within a total of 90 days after the issuance of the summons.

B. **Stay of Discovery**. The parties' obligations to conduct formal discovery in each Avoidance Action shall be, and hereby is, stayed until the Mediation Process (as defined herein) is concluded; *provided*, that the stay of discovery shall in no way preclude, with respect to any Avoidance Action, the Plaintiff and the applicable Defendant from informally exchanging documents and information in an attempt to resolve such Avoidance Action in advance of, or during, the Mediation Process.

C. **Mediation**. Any Avoidance Action subject to this scheduling order that has not been settled or otherwise resolved by April 30, 2022 (the "Remaining Avoidance Actions") shall be referred to mediation and subject to the following procedures (the "Mediation Process"):

1. No later than May 15, 2022, Plaintiff and the Defendant shall jointly agree to a mediator (the "Mediator"). If the parties are unable to agree, the parties shall jointly request a hearing or conference before the Court.

2. The Mediator shall define the parameters for Mediation except that all submission to the Mediator shall be confidential unless the parties agree otherwise.

3. The mediations shall be conducted 1) via a video conferencing service (such as Zoom, Microsoft Teams, BlueJeans, or Webex) or 2) in person, at discretion of the mediator (and with the agreement of the parties).

4. The Plaintiff and each applicable Defendant will participate in the mediation, as scheduled and presided over by the Mediator, in good faith and with a view toward reaching a consensual resolution. The mediation

shall be attended by a representative of the Defendant with full settlement authority (and if a Defendant is represented by counsel, their counsel) as well as counsel for the Plaintiff (who must have full settlement authority from the Plaintiff or be accompanied by a Plaintiff representative with full settlement authority).

5. Within 14 days of the completion of the mediation, the Mediator shall file a certificate of completion ("Mediator's Report") with the Court noting whether or not the Remaining Avoidance Action was successfully resolved.

6. The Mediation Process with respect to all of the Remaining Avoidance Actions must be concluded by October 31, 2022 (the "Mediation Deadline").

7. The fees and costs of the Mediator shall be paid equally by the parties on a fixed-fee schedule as set forth below. The parties shall pay one-fourth of the Mediation Fee as least seven (7) calendar days prior to the commencement of mediation (the "Initial Mediation Fee"). The remaining fee will be due and paid by the parties on the date of mediation, should the mediation go forward. The Initial Mediation Fee will only be refunded to the parties in the event that the parties inform the Mediator at least seven (7) calendar days prior to the scheduled mediation that they have reached a settlement and the mediation will not go forward.

   i. Cases with a claim amount (as reflected in the complaint) of less than $100,000: $3,000.00 per case;

   ii. cases with a claim amount (as reflected in the complaint) equal to or greater than $100,000 and less than $250,000: $4,000 per case;

   iii. cases with a claim amount (as reflected in the complaint) equal to or greater than $250,000 and less than $1,000,000: $5,000 per case; and

   iv. cases with a claim amount (as reflected in the complaint) equal to or greater than $1,000,000 and less than $5,000,000: $6,000.00 per case.

8. Defendants that have additional Avoidance Actions commenced against their affiliates in the Debtors' bankruptcy cases may mediate all related Avoidance Actions at one time.

9. Except for issues related to the lack of a party's good faith, the Mediator shall not be called as a witness. No party shall seek to compel (i) the testimony of, or (ii) compel the production of documents from, the Mediator.

10. All proceedings, discussions, and written materials incident to the Mediation Process shall be privileged and confidential.

D. **Discovery Schedule**. The following deadlines shall apply to any Remaining Avoidance Action not concluded prior to the Mediation Deadline:

1. The parties to Avoidance Actions shall provide the disclosures required under Bankruptcy Rule 7026(a)(1) ("Initial Disclosures") on or prior to November 30, 2022;

2. All discovery shall be completed by June 30, 2023.

3. Any motions for summary judgment shall be filed after the close of discovery and prior to July 31, 2023. The parties may seek relief from this paragraph upon a showing of cause.

4. The party with the burden of proof shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on March 31, 2023. The responding party shall designate its expert(s), if any, and provide a report by 5:00 P.M. (prevailing Central Time) on May 15, 2023.

5. The parties shall file a Joint Pretrial Statement by August 31, 2023. All counsel and unrepresented parties shall be responsible for the filing of the jointly prepared document.

6. A Pretrial Conference shall be held on September 12, 2023 at 10:00 A.M. (prevailing Central Time). All counsel and unrepresented parties must attend the Pretrial Conference. A trial date will be assigned at the Pretrial Conference.

7. Any changes in this schedule will only be made by further order of the Court, either orally at a hearing or in writing.

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re: ARMSTRONG FLOORING, INC., *et al.*,[1] Debtors.	Chapter 7 Case No. 22-10426 (MFW) (Jointly Administered)
Alfred T. Giuliano, Chapter 7 Trustee for the Estate of Armstrong Flooring, Inc., Plaintiff, vs. Defendants Listed on Exhibit "1," Defendants.	Re: Docket No. 1244

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] filed by Armstrong Flooring, Inc. ("AFI"), one of the debtors and debtors in possession (collectively, the "Debtors") in the above-captioned cases, by and through its undersigned counsel, for entry of a procedures order (the "Procedures Order") pursuant to sections 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

[1] The Debtors in these chapter 7 cases, along with the last four digits of their respective tax identification numbers, are as follows: Armstrong Flooring, Inc. (3305); AFI Licensing LLC (3265); Armstrong Flooring Latin America, Inc. (2943); and Armstrong Flooring Canada Ltd. (N/A). The former address of the Debtors' corporate headquarters was PO Box 10068, 1770 Hempstead Road, Lancaster, PA 17065.

