The Rising Use of Mediators: Is This the Wave of the Future?

Marcia L. Goldstein, Presiding Officer and Moderator
Weil, Gotshal & Manges LLP; New York

Hon. Robert D. Drain
U.S. Bankruptcy Court (S.D.N.Y.); White Plains

Hon. Elizabeth L. Perris
U.S. Bankruptcy Court (D. Or.); Portland

Joseph Samet
Baker & McKenzie LLP; New York

Hon. Gregg W. Zive
U.S. Bankruptcy Court (D. Nev.); Reno

2015

ABI

VALCON 2015

Emerging Valuation Issues in Bankruptcy and Beyond

Las Vegas

February, 2015

THE RISING USE OF MEDIATORS: IS THIS THE WAVE OF THE FUTURE?

Panelists:

Honorable Elizabeth Perris

Honorable Gregg W. Zive

Honorable Robert D. Drain

Joseph Samet, Baker & McKenzie LLP

Moderator:

Marcia Goldstein, Weil, Gotshal & Manges LLP

Table of Contents

I. Select Cases

Appendices

A. S.D.N.Y. Mediation Rules: M-390, General Order Amending, and Restating M-143 and M-211, *In re: Adoption of Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings* (S.D.N.Y).

B. Sample Mediation Order: *Order Selecting Mediator and Governing Mediation Procedure, LightSquared LP, et al., v. SP Special Opportunities LLC, et al.,* Bankruptcy Case No. 121280 (SCC), Adv. Proceeding Case No. 13-1930 (Bankr. S.D.N.Y. May 28, 2014).

Select Cases

I. **Discoverability of Mediation Documents**

a. In re Teligent, Inc., 640 F.3d 53 (2d Cir. 2011)

i. The debtor and its CEO had engaged in court-ordered mediation and agreed to be bound by the standard protective orders employed by the S.D.N.Y. The parties reached a settlement, one aspect of which required the CEO to sue his former lawyers for malpractice. During discovery, the defendant law firm sought all mediation and settlement communications.

ii. The court of appeals for the Second Circuit affirmed the district court's order denying the law firm's motion to lift two protective orders prohibiting disclosure of communications made during mediation.

iii. The court explained that there is a presumption against modifying confidentiality provisions contained in protective orders entered in the mediation context, and emphasized the importance of confidentiality in mediation to promote the free flow of information that may result in the settlement of a dispute.

iv. ***Teligent Test***: The court established a three-prong test that the party seeking discovery must meet to obtain mediation material: "(1) a special need for the confidential material, (2) resulting unfairness from a lack of discovery, and (3) that the need for the evidence out-weighs the interest in maintaining confidentiality. All three factors are necessary to warrant disclosure of otherwise non-discoverable documents."

b. *Dandong v. Pinnacle Performance Ltd.,* 2012 WL 4793870 (S.D.N.Y. Oct. 9, 2012)

i. The confidential materials in dispute were from a private, confidential mediation among plaintiffs, who claimed that they had been the victims of a fraud relating to their purchase of certain notes created by the defendants. The defendants sought to use the prior mediation statements of the plaintiffs to impeach them and the plaintiffs sought a protective order to prevent access to the materials.

ii. The District Court for the S.D.N.Y. first held that the *Teligent* test protects the confidentiality of mediations in which the confidentiality order is purely private, stating the test applies to "all situations in which a party seeks disclosure of confidential mediation communications."

iii. The court went on to clarify that the third party seeking discovery must show extraordinary need, and one that outweighs the strong public interest in preserving a mediation's presumed confidentiality, in order to obtain disclosure of mediation materials.

iv. The court ultimately reversed the magistrate's decision that a "special need" for the material had been demonstrated and held that impeachment was not a "special need" or "compelling need" warranting lifting the protective order and, therefore, the *Teligent* test was not satisfied.

