AMERICAN BANKRUPTCY INSTITUTE

2017 Northeast Bankruptcy Conference

Sealing the Deal: Negotiating, Documenting and Consummating Settlements in Bankruptcy

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U.S. Bankruptcy Court (E.D.N.Y.); Brooklyn

CONCURRENT SESSION

2017

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Compromises and Settlements in Bankruptcy – The Basics
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Rule 9019 of the Federal Rules of Bankruptcy Procedure provides, in pertinent part:

> On motion by the trustee and after notice and a hearing, the court may approve a compromise or settlement. Notice shall be given to creditors, the United States trustee, the debtor, and indentured trustees as provided in Rule 2002 and to any other entity as the court may direct.

Fed. R. Bankr. P. 9019(a). The primary purpose of a compromise or settlement is to avoid the necessity of determining sharply contested and dubious issues. See, e.g., Wil-Rud Corp. v. Lynch (In re California Associated Prods. Co.), 183 F.2d 946, 949 (9th Cir. 1950). Settlements and compromises are a normal part of the bankruptcy process. Protective Comm. For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson, 390 U.S. 414, 424 (1968) (quoting Case v. Los Angeles Lumber Prods. Co., 308 U.S. 106, 130 (1939)). Indeed, "[c]ompromises are favored in bankruptcy." Hicks, Muse & Co. v. Brandt (In re Healthco Int'l, Inc.), 136 F.3d 45, 50 n.5 (1st Cir. 1998). See also 9 LAWRENCE P. KING, COLLIER ON BANKRUPTCY ¶ 9019.03[1] (15th ed.1993) (to minimize litigation and expedite the administration of a bankruptcy estate, "[c]ompromises are favored in bankruptcy.").

In determining whether to approve a settlement, the bankruptcy court essentially is expected to "assess[] and balance the value of the claims . . . being compromised against the value . . . of the compromise proposal." Jeffrey v. Desmond, 70 F.3d 183, 185 (1st Cir. 1995) (citation omitted). The approval of a compromise is within the sound discretion of the bankruptcy judge, and a reviewing court will not overturn a decision to

approve a compromise absent a clear showing that the bankruptcy judge abused her discretion. Id.

The factors to be considered in approving settlement, as articulated by the First Circuit in Jeffrey include:

(i) the probability of success in the litigation being compromised;

(ii) the difficulties, if any, to be encountered in the matter of collection;

(iii) the complexity of the litigation involved, and the expense, inconvenience and delay attending it; and

(iv) the paramount interest of the creditors and a proper deference to their reasonable views in the premise.

Id.; see also In re ServiSense.com, Inc., 382 F.3d 68, 72 (1st Cir. 2004). Courts in the First Circuit have recognized that the Jeffrey factors are not exclusive, and that public policy should also be considered in evaluating compromises as well. See In re High Voltage Eng'g Corp., 397 B.R. 579, 601-02 (Bankr. D. Mass. 2008), *aff'd*, 403 B.R. 163 (D. Mass. 2009).

The burden of proof rests with the party seeking approval of the proposed settlement. Underwriters at Lloyd's, London v. Chancellor Corp. et al. (In re Adley), 333 B.R. 587, 608 (Bankr. D. Mass. 2005). Bankruptcy courts defer to the estate representative when examining the reasonableness of a settlement. Hill v. Burdick (In re Moorhead Corp.), 208 B.R. 87, 89 (1st Cir. BAP 1997) ("The judge, however, is not to substitute her judgment for that of the trustee, and the trustee's judgment is to be accorded some deference."), *aff'd*, 201 F.3d 428 (1st Cir.1998); In re 110 Beaver Street Partnership, 244 B.R. 185, 187 (Bankr. D. Mass. 2000) ("[T]he Court will defer to the

trustee's judgment and approve the compromise, provided the trustee demonstrates that the proposed compromise falls within the 'range of reasonableness' and thus is not an abuse of his or her discretion.").