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

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 AFI 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 the Court having entered an order in the main bankruptcy case converted the Debtors' chapter 11 cases to chapter 7 cases [Docket No. 1352], and Alfred T. Giuliano having been appointed as the chapter 7 trustee for the Debtors' estates (the "Trustee"), and the Trustee now being the sole representative of the estates and the substituted plaintiff in 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 April 5, 2023 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 July 31, 2023 (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 August 1, 2023 and August 15, 2023, 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 August 16, 2023, 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 December 4, 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 January 31, 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 January 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 May 31, 2024, 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 June 28 2024.

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 July 31, 2024.

23. All expert discovery, including expert witness depositions, shall be concluded on or before September 16, 2024.

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 November 15, 2024. 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 or directed by the mediator, 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* 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, or Defendant is deemed to waive such request.** 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 may file a motion for sanctions with the Court. Litigation with respect to the issuance of sanctions shall not delay the commencement of the Mediation. Sanctions may include, but are not limited to, attorney's fees and costs and fees of the Mediator.

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 a default judgment or dismissal 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. 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 April 5, 2023 at 10:30 a.m. (ET). Thereafter, except as otherwise ordered by the Court, the pretrial conference shall be adjourned to future date(s), if any, as properly noticed.

41. 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 omnibus hearing or at such other date convenient to the Court, 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

42. 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.

43. 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.

Dated: June 13th, 2023
Wilmington, Delaware

MARY F. WALRATH
UNITED STATES BANKRUPTCY JUDGE

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: SEARS HOLDINGS CORPORATION, *et al.,* Debtors.[1]	Chapter 11 Case No. 18-23538 (RDD) (Jointly Administered)

ORDER ON MOTION FOR AN ORDER ESTABLISHING STREAMLINED PROCEDURES GOVERNING ADVERSARY PROCEEDINGS WITH TOTAL IN CONTROVERSY LESS THAN OR EQUAL TO $500,000 BROUGHT BY THE DEBTORS PURSUANT TO SECTIONS 502, 547, 548 AND 550 OF THE BANKRUPTCY CODE

Upon the *Fourth Motion for Orders Establishing Streamlined Procedures Governing Adversary Proceedings Brought by the Debtors Pursuant to Sections 502, 547, 548 and 550 of the Bankruptcy Code,* dated April 9, 2020 (the "**Motion**"), by notice of presentment dated April 9, 2020,[2] filed by Sears Holdings Corporation and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**" or "**Plaintiff**") by and through their undersigned counsel, for entry of, among other things, a procedures order (the

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

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

"**Procedures Order**") establishing streamlined procedures governing the adversary proceedings with a total transfers less than or equal to $500,000 brought by the Debtors pursuant to Sections 502, 547, 548, and 550 of the Bankruptcy Code identified in **Exhibit 1** annexed hereto (each an "**Avoidance Action**," collectively, the "**Avoidance Actions**"); and the Court having jurisdiction to consider and determine the Motion as a core proceeding in accordance with 28 U.S.C. §§ 157(a)-(b) and 1334(b) and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion and the opportunity for a hearing thereon having been provided in accordance with the Amended Order Implementing Certain Notice and Case Management Procedures, dated November 1, 2018 (D.I. No. 405), including, as represented by counsel for the Debtors, the parties to the Avoidance Actions; and it appearing that no other or further notice need be provided; and the only objection(s) to the Motion having been withdrawn, overruled, or otherwise resolved; and the Court having determined that no hearing on the Motion is required; and, after due deliberation, the Court having determined that the legal and factual bases set forth in the Motion establish good and sufficient cause for the relief granted herein and that such relief is in the best interests of the Debtors, their estates, their creditors and all parties in interest in that it will facilitate the prompt, economical and fair determination and resolution of the Avoidance Actions; now, therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion granted as provided herein.

2. All parties to the Avoidance Actions shall be governed by the procedures attached hereto as **Exhibit 2** (the "**Avoidance Action Procedures**") and incorporated herein by reference, which Avoidance Action Procedures are hereby approved and shall govern the

Avoidance Actions, effective as of the date of this Order.

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

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

5. This Order shall be effective immediately upon its entry.

Dated: May 4, 2020
White Plains, New York

/s/Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 2

AVOIDANCE ACTION PROCEDURES

A. Effectiveness of the Procedures Order

1. This Procedures Order approving the procedures Motion shall apply to all Defendants in the Avoidance Actions listed on **Exhibit 1** attached hereto. To the extent a Party is a Defendant in an Avoidance Action subject to this Procedures Order governing cases less than or equal to $500,000, and is also a defendant in a separate adversary proceeding governed by the procedures order covering those cases with an amount in controversy greater than $500,000, the Parties shall meet and confer to decide whether the actions should proceed under one procedures order or the other. If an agreement cannot be made, the parties may apply to the Court for resolution.

2. The Procedures Order will not alter, affect or modify the rights of Defendants to seek a jury trial in or withdrawal of the reference of, Avoidance Actions or otherwise to move for a determination on whether the Court has authority to enter a final judgment, or issue proposed findings of fact and conclusions of law, in an Avoidance Action under 28 U.S.C. § 157, and all such rights shall be preserved unless otherwise agreed to in a responsive pleading consistent with the Bankruptcy Rules and Local Bankruptcy Rules.

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.

C. Waiver of Requirement to Conduct Pretrial Conference

4. Federal Rule of Civil Procedure 16, made applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7016 (*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 any initial pretrial conference, including any initial pretrial conference originally scheduled pursuant to Local Rule 7016-2.

D. Waiver of Requirement to Conduct Scheduling Conference

5. Federal Rule of Civil Procedure 26(f), made applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan), is hereby waived and is not applicable to the Avoidance Actions. 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. All discovery in each Avoidance Action is hereby stayed until the mediation process set forth below (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.

7. Any open Avoidance Actions that have not been resolved and/or settled by August 31, 2020 (the "**Remaining Avoidance Actions**"), shall be referred to mandatory mediation and the Mediation Process in paragraphs 8-13.