II. Material Non-Public Information (MNPI)

a. *In re Washington Mut., Inc.*, 461 B.R. 200, 259 (Bankr. D. Del. 2011) vacated in part, No. 08-12229 MFW, 2012 WL 1563880 (Bankr. D. Del. Feb. 24, 2012)

i. There were several disputes between creditors of Washington Mutual Bank's parent company and JPMorgan over the ownership of certain assets following the sale of Washington Mutual Bank to JPMorgan.

ii. Investors holding substantial positions in Washington Mutual participated in various confidential settlement negotiations with JPMorgan. In an effort to minimize their risk of trading with MNPI obtained during the confidential negotiations, the investors typically agreed not to trade until Washington Mutual disclosed the MNPI at the end of predetermined lock-up periods.

iii. Notwithstanding the precautions the investors took to avoid trading improprieties, Judge Walrath found that there were "colorable claims" that the investors may have traded while in possession of MNPI and that they could be subject to equitable remedies imposed by the bankruptcy court.

b. Mediation Orders in the Wake of Washington Mutual

i. In an effort to encourage parties to participate in mediations and provide parties with an up-front understanding of the potential risks of participating, recent mediation orders have addressed the MNPI issue directly. Compare *General Motors* with *Cengage* and *Lightsquared*.

ii. ***General Motors***: The mediation order included a warning to potential parties that they may come into possession of MNPI by participating in the mediation. Notably, the order did not provide any comfort to potential parties with respect to the risk that their claims could be subject to equitable treatment.

1. "In connection with the Mediation, such Mediation Party may come into possession of information (including but not limited to information concerning the ranges of values and other circumstances in which the Mediation Parties might be willing to settle the Claims Objection, the Adversary Proceeding, the Rule 60(b) Motion and the New GM Claim) that may constitute material, non-public information under the Securities Laws."

iii. ***Cengage*:** The mediation order included explicit language to provide the parties comfort with respect to the potential risks of participating in the mediation:

1. "No Party to the mediation shall . . . be or become an insider, a temporary insider or fiduciary of any Debtor, any affiliate of any Debtor…"; and

2. "No party in interest . . . shall have any claim, defense, objection, or cause of action of any nature whatsoever against a Party, including, but not limited to, any objection to a claim, or any other basis to withhold, subordinate, disallow, or delay payment or issuance of any consideration to a Party on account of a claim based on such Party's trading in Debtor Party Securities by reason of a Party's participation in the Mediation as a result of receiving (a) information that, at the time of such trading, such Party has no duty of confidentiality with respect to a Confidentiality Agreement."

iv. ***LightSquared***: The mediation order included similar language to the *Cengage* order, which provided comfort to the parties as to the risks associated with obtaining MNPI during the mediation.

III. Chapter 9 Issues

a. *In re Palm Drive Health Care District* (Bankr. N.D. Cal. May 16, 2014)

i. A hospital district, which had filed for bankruptcy relief under chapter 9, elected to close a Sonoma County hospital as part of a realignment of the district's healthcare services. A nonprofit foundation, which had formed to provide charitable contributions to the hospital, submitted a proposal to the debtor suggesting a means for reopening the hospital. The debtor rejected the proposal. In response, the foundation filed a motion pursuant to section 105 of the Bankruptcy Code for appointment of a mediator to resolve the "impasse in discussions" regarding the rejected proposal.

ii. The debtor challenged the motion on multiple grounds, including the court's lack of jurisdiction. Relying on section 904, the debtor asserted that the court could not grant the relief requested because the subject matter of the dispute was beyond the constitutional limits of the court's power.

iii. The court began its analysis by acknowledging that section 105 provides "broad equitable powers that would certainly include appointment of a mediator." The court found, however, that such power is restricted by section 904, which prohibits courts from interfering with any of the political or governmental powers of a chapter 9 debtor without its consent.