In considering whether or not to settle a claim, the estate representative's duty is "to reach an informed judgment, after diligent investigation, as to whether it would be prudent to eliminate the inherent risks, delays and expense of prolonged litigation in an uncertain case." In re C.R. Stone Concrete Contractors, Inc., 346 B.R. 32, 49 (Bankr. D. Mass. 2006). "[T]he responsibility of the bankruptcy judge, and ours on review, is not to decide the numerous questions of law and fact raised by appellants but rather to canvass the issues and see whether the settlement falls below the lowest point in the range of reasonableness." Ars Brook LLC v. Jalbert (In re Servisense.com, Inc.), 382 F.3d 68, 71–72 (1st Cir. 2004) (quoting In re Healthco Int'l, 136 F.3d at 51); see also Beacon Investments LLC v. MainePCS, LLC, 468 B.R. 1, 16 (D. Me. 2012) (noting that standard for evaluating proposed settlement fell within the "span of reasonableness" and that the settlement "may not be the most reasonable and it can be, basically, the least reasonable as long as it's within reason."). In so doing, this Court should consider "the experience and competence of the fiduciary proposing the settlement." Healthco, 136 F.3d at 50.

"When augmentation of an asset involves protracted investigation or potentially costly litigation, with no guarantee as to the outcome, the trustee must tread cautiously—and an inquiring court must accord him wide latitude should he conclude that the game is not worth the candle." LeBlanc v. Salem (In re Mailman Steam Carpet Cleaning Corp.), 212 F.3d 632, 635 (1st Cir.2000). The duty of the Chapter 7 trustee in

considering whether to settle a claim is "... to reach an informed judgment, after diligent investigation, as to whether it would be prudent to eliminate the inherent risks, delays and expense of prolonged litigation in an uncertain case." Kowal v. Malkemus (In re Thompson), 965 F.2d 1136, 1145 (1st Cir.1992).

Despite the broad deference afforded to fiduciaries, a compromise that fails to satisfy the Jeffrey standards may be properly denied by the court. For instance, in In re C.R. Stone Concrete Contractors, Inc., 346 B.R. 32, 51 (Bankr. D. Mass. 2006), the bankruptcy court denied approval of a settlement after concluded that a complaint had at least a modest chance of providing a recovery to the estate far in excess of that provided by the compromise proposed by the trustee, particularly where counsel litigating the claims – also an administrative claimant objecting to the compromise – had agreed to pursue the claims on a contingency fee basis, and the proposed compromise left no recovery to unsecured creditors.

Lastly, where a settlement is not put forth by a fiduciary having authority and responsibility to act for the estate and who negotiated it in an arm's length transaction, but by a party who would benefit from the compromise, no deference is afforded. In re Whispering Pines Estates, Inc., 370 B.R. 452, 461 (B.A.P. 1st Cir. 2007) (reversing order confirming chapter 11 plan proposed by creditor which contained overbroad release in favor of creditor).

Rule 9019-1 ALTERNATIVE DISPUTE RESOLUTION -- MEDIATION

(a) *Assignment of a Matter to Mediation.*

The Court may direct any dispute arising in any case or proceeding (collectively, "Matter") to mediation *sua sponte* or upon the request of one or more party in interest. The Court may determine which parties in interest shall participate in the mediation. If a Matter is assigned to mediation, the parties shall comply with all applicable pleading, discovery, and other deadlines and scheduling requirements.

(b) *Appointment of a Mediator*.

The mediation participants shall select a mediator and at least one alternate from the Mediation Register of approved mediators kept by the Clerk within 7 days of the entry of the order assigning the matter to mediation. If the mediation participants cannot agree within that time, or if the Court determines that selection of a mediator by the Court is appropriate, then the Court shall appoint a mediator. Within 7 days of the selection of a mediator, the mediation participants and the mediator shall submit a proposed consent order appointing the mediator and describing the mediation procedures, including the terms of the mediator's compensation and expense reimbursement (the "Mediation Order"). Procedures that are not set forth in the Mediation Order shall be