8. Between September 1, 2020 and September 15, 2020, Defendants in the Remaining Avoidance Actions shall choose a mediator from the list of proposed mediators (each a "**Mediator**," collectively, the "**Mediators**") (the "**Mediator List**") attached hereto as **Exhibit 3**. Concurrently, Defendants in the Remaining Avoidance Actions shall notify Plaintiff's counsel of the Defendant's choice of Mediator by contacting: (i) if Plaintiff is represented by ASK LLP, 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, or (ii) if Plaintiff is represented by Katten Muchin Rosenman LLP ("**Katten**"), Anthony Wong, in writing, via email at **anthony.wong@katten.com** or via letter correspondence addressed to Katten Muchin Rosenman LLP, 575 Madison Avenue, New York, NY 10022. 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 determine whether he/she has any conflicts with the Defendant(s) and, in the event of a conflict, may abstain from acting in the particular mediation. If the selected Mediator abstains, Defendant will be given another 15 days to select an alternate Mediator as described in paragraph 8 above.

10. Upon the selection of Mediators, 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 7 calendar days after the conclusion of the mediation, the Mediator shall file a report (the "**Mediator's Report**") pursuant to General Order M-452 in the Remaining Avoidance Action, which shall be limited to stating only a) compliance or non-compliance with the General Order and b) whether the Remaining Avoidance Action settled or did not settle.

13. The Mediation Process with respect to all of the Remaining Avoidance Actions must be concluded by January 29, 2021.

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 26, 2021.

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 no later than March 31, 2021.

16. The parties to the Avoidance Actions shall have through and including June 15, 2021 to complete non-expert fact discovery, including depositions of fact witnesses.

17. Unless the parties agree to a broader scope of discovery, absent further order of the Court upon a showing of good cause, discovery will be limited solely and specifically to nonprivileged matters (i) that are properly discoverable under the Bankruptcy Rules and (ii) relate solely to the Avoidance Actions.

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

19. Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, shall apply to the Avoidance Actions.

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

21. Should a discovery dispute arise, the parties' counsel shall promptly confer to attempt in good faith to resolve the dispute. If, notwithstanding their good faith efforts to do so, they are unable to resolve a discovery dispute, the complainant shall file with the Court and email to the Court's chambers, copying counsel for the opponent, a letter outlining said issues. Respondent must reply within two (2) business days by filing a letter on the docket with a copy emailed to the Court's chambers, copying counsel for the opponent. Such 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. At any ensuing conference or hearing on a motion, the Court will ask the parties about their prior efforts to resolve the dispute.

22. Pursuant to Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports (a) concerning any issue on which a party bears the burden of proof (not including any report by Plaintiff on insolvency) and (b) if Defendant intends to provide expert testimony regarding insolvency of the Debtors, such report, if any, shall be made to the Plaintiff on or before July 30, 2021.

23. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports (a) of the parties' rebuttal experts, and (b) Plaintiff's report on the insolvency of the Debtors, if any, shall be made to the adverse party on or before September 21, 2021.

24. All expert discovery, including expert witness depositions, shall be concluded on or before October 29, 2021.

25. 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.

26. Either or both parties may seek leave under Local Bankruptcy Rule 7056 by email to the Court, with a copy to the counsel for the opposing party; provided, that all dispositive motions shall be filed and served at any time after the Mediation Process but before November 30, 2021. In the normal course, the Court will not permit the filing and pursuit of a summary judgment motion before the completion of discovery. Notwithstanding Local Bankruptcy Rule 7005-1, the party filing or opposing such dispositive motion shall be allowed to introduce such exhibits as needed to meet its burden of proof or rebut such burden.

F. Mediation Procedures and Requirements

27. Mediations shall take place in New York, New York, except as otherwise agreed to by the parties and the Mediator. Mediations shall be held at the law office of the Debtors' counsel, the Mediator's office, or at another location agreed upon by the Mediator; **provided, that, notwithstanding any other provision hereof, at the direction of the Mediator, any or all of the Mediation may be conducted telephonically**. Local Bankruptcy Rule 9019-1 and the Court's General Order M-452 concerning mediation procedures shall govern the mediations, except as otherwise set forth herein. General Order M-452 is available on the Court's website at: http://www.nysb.uscourts.gov/.

28. All proceedings and writing 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 except to prove that a party failed to comply with the Mediation Process set forth in these Procedures.

29. The Mediators shall be required to file disclosures prior to the scheduling of mediation.

30. 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. The mediation shall be attended in person by a representative of the Defendant with full settlement authority (and if a Defendant is represented by counsel, their counsel) as well as counsel for the Debtor (who must have settlement authority from the Debtors, or a Debtor representative shall appear as well), except that: (1) a Mediator, in his or her discretion, may allow a party representative to appear telephonically or, (2) the parties may consent to a party representative appearing telephonically. **Any such request must be made prior to ten (10) business days before the scheduled mediation date, or Defendant is deemed to waive such request.** Should a party representative appear by telephone, counsel appearing in person for that party shall have full settlement authority. To the extent a Mediator grants a party's request to appear telephonically, the requesting party 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 party representative to appear telephonically rather than in person, a party may apply by email 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.

31. 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.

32. 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.

33. 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 may file a motion for sanctions with the Court. Litigation with respect to the issuance of sanctions shall not delay the commencement of the mediation. Sanctions may include, but are not limited to, attorney's fees and costs and fees of the Mediator.

34. 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 a default judgment or dismissal 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.