In light of this limitation, the court concluded that it did not "have jurisdiction to interfere with the political and policy choices a health care district makes in running its affairs."

iv. Notwithstanding the limitation imposed by section 904, the court stated that it could appoint a mediator over a chapter 9 debtor's objection under certain circumstances. Specifically, where the contested matter arises under chapter 9 — such as an entity's eligibility to be a debtor pursuant to section 109(c), or the confirmation of a municipality's proposed plan of adjustment — the court stated that it had "wide latitude" in choosing the manner of adjudicating the dispute, including appointing a mediator.

b. <u>Mediators in Chapter 9 Cases</u>

i. Although the *Palm Drive Health Care District* ruling is noteworthy, its impact likely will be limited to enabling chapter 9 debtors to avoid mediation of disputes that plainly relate to the exercise of their political and governmental powers.

ii. In complex chapter 9 cases, however, the most contentious battles have been fought over eligibility and confirmation issues, which are fair game for court-ordered mediation.

iii. Mediators have played a critical role in recent high profile chapter 9 proceedings for the *City of Detroit*, the *City of Stockton*, and *San Bernardino*.

Appendix A

M-390, General Order Amending, and Restating M-143 and M-211, *In re: Adoption of Procedures Governing Mediation of Matters and the Use of Early Neutral Evaluation and Mediation/Voluntary Arbitration in Bankruptcy Cases and Adversary Proceedings* (S.D.N.Y).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: ADOPTION OF PROCEDURES GOVERNING MEDIATION OF MATTERS AND THE USE OF EARLY NEUTRAL EVALUATION AND MEDIATION/ VOLUNTARY ARBITRATION IN BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS	:	GENERAL ORDER AMENDING, AND RESTATING M-143 AND M-211 M-390

Whereas, on November 12, 1993, this court entered General Order M-117 adopting procedures governing the mediation of matters in bankruptcy cases and adversary proceedings before this court (the "Court Annexed Mediation Program"); and

Whereas, on January 18, 1995, this court entered General Order M-143 amending and superseding General Order M-117 and setting forth the Court Annexed Mediation Program in Rules 1.0 through 8.0 of General Order M-143; and

Whereas, in order to expand the Court Annexed Mediation Program to include the use of Early Neutral Evaluation and Mediation/Voluntary Arbitration, as referred to in 28 U.S.C. § 651 through § 658, on October 20, 1999, this court entered General Order M-211, supplementing General Order M-143 by (i) providing that the provisions of General Order M-143, set forth in Rules 1.0 through 8.0, be entitled "Court Annexed Alternative Dispute Resolution Program" and apply to Early Neutral Evaluation and (ii) adding procedures governing Mediation/Voluntary Arbitration set forth in Rules 9.0 through 13.0; and

Whereas, the court wishes to conform certain time periods set forth in its procedures to the 2009 time-related amendments to the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"); and

Whereas, the court wishes to amend, restate and supersede General Orders M-143 and M-211 and to combine them into one General Order, and to continue to include Early Neutral Evaluation within the Court Annexed Alternative Dispute Resolution Program.

THEREFORE IT IS ORDERED that the Court Annexed Alternative Dispute Resolution Program shall continue to include Early Neutral Evaluation.

IT IS FURTHER ORDERED that the procedures governing the Court Annexed Dispute Resolution Program and Mediation/Voluntary Arbitration 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, this General Order 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 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 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 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 this General Order 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 this General Order 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 this General Order shall relieve any debtor, party in interest, or the U.S. Trustee from complying with any other court orders, U.S. Code, the Bankruptcy Rules, or this court's Local 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 Rules 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.

Dated: New York, New York
December 1, 2009

/s/ *Stuart M. Bernstein*
Stuart M. Bernstein
Chief Bankruptcy Judge

Appendix B

Order Selecting Mediator and Governing Mediation Procedure, LightSquared LP, et al., v. SP Special Opportunities LLC, et al., Bankruptcy Case No. 121280 (SCC), Adv. Proceeding Case No. 13-1930 (Bankr. S.D.N.Y. May 28, 2014).

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re:	Chapter 11
LIGHTSQUARED INC., *et al.*,	Case No. 12-12080 (SCC)
Debtors.	Jointly Administered
LIGHTSQUARED LP, LIGHTSQUARED INC., LIGHTSQUARED INVESTORS HOLDINGS INC. TMI COMMUNICATIONS DELAWARE, LIMITED PARTNERSHIP, LIGHTSQUARED GP INC., ATC TECHNOLOGIES, LLC, LIGHTSQUARED CORP., LIGHTSQUARED INC. OF VIRGINIA, LIGHTSQUARED SUBSIDIARY LLC, SKYTERRA HOLDINGS (CANADA) INC., AND SKYTERRA (CANADA) INC.,	Adv. Pro. No. 13-1390 (SCC)
Plaintiff-Intervenors,	
-against-	
SP SPECIAL OPPORTUNITIES LLC, DISH NETWORK CORPORATION, ECHOSTAR CORPORATION, AND CHARLES W. ERGEN,	
Defendants.	

ORDER SELECTING MEDIATOR AND GOVERNING MEDIATION PROCEDURE

By this Order (the "***Order***"), the Court authorizes the Honorable Robert D. Drain, of the United States Bankruptcy Court for the Southern District of New York, to serve as a mediator (the "***Mediator***") in the above-captioned chapter 11 cases of LightSquared Inc. and its affiliated debtors, as debtors and debtors in possession (collectively, the "***Debtors***").

RECITALS

A. **WHEREAS**, on May 14, 2012, the Debtors each commenced a voluntary case (collectively, the "***Chapter 11 Cases***") under chapter 11 of title 11 of the United States Code (the "***Bankruptcy Code***") in the United States Bankruptcy Court for the Southern District of New York (the "***Court***");

B. **WHEREAS**, on August 6, 2013, Harbinger Capital Partners, LLC; HGW US Holding Company, L.P.; Blue Line DZM Corp.; and Harbinger Capital Partners SP, Inc. (collectively, "***Harbinger***") commenced the above-captioned adversary proceeding (the "***Adversary Proceeding***"). On August 22, 2013, the Debtors intervened in the Adversary Proceeding on limited grounds [Adv. Docket No. 15]. U.S. Bank National Association ("***U.S. Bank***"), Mast Capital Management LLC ("***Mast***"), and the Ad Hoc Secured Group of LightSquared LP Lenders (the "***Ad Hoc Secured Group***") also intervened on the same day [Adv. Docket Nos. 12, 14]. By Order dated November 14, 2013 (the "***November Order***"), this Court (i) granted motions to dismiss the amended complaint filed by Harbinger [Adv. Pro. Docket No. 43], (ii) granted Harbinger leave to file a second amended complaint that did not assert claims on Harbinger's own behalf, and (iii) authorized the Debtors to file a complaint setting forth the basis for their intervention. On November 21, 2013, the Court issued its *Memorandum Decision Granting Motions To Dismiss Complaint*, which set forth the bases for the November Order [Adv. Pro. Docket No. 68].

C. **WHEREAS**, on November 15, 2013, the Debtors filed a Complaint-in-Intervention in the Adversary Proceeding, and, on December 2, 2013, Harbinger filed a Second Amended Complaint (together, the "***Complaints***"). Certain counts of the Complaints were dismissed by Order dated December 12, 2013 [Adv. Pro. Docket No. 97].

D. **WHEREAS**, on January 9, 2014, the Court commenced a trial in the Adversary Proceeding, which trial concluded on January 17, 2014, with closing arguments held on March 17, 2014.

E. **WHEREAS**, on March 19, 2014, the Court commenced a confirmation hearing on the *Debtors' Third Amended Joint Plan Pursuant to Chapter 11 of Bankruptcy Code* (the "***Plan***"), which evidentiary hearing concluded on March 31, 2014, with closing arguments held on May 5 and May 6, 2014.