35. The fees and costs of the Mediator (the "**Mediation Fee**") shall be paid equally by the parties on a fixed-fee schedule as set forth below. The parties shall pay one-fourth of the Mediation Fee as least seven (7) calendar days prior to the commencement of mediation (the "**Initial Mediation Fee**"). The remaining fee will be due and paid by the parties on the date of mediation, should the mediation go forward. If the parties settle prior to the mediation, the Mediator must be informed of the settlement prior to seven calendar days before the scheduled mediation or the Initial Mediation Fee is nonrefundable:

i. cases with a claim amount (as reflected in the complaint) of less than $100,000: $3,000.00 per case;

ii. cases with a claim amount (as reflected in the complaint) equal to or greater than $100,000 and less than $250,000: $4,000 per case; and

iii. cases with a claim amount (as reflected in the complaint) equal to or greater than $250,000 and less than $1,000,000: $5,000 per case.

iv. cases with a claim amount (as reflected in the complaint) equal to or greater than $1,000,000 and less than $5,000,000: $6,000.00 per case;

v. cases with a claim amount (as reflected in the complaint) equal to or greater than $5,000,000: $7,000 per case.

36. Mediation that is continued for more than one calendar day will be continued on an hourly fee basis to be paid equally by the parties.

37. Defendants that have additional Avoidance Actions commenced against their affiliates in the Debtors' bankruptcy cases 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.

38. Mediation statements shall be delivered to the Mediator 7 calendar days prior to the mediation. 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 such confidential information solely with the Mediator. The Mediator will direct the parties as to further instructions regarding the mediation statements.

39. 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.

40. No Mediator shall be called as a witness by any party except as set forth in this paragraph. 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 procedures as required in the foregoing paragraphs of this Procedures Order.

41. All proceedings and writings incidental to the mediation shall be privileged and confidential, and shall not be reported or placed in evidence.

G. Miscellaneous

42. If, after dispositive motions have been filed in an Avoidance Action and a decision on the same does not resolve the matter, that Avoidance Action shall be scheduled for a trial date that is convenient to the Court's calendar. Parties should be ready to proceed to trial within three weeks after such decision is rendered. Before seeking such trial date, the parties shall have met and conferred and agreed on their best estimate of the length of the trial, taking into account the procedures set forth below. When seeking such date, they shall inform the Court's Courtroom Deputy of such estimate. Normally, the Court expects that Avoidance Action trials will not take longer than one day. If the parties believe otherwise, they should arrange a pre-trial conference before scheduling the trial.

43. On or before two weeks before the trial, the parties shall have (a) met and conferred and used their best efforts to agree on a joint agreed admissible exhibit book and shall have identified any exhibits whose admissibility is not agreed and (b) exchanged proposed witness lists.

44. On or before one week before the scheduled trial date, the parties shall (a) submit to chambers (in hard copy) declarations under penalty of perjury or affidavits of their direct witnesses, who shall be present at trial for cross-examination and redirect, or have previously sought (by email to the Court's chambers, with a copy

to counsel for the opposing party) the Court's permission to examine direct witnesses at trial and (b) submit the joint exhibit book referred to in paragraph 43.

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

46. The deadlines and/or provisions contained in this 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 (a) if solely related to an extension of time for Defendant to file a response to the complaint, must be filed with the Court, and (b) in all other deadline extensions, must be filed with the Court, with a copy emailed to the Court's chambers and "So Ordered."

47. FAILURE TO COMPLY WITH THESE PROCEDURES MAY RESULT IN DISMISSAL OR OTHER SANCTION. If delay or other act or omission of your adversary may result in a sanction against you, it is incumbent on you to promptly bring this matter to the Court for relief.

Exhibit 3

MEDIATOR LIST

1. David Banker
   Montgomery McCracken Walker & Rhoads LLP

2. Christopher Battaglia
   Halperin Battaglia Benzija, LLP

3. Mark Felger
   Cozen O'Connor P.C.

4. Eric Haber
   Law Office of Eric Haber, PLLC

5. Jorian Rose
   BakerHostetler

6. Sean Southard
   Klestadt Winters Jureller Southard & Stevens, LLP

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: SEARS HOLDINGS CORPORATION, *et al.,* Debtors.[1]	Chapter 11 Case No. 18-23538 (RDD) (Jointly Administered)

ORDER ON MOTION FOR AN ORDER ESTABLISHING STREAMLINED PROCEDURES GOVERNING CERTAIN ADVERSARY PROCEEDINGS WITH TOTAL IN CONTROVERSY GREATER THAN $500,000 BROUGHT BY THE DEBTORS PURSUANT TO SECTIONS 502, 547, 548 AND 550 OF THE BANKRUPTCY CODE

Upon the *Fourth Motion for Orders Establishing Streamlined Procedures Governing Adversary Proceedings Brought by the Debtors Pursuant to Sections 502, 547, 548 and 550 of the Bankruptcy Code,* dated April 9, 2020 (the "**Motion**"), by notice of presentment dated April 9, 2020,[2] filed by Sears Holdings Corporation and its debtor affiliates, as debtors and debtors in possession in the above-captioned chapter 11 cases (collectively, the "**Debtors**" or "**Plaintiff**") by and through their undersigned counsel, for entry of, among other things, a procedures order (the