F. **WHEREAS**, on May 8, 2014, the Court issued two decisions from the bench. With respect to the Adversary Proceeding, the Court held, among other things, that the claim of SP Special Opportunities LLC ("***SPSO***") against LightSquared LP shall be equitably subordinated in an amount to be determined after further proceedings before the Court, and the Court denied claims for tortious interference and disallowance of SPSO's claim. In its confirmation decision in the Chapter 11 Cases, the Court denied confirmation of the Plan. After issuing its decisions, the Court directed the parties to work together to attempt to reach a resolution on all plan issues and on the amount of equitable subordination and to provide the Court with an update on May 27, 2014. After May 27, 2014, if no resolution had been reached, the Court informed the parties that it would seek to appoint a mediator.

G. **WHEREAS**, the Court held a status conference on May 27, 2014 (the "***Status Conference***") at which the following parties were present: the Debtors; the Special Committee of the Boards of Directors of LightSquared Inc. and LightSquared GP Inc. (the "***Special Committee***"); Harbinger; Mast; U.S. Bank; the Ad Hoc Secured Group; SIG Holdings, Inc.; Fortress Investment Group LLC; and SPSO (with their respective principals, attorneys, and

advisors, each a "***Party***" and, collectively, the "***Parties***"). At the Status Conference, the Parties informed the Court that no resolution had been reached.

H. **WHEREAS**, the Court indicated on the record of the Status Conference that it would contact the Mediator to determine his availability and willingness to mediate in the Chapter 11 Cases and the Adversary Proceeding.

ORDER

NOW, **THEREFORE**, in consideration of the foregoing recitals, which are incorporated into this Order, the Court hereby orders as follows:

1. The Court authorizes and appoints the Honorable Robert D. Drain, United States Bankruptcy Judge for the Southern District of New York, to serve as Mediator in these Chapter 11 Cases and in the Adversary Proceeding and to conduct the mediation as set forth herein (the "***Mediation***").

2. As outlined on the record at the Status Conference, the Mediator is authorized to mediate any issues concerning, among other things, the terms of a plan or plans of reorganization for the Debtors, including the following disputes:

- the amount of equitable subordination of the claim of SPSO (the "***SPSO Claim***") and the classification and treatment of the SPSO Claim in a plan of reorganization;
- the allocation of estate value among the various constituencies and the structure of a plan or plans of reorganization for the Debtors;
- certain other plan confirmation or other issues appropriate for mediation, as determined by the Parties and the Mediator.

3. The Parties shall meet and confer with the Mediator to establish procedures and timing for the mediation.

4. Unless otherwise directed by the Mediator, each of the Parties, including their respective principals, attorneys, and advisors, may attend and participate in the mediation sessions.

5. The Mediator may require each Party participating in the mediation sessions to appear with at least one (1) principal or other individual with authority to make a decision binding upon such Party.

6. On or before the first mediation session or submission to the Mediator, each Party shall submit to the Mediator and each other Party a separate statement setting forth with specificity such Party's claims against and/or interests in the Debtors (the "***Ownership Statement***"), provided, however, that neither the Debtors nor their Special Committee shall be required to submit an Ownership Statement. Any Party or its counsel that represents more than one claim or interest holder, or represents a party that in an agency or trustee capacity has received direction from one or more claim or interest holder(s) with respect to these Chapter 11 Cases, shall complete a separate Ownership Statement for each claim or interest holder that such Party represents or from whom it takes direction. The Ownership Statement shall include (a) the name and address of the Party and (b) the face amount of each disclosable economic interest (as defined in Bankruptcy Rule 2019) held in relation to the Debtors as of the date of the Ownership Statement. If any fact disclosed in an Ownership Statement changes materially during the course of the Mediation, such Party shall promptly submit a supplemental Ownership Statement setting forth the materially changed fact.

7. Subject to the consent of the Mediator and the Parties, the Parties may schedule mediation sessions as necessary.

8. Subject to the written consent of each of the Parties and the Mediator (including via email), any other party may participate in the Mediation.