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are as follows: Sears Holdings Corporation (0798); Kmart Holding Corporation (3116); Kmart Operations LLC (6546); Sears Operations LLC (4331); Sears, Roebuck and Co. (0680); ServiceLive Inc. (6774); SHC Licensed Business LLC (3718); A&E Factory Service, LLC (6695); A&E Home Delivery, LLC (0205); A&E Lawn & Garden, LLC (5028); A&E Signature Service, LLC (0204); FBA Holdings Inc. (6537); Innovel Solutions, Inc. (7180); Kmart Corporation (9500); MaxServ, Inc. (7626); Private Brands, Ltd. (4022); Sears Development Co. (6028); Sears Holdings Management Corporation (2148); Sears Home & Business Franchises, Inc. (6742); Sears Home Improvement Products, Inc. (8591); Sears Insurance Services, L.L.C. (7182); Sears Procurement Services, Inc. (2859); Sears Protection Company (1250); Sears Protection Company (PR) Inc. (4861); Sears Roebuck Acceptance Corp. (0535); Sears, Roebuck de Puerto Rico, Inc. (3626); SYW Relay LLC (1870); Wally Labs LLC (None); SHC Promotions LLC (9626); Big Beaver of Florida Development, LLC (None); California Builder Appliances, Inc. (6327); Florida Builder Appliances, Inc. (9133); KBL Holding Inc. (1295); KLC, Inc. (0839); Kmart of Michigan, Inc. (1696); Kmart of Washington LLC (8898); Kmart Stores of Illinois LLC (8897); Kmart Stores of Texas LLC (8915); MyGofer LLC (5531); Sears Brands Business Unit Corporation (4658); Sears Holdings Publishing Company, LLC. (5554); Sears Protection Company (Florida), L.L.C. (4239); SHC Desert Springs, LLC (None); SOE, Inc. (9616); StarWest, LLC (5379); STI Merchandising, Inc. (0188); Troy Coolidge No. 13, LLC (None); BlueLight.com, Inc. (7034); Sears Brands, L.L.C. (4664); Sears Buying Services, Inc. (6533); Kmart.com LLC (9022); Sears Brands Management Corporation (5365); and SRe Holding Corporation (4816). The location of the Debtors' corporate headquarters is 3333 Beverly Road, Hoffman Estates, Illinois 60179.

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

"**Procedures Order**") establishing streamlined procedures governing teh adversary proceedings with total transfers greater than $500,000 brought by the Debtors pursuant to Sections 502, 547, 548, and 550 of the Bankruptcy Code identified in **Exhibit 1** annexed hereto (each an "**Avoidance Action**," collectively, the "**Avoidance Actions**"); and the Court having jurisdiction to consider and determine the Motion as a core proceeding in accordance with 28 U.S.C. §§ 157(a)-(b) and 1334(b) and the Amended Standing Order of Reference M-431, dated January 31, 2012 (Preska, C.J.); and venue being proper before the Court pursuant to 28 U.S.C. §§ 1408 and 1409; and due and proper notice of the Motion and the opportunity for a hearing thereon having been provided in accordance with the Amended Order Implementing Certain Notice and Case Management Procedures, dated November 1, 2018 (D.I. No. 405), including, as represented by counsel for the Debtors, the parties to the Avoidance Actions; and it appearing that no other or further notice need be provided; and any objection to the Motion having been withdrawn or otherwise resolved; and the Court having determined that no hearing on the Motion is required; and, after due deliberation, the Court having determined that the legal and factual bases set forth in the Motion establish good and sufficient cause for the relief granted herein and that such relief is in the best interests of the Debtors, their estates, their creditors and all parties in interest in that it will facilitate the prompt, economical and fair determination and resolution of the Avoidance Actions; now, therefore,

IT IS HEREBY ORDERED THAT:

1. The Motion granted as provided herein.

2. All parties to the Avoidance Actions shall be governed by the procedures attached hereto as **Exhibit 2** (the "**Avoidance Action Procedures**") and incorporated herein by reference, which Avoidance Action Procedures are hereby approved and shall govern the Avoidance Actions, effective as of the date of this Order.

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

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

5. This Order shall be effective immediately upon its entry.

Dated: May 4, 2020
White Plains, New York

/s/Robert D. Drain
THE HONORABLE ROBERT D. DRAIN
UNITED STATES BANKRUPTCY JUDGE

Exhibit 2

AVOIDANCE ACTION PROCEDURES

A. Effectiveness of the Procedures Order

1. This Procedures Order approving the procedures Motion shall apply to all Defendants in the Avoidance Actions listed on **Exhibit 1** attached hereto. To the extent a Party is a Defendant in an Avoidance Action subject to this Procedures Order governing cases greater than $500,000, and is also a defendant in a separate adversary proceeding governed by the procedures order covering those cases with an amount in controversy less than or equal to $500,000, the Parties shall meet and confer to decide whether the actions should proceed under one procedures order or the other. If an agreement cannot be made, the parties may apply to the Court for resolution.

2. The Procedures Order will not alter, affect or modify the rights of Defendants to seek a jury trial in or withdrawal of the reference of, Avoidance Actions or otherwise to move for a determination on whether the Court has authority to enter a final judgment, or issue proposed findings of fact and conclusions of law, in an Avoidance Action under 28 U.S.C. § 157, and all such rights shall be preserved unless otherwise agreed to in a responsive pleading consistent with the Bankruptcy Rules and Local Bankruptcy Rules.

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.

C. Waiver of Requirement to Conduct Pretrial Conference

4. Federal Rule of Civil Procedure 16, made applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7016 (*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 any initial pretrial conference, including any initial pretrial conference originally scheduled pursuant to Local Rule 7016-2.

D. Waiver of Requirement to Conduct Scheduling Conference

5. Federal Rule of Civil Procedure 26(f), made applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan), is hereby waived and is not applicable to the Avoidance Actions. 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 disclosures required under Rule 7026(a)(1) (the "**Initial Disclosures**") shall be made on or before August 31, 2020.

7. Except as set forth herein, all written interrogatories, document requests and requests for admission, if any, may be served upon the adverse party any time after the service of Initial Disclosures or in conjunction with the service of the Initial Disclosures. All written interrogatories, document requests and requests for admission, if any, must be served upon the adverse party no later than August 31, 2020.

8. The parties to the Avoidance Actions shall have through and including November 16, 2020 to complete non-expert fact discovery, excluding depositions of fact witnesses.

9. Federal Rule of Civil Procedure 33, made applicable herein pursuant to Bankruptcy Rule 7033, shall apply to the Avoidance Actions, except that responses to interrogatories are due 60 days after service.

10. Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, shall apply to the Avoidance Actions except that document production and responses to requests for production are due 60 days after service.

11. Federal Rule of Civil Procedure 36, made applicable herein pursuant to Bankruptcy Rule 7036, shall apply to the Avoidance Actions, except that responses to requests for admission are due 60 days after service.

12. Unless the parties agree to a broader scope of discovery, absent further order of the Court upon a showing of good cause, discovery will be limited solely and specifically to nonprivileged matters (i) that are properly discoverable under the Bankruptcy Rules and (ii) relate solely to the Avoidance Actions.

13. Should a discovery dispute arise, the parties' counsel shall promptly confer to attempt in good faith to resolve the dispute. If, notwithstanding their good faith efforts to do so, they are unable to resolve a discovery dispute, the complainant shall file with the Court and email to the Court's chambers, copying counsel for the opponent, a letter outlining said issues. Respondent must reply within two (2) business days by filing a letter on the docket with a copy emailed to the Court's chambers, copying counsel for the opponent. Such 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. At any ensuing conference or hearing on a motion, the Court will ask the parties about their prior efforts to resolve the dispute.

14. Any open Avoidance Actions that have not been resolved and/or settled by November 30, 2020 (the "**Remaining Avoidance Actions**"), shall be referred to mandatory mediation and the Mediation Process in paragraphs 15-25. Upon mutual

agreement of the parties to any Avoidance Action, mediation may be conducted prior to November 30, 2020. Should the parties to an Avoidance Action mutually agree to conduct the mediation earlier, any discovery deadlines pending shall be stayed until the Mediation Process has concluded.

15. Between December 1, 2020 and December 15, 2020, Defendants in the Remaining Avoidance Actions shall choose a mediator from the list of proposed mediators (each a "**Mediator**," collectively, the "**Mediators**") (the "**Mediator List**") attached hereto as **Exhibit 3**. Concurrently, Defendants in the Remaining Avoidance Actions shall notify Plaintiff's counsel of the Defendant's choice of Mediator by contacting: (i) if Plaintiff is represented by ASK LLP, 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, or (ii) if Plaintiff is represented by Katten Muchin Rosenman LLP ("**Katten**"), Anthony Wong, in writing, via email at **anthony.wong@katten.com** or via letter correspondence addressed to Katten Muchin Rosenman LLP, 575 Madison Avenue, New York, NY 10022. 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.

16. Upon notification of such selection or assignment, the selected Mediator shall have an opportunity to determine whether he/she has any conflicts with the Defendant(s) and, in the event of a conflict, may abstain from acting in the particular mediation. If the selected Mediator abstains, Defendant will be given another 15 days to select an alternate Mediator as described in paragraph 15 above.

17. Upon the selection of Mediators, 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.

18. 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.

19. Within 7 calendar days after the conclusion of the mediation, the Mediator shall file a report (the "**Mediator's Report**") pursuant to General Order M-452 in the Remaining Avoidance Action, which shall be limited to stating only (a) compliance or non-compliance with the General Order and (b) whether the Remaining Avoidance Action settled or did not settle.

20. The Mediation Process with respect to all of the Remaining Avoidance Actions must be concluded by June 30, 2021.

21. Should mediation fail to resolve a Remaining Avoidance Action, pursuant to Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports (a) concerning any issue on which a party bears the burden of proof (not including any report by Plaintiff on insolvency) and (b) if Defendant intends to provide expert testimony regarding insolvency of the Debtors, such report, if any, shall be made to the to the adverse party within 30 days after the Mediator's Report is filed.

22. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports (a) of the parties' rebuttal experts, and (b) Plaintiff's report on the insolvency of the Debtors, if any, shall be made to the adverse party within 60 days after the Mediator's Report is filed.

23. All fact and expert discovery, including fact and expert witness depositions, shall be concluded the earlier of 120 days after the Mediator's Report is filed or on October 29, 2021.

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. Either or both parties may seek leave under Local Bankruptcy Rule 7056 by email to the Court, with a copy to the counsel for the opposing party; provided, that all dispositive motions shall be filed and served at any time after the Mediation Process but before November 30, 2021. In the normal course, the Court will not permit the filing and pursuit of a summary judgment motion before the completion of discovery. Notwithstanding Local Bankruptcy Rule 7005-1, the party filing or opposing such dispositive motion shall be allowed to introduce such exhibits as needed to meet its burden of proof or rebut such burden.

F. Mediation Procedures and Requirements

26. Mediations shall take place in New York, New York, except as otherwise agreed to by the parties and the Mediator. Mediations shall be held at the law office of the Debtors' counsel, the Mediator's office, or at another location agreed upon by the Mediator; **provided, that, notwithstanding any other provision hereof, at the direction of the Mediator, any or all of the Mediation may be conducted telephonically**. Local Bankruptcy Rule 9019-1 and the Court's General Order M-452 concerning mediation procedures shall govern the mediations, except as otherwise set forth herein. General Order M-452 is available on the Court's website at: http://www.nysb.uscourts.gov/.

27. All proceedings and writing 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 except to prove that a party failed to comply with the Mediation Process set forth in these Procedures.

28. The Mediators shall be required to file disclosures prior to the scheduling of mediation.

29. 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. The mediation shall be attended in person by a representative of the Defendant with full settlement authority (and if a Defendant is represented by counsel, their counsel) as well as counsel for the Debtor (who must have settlement authority from the Debtors, or a Debtor representative shall appear as well), except that: (1) a Mediator, in his or her discretion, may allow a party representative to appear telephonically or, (2) the parties may consent to a party representative appearing telephonically. **Any such request must be made prior to ten (10) business days before the scheduled mediation date, or Defendant is deemed to waive such request.** Should a party representative appear by telephone, counsel appearing in person for that party shall have full settlement authority. To the extent a Mediator grants a party's request to appear telephonically, the requesting party 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 party representative to appear telephonically rather than in person, a party may apply by email 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.