9. The results of the Mediation are non-binding.

10. There shall be an absolute mediation privilege, and all communications made by a Party (a "***Disclosing Party***") in connection with the Mediation, including discussions or communications with or in the presence of the Mediator, shall be confidential, protected from disclosure (and shall not be disclosed) to other Parties (except as such Disclosing Party may agree) or to third parties (including holders of securities or claims for which the Party is acting in a representative or trustee capacity to the extent such holders are not themselves Parties), shall not constitute a waiver of any existing privileges and immunities, and shall not be used for any purpose other than the mediation (the "***Absolute Mediation Privilege***"). Submissions by each Party (or any third party participant) to the Mediator, including correspondence, offers, or counteroffers made in connection with the mediation, shall not be submitted to any other person or entity without the consent of the submitting Party (or any submitting third party participant). Nothing herein shall restrict any Party from providing its own Mediation submissions to any other Party. For the avoidance of doubt, the Parties shall not disclose to any court, including in any pleading or other submission to any court, any such discussions or communications made in connection with the Mediation, unless otherwise available to such Party and not subject to a separate confidentiality agreement or protective order which would prevent its disclosure. For the avoidance of doubt, and notwithstanding any separate confidentiality agreements or confidentiality provisions in relevant credit agreements or indentures, all Parties participating in the Mediation shall comply with the terms of this Order and maintain the Absolute Mediation Privilege. The terms of this Order (as may be supplemented or amended by further orders), and

not any separate confidentiality agreement or confidentiality provisions in relevant credit agreements or indentures, shall govern the protection of communications or discussions in connection with the Mediation.

11. All settlement proposals, counterproposals, and offers of compromise made during the mediation sessions (collectively, "***Settlement Proposals***") shall (a) remain confidential unless the Party making such Settlement Proposal agrees to the disclosure of any such Settlement Proposal, (b) be subject to protection under Rule 408 of the Federal Rules of Evidence and any equivalent or comparable state law, and (c) shall not constitute material nonpublic information.

12. No Party shall (a) be or become an insider, a temporary insider, or fiduciary of any Debtor or any affiliate of any Debtor (collectively, the "***Debtor Parties***"), (b) be deemed to owe any duty to any of the Debtor Parties or the Debtors' estates, (c) undertake any duty to any party in interest, or (d) be deemed to misappropriate any information of any of the Debtor Parties, with respect to each of foregoing clauses (a) through (d), as a result of (x) participating in the Mediation conducted pursuant to this Order without reliance on this Order, (y) being aware, or in possession, of any Settlement Proposal, or (z) with respect to the Mediation, acting together in a group with other holders of securities issued by the Debtor Parties ("***Debtor Party Securities***"); provided, however, that nothing herein shall affect any Party's pre-existing fiduciary obligations.

13. No party in interest in these Chapter 11 Cases, including each of the Debtors or any successor to the Debtors, shall have any claim, defense, objection, or cause of action of any nature whatsoever against a Party, including, but not limited to, any objection to a claim, or any other basis to withhold, subordinate, disallow, or delay payment or issuance of any consideration

to a Party on account of a claim based on such Party's trading in Debtor Party Securities by reason of such Party's receipt, as a result of participation in the Mediation, of (a) information with respect to which, at the time of such trading, such Party has no duty of confidentiality under a Confidentiality Agreement, or (b) a Settlement Proposal, whether or not such Settlement Proposal is confidential; provided, however, that nothing herein shall be deemed to waive any claims for non-compliance with this Order or any other contractual confidentiality obligations.

14. At the conclusion of the Mediation, the Mediator shall file with the Court a memorandum stating (a) that the Mediator has conducted the Mediation, (b) the names, addresses, and telephone numbers of counsel and advisors who participated in the Mediation, and (c) whether and to what extent the Mediation was successful.

15. The Mediator shall be authorized to report to the Court on the good faith of any or all of the Parties.

16. The sanctions available under Fed. R. Civ. P. 16(f) shall apply to any violation of this Order and, except as modified herein, the provisions of Rule 9019-1 of the Local Bankruptcy Rules of the Southern District of New York governing alternative dispute resolution and mediation matters shall apply to the Mediation.

17. This Order shall be governed by, and construed in accordance with, the laws of the state of New York without regard to the conflicts of laws principles thereof.