30. 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.

31. 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.

32. 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 may file a motion for sanctions with the Court. Litigation with respect to the issuance of sanctions shall not delay the

commencement of the mediation. Sanctions may include, but are not limited to, attorney's fees and costs and fees of the Mediator.

33. 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 a default judgment or dismissal 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.

34. The fees and costs of the Mediator (the "**Mediation Fee**") shall be paid equally by the parties on a fixed-fee schedule as set forth below. The parties shall pay one-fourth of the Mediation Fee as least seven (7) calendar days prior to the commencement of mediation (the "**Initial Mediation Fee**"). The remaining fee will be paid by the parties on the date of mediation, should the mediation go forward. If the parties settle prior to the mediation, the Mediator must be informed of the settlement prior to seven calendar days before the scheduled mediation or the Initial Mediation Fee is nonrefundable:

i. cases with a claim amount (as reflected in the complaint) of less than $100,000: $3,000.00 per case;

ii. cases with a claim amount (as reflected in the complaint) equal to or greater than $100,000 and less than $250,000: $4,000 per case; and

iii. cases with a claim amount (as reflected in the complaint) equal to or greater than $250,000 and less than $1,000,000: $5,000 per case.

iv. cases with a claim amount (as reflected in the complaint) equal to or greater than $1,000,000 and less than $5,000,000: $6,000.00 per case;

v. cases with a claim amount (as reflected in the complaint) equal to or greater than $5,000,000: $7,000 per case.

35. Mediation that is continued for more than one calendar day will be continued on an hourly fee basis to be paid equally by the parties.

36. Defendants that have additional Avoidance Actions commenced against their affiliates in the Debtors' bankruptcy cases 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.

37. Mediation statements shall be delivered to the Mediator 7 calendar days prior to the mediation. 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 such confidential information solely with the Mediator. The Mediator will direct the parties as to further instructions regarding the mediation statements.

38. 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.

39. No Mediator shall be called as a witness by any party except as set forth in this paragraph. 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 procedures as required in the foregoing paragraphs of this Procedures Order.

40. All proceedings and writings incidental to the mediation shall be privileged and confidential, and shall not be reported or placed in evidence.

G. Miscellaneous

41. If, after dispositive motions have been filed in an Avoidance Action and a decision on the same does not resolve the matter, that Avoidance Action shall be scheduled for a trial date that is convenient to the Court's calendar. Parties should be ready to proceed to trial within three weeks after such decision is rendered. Before seeking such trial date, the parties shall have met and conferred and agreed on their best estimate of the length of the trial, taking into account the procedures set forth below. When seeking such date, they shall inform the Court's Courtroom Deputy of such estimate. Normally, the Court expects that Avoidance Action trials will not take longer than one day. If the parties believe otherwise, they should arrange a pre-trial conference before scheduling the trial.

42. On or before two weeks before the trial, the parties shall have (a) met and conferred and used their best efforts to agree on a joint agreed admissible exhibit book and shall have identified any exhibits whose admissibility is not agreed and (b) exchanged proposed witness lists.

43. On or before one week before the scheduled trial date, the parties shall (a) submit to chambers (in hard copy) declarations under penalty of perjury or affidavits of

their direct witnesses, who shall be present at trial for cross-examination and redirect, or have previously sought (by email to the Court's chambers, with a copy to counsel for the opposing party) the Court's permission to examine direct witnesses at trial and (b) submit the joint exhibit book referred to in paragraph 42.

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

45. The deadlines and/or provisions contained in this 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 (a) if solely related to an extension of time for Defendant to file a response to the complaint, must be filed with the Court, and (b) in all other deadline extensions, must be filed with the Court, with a copy emailed to the Court's chambers and "So Ordered."

46. FAILURE TO COMPLY WITH THESE PROCEDURES MAY RESULT IN DISMISSAL OR OTHER SANCTION. If delay or other act or omission of your adversary may result in a sanction against you, it is incumbent on you to promptly bring this matter to the Court for relief.

Exhibit 3

MEDIATOR LIST

1. David Banker
   Montgomery McCracken Walker & Rhoads LLP

2. Christopher Battaglia
   Halperin Battaglia Benzija, LLP

3. Mark Felger
   Cozen O'Connor P.C.

4. Eric Haber
   Law Office of Eric Haber, PLLC

5. Jorian Rose
   BakerHostetler

6. Sean Southard
   Klestadt Winters Jureller Southard & Stevens, LLP

Faculty

Derek C. Abbott is a partner with Morris, Nichols, Arsht & Tunnell LLP in Wilmington, Del., and a member of its Business Reorganization & Restructuring Group. He also chairs the firm's *pro bono* committee and sits on the firm's recruiting committee Mr. Abbott has represented *Fortune 1000*, local, international and other organizations as lead or Delaware counsel in bankruptcy proceedings and litigation on behalf of debtors, creditors, official and *ad hoc* committees and transactional case constituents. He regularly works with debtors in possession and exit-financing lenders, as well as outside and inside counsel, turnaround professionals, crisis-management firms, and investment and non-investment bank professionals. Mr. Abbott also frequently serves as a mediator in matters related to insolvency and distressed businesses, including both adversary proceedings and case-dispositive matters. In addition, he has served as an expert witness in matters involving restructuring and bankruptcy matters both domestically and internationally. Mr. Abbott's recent client representations include Boy Scouts of America, John Varvatos Enterprises, Grupo AeroMexico, Papa Gino's, AT&T Inc., General Motors Corporation, Philips International, Viacom Inc., TD Bank and Nortel Networks. He also has served as chapter 11 trustee and chapter 7 trustee of Tough Mudder. Mr. Abbott has been recognized by *Chambers USA, The Best Lawyers in America, Law & Politics* magazine and *Delaware Super Lawyers*. In 2016, he was invited to join the 28th Class of Fellows of the American College of Bankruptcy, and in 2018, he was presented with the Delaware State Bar Association's Access to Justice Commitment Award, which recognized his commitment to *pro bono* work throughout his career. In 2011, he received the Caleb R. Layton III Service Award, presented by the judges of the U.S. District and Bankruptcy Courts for the District of Delaware. Mr. Abbott is a member of the American and Delaware State Bar Associations, Turnaround Management Association and ABI, for which he served two terms on its Board of Directors and is a member of its Veteran and Servicemembers Affairs Task Force. He also serves as legal counsel for a variety of indigent clients through Delaware Volunteer Legal Services. Mr. Abbott received his B.S. in human factors psychology in 1987 from the U.S. Military Academy at West Point and his J.D. with honors from the University of North Carolina School of Law in 1995, where he was an editor of the *North Carolina Law Review*.