18. The Parties are authorized and empowered to take such steps and perform such acts as may be necessary to implement and effectuate the terms of this Order.

19. Notwithstanding the possible applicability of Bankruptcy Rule 6004(h), 7062, and 9014 or otherwise, the terms and conditions of this Order shall be immediately effective and enforceable upon its entry.

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

Dated: May 28, 2014
New York, New York

/s/ Shelley C. Chapman
HONORABLE SHELLEY C. CHAPMAN
UNITED STATES BANKRUPTCY JUDGE

Mediation in Bankruptcy

By Joseph Samet

Baker & McKenzie LLP
452 Fifth Avenue
New York, New York 10018
(212) 891-3565

Mediation in Bankruptcy

1. Historical development of mediation in business bankruptcy cases;
2. Types of bankruptcy related matters in dispute in bankruptcy courts, and elsewhere;
3. What is the nature and legal and procedural status of the dispute? Is it early or late stage?; What's really at stake?
4. Need for a mediator to have at least some knowledge of bankruptcy law and jurisdiction (Stern v. Marshall), local rules, guidelines and practice; possible need for other necessary legal resources; is technical industry expertise required?;
5. Dealing with mediation rules, confidentiality and privilege; Are there loopholes to be dealt with?;
6. Is mediation right for your client at this time? Do you even have a choice?; Judge's views on mediation; client and budgetary considerations;
7. Selecting the mediator - choice, criteria and due diligence;
8. Who are the parties in the mediation, and critical parties behind the scenes? (i.e.; Committee, other Players); Who has the leverage?; Who has the authority to make the deal?; Is court approval needed?;

9. Understanding relevant economic interests and timing which may affect potential resolution of the dispute;

10. How does the law, priority and value of claims in bankruptcy effect the dynamics of the mediation?; Approximately what is the claim worth in the bankruptcy context of the particular case?; i.e., landlord and employment claim caps; secured (valuation) or unsecured claims?;

11. How do timing and other issues in the bankruptcy case effect the mediation?;

    a. what are the positions of the parties in the case and disputed proceeding;

    b. status of exclusivity for a debtor proposing a plan;

    c. debtor's economic position and prospects, including cash flow;

    d. capability of the debtor and management;

    e. valuation of secured claims;

    f. other;

12. Mediation statements - preparation, content, timing, and to whom they are transmitted; direct submission versus exchange; privilege and confidentiality;

13. Pre-mediation calls with the mediator and the process; agendas, benefits and pitfalls;

14. Preparing for the mediation:

a. Preparing the case and the client; getting realistic;

b. Conditioning the client for what may happen during the mediation, and how to appropriately respond or react;

c. Role of the client and its presence in the mediation;

d. Flexibility of client's counsel and experts; the mindsets of some litigators and bankruptcy lawyers;

e. Who has the authority to be heard, negotiate and settle?;

f. Understanding some of the dynamics of the overall bankruptcy case, as well as the specific dispute in mediation; any Stern v. Marshall and its progeny ramifications on the mediation?;

g. Be prepared for negotiating; consider the needs and hot buttons of both parties; considerations for dealing with the mediator; making counteroffers that may be of interest and palatable to both sides; consider monetary and non-monetary issues, business issues and solutions; dealing with personality issues;

h. Prepare fully and try to limit surprises;

i. Consider how isolated or precedential your matter is for both sides; be prepared to deal with that analysis;

j. What would be the costs, fees and expenses of continuing litigation, and the business and legal ramifications if the mediation fails?; Can significant future business and professional time involved be justified?;

15. Key elements of the mediation - goals; opening statements (substance and setting the mood for making the most of the mediation; getting key information or confirming or refuting information; addressing the business people; improving your understanding of the respective legal positions;

16. Considerations for reaching a deal; are you done?; effects, if any, of rejecting a deal and terminating the mediation;

17. Documenting and implementing the deal; timing and dealing with potential pitfalls; term sheets and final documents;

18. Is bankruptcy court approval of the deal needed, after notice to parties in interest?