Ian Connor Bifferato is director of The Bifferato Firm in Wilmington, Del., and focuses his practice on alternative dispute resolution, commercial bankruptcy and corporate/commercial litigation. His practice has focused on complex litigation, products liability, and creditors rights and business reorganization, as well as mediation of commercial disputes, including appeals from the U.S. Bankruptcy Court for the District of Delaware, secured lender disputes, general corporate litigation, preference litigation and creditor rights issues, and arbitration. Mr. Bifferato has mediated well over 1,000 commercial disputes, including appeals from the U.S. Bankruptcy Court for the District of Delaware, secured lender disputes, general corporate litigation, preference litigation and creditors' rights issues. He also frequently serves as an arbitrator for single and panel binding and nonbinding arbitrations. Experienced as lead counsel in complex litigation, Mr. Bifferato also frequently teams with out-of-state lawyers who need access to Delaware's courts. He is admitted to the Delaware Bar, the U.S. District Court for the District of Delaware and the U.S. Third Circuit Court of Appeals. Mr. Bifferato is a member of the Delaware, Federal and American Bar Associations, co-chair of the Delaware State Bar Association's Professional Ethics Committee, assistant treasurer to the Delaware State Bar Association, and a member of the U.S. Bankruptcy Court Rules Committee for the District of Delaware

and of the mediation panel for the U.S. Bankruptcy Court for the District of Delaware. He received his B.A. in 1990 from the University of Delaware and his J.D. in 1994 from Widener University School of Law.

Andrew W. Caine chairs Pachulski Stang Ziehl & Jones's Post-Confirmation Practice Group in Los Angeles, where he oversees the entire spectrum of claims and avoidance litigation for debtors, creditors' committees, trustees, liquidation or post-confirmation trusts, and defendants, from "mega cases" to smaller individual matters. He also helped develop proprietary avoidance and preference claim analysis software and spends considerable time as "general counsel," assisting in the administration of post-confirmation estate/corporate wind-downs, and representing individuals and business entities in avoidance and claims-litigation defense. Mr. Caine has lead responsibility in litigation concerning a variety of business, bankruptcy and commercial law issues, as well as the representation of debtors, trustees, creditors and committees in chapter 11 reorganization cases. He handles matters in state and federal courts, with an emphasis on disputes tried in bankruptcy court, including contested reorganization matters. Mr. Caine has written numerous articles and often lectures nationally on bankruptcy and litigation, and he is a Past President and former Chair and Vice President-Education of ABI. He is a member of the Registry of Mediators for the U.S. Bankruptcy Court for the District of Delaware, and a former member of the Los Angeles Superior Court panel of business law arbitrators. Mr. Caine holds an AV-Preeminent Peer Rating from Martindale-Hubbell and has been named a "Super Lawyer" in the field of Bankruptcy & Creditor/Debtor Rights every year since 2007 in a peer survey conducted by *Law & Politics* and the publishers of *Los Angeles* magazine. He also was named in *The Best Lawyers in America* in 2017 in the practice area of Bankruptcy and Creditor/Debtor Rights/Insolvency and Reorganization Law. Mr. Caine received his B.A. from Northwestern University and his J.D. from the University of California at Los Angeles, where he was elected Phi Beta Kappa and was a member of the Mortar Board.

Kara E. Casteel is a partner at ASK LLP in St. Paul, Minn., and heads its Bankruptcy Litigation Group. She represents trustees, committees, and debtors in possession in preference analysis and litigation of avoidance actions. She has successfully litigated preference and fraudulent-transfer matters in multiple jurisdictions, including the U.S. Bankruptcy Courts for the District of Delaware, Southern District of New York, Southern District of Texas and the Southern District of Indiana. In 2022, Ms. Casteel obtained a judgment in excess of $3.5 million in a preference trial. Representative matters include the prosecution of avoidance actions in large bankruptcies such as Dean Foods Co., Sears Holdings Corp., Quebecor World (USA), WP Steel Venture LLC, NewPage Corp., RS Legacy Corp. (fka RadioShack) and hhgregg, Inc. Previously, she clerked for Hon. Casey Christian and Hon. Joseph Bueltel in the Third Judicial District of Minnesota. Before her judicial clerkship, she clerked for the Office of the Minnesota Attorney General. Ms. Casteel is admitted to practice law in the State of Minnesota, the U.S. District Court for the District of Minnesota and the U.S. Court of Appeals for the Third Circuit. She is a member of the Minnesota State Bar Association, the International Women's Insolvency & Restructuring Confederation (IWIRC), ABI and Minnesota Women Lawyers. In 2013, she helped found the Minnesota chapter of IWIRC, and she is currently the immediate past co-chair of the IWIRC-Minnesota Network. Ms. Casteel received her B.A. in 2005 in political science and legal studies from the University of Wisconsin and her J.D. in 2008 from the University of Minnesota Law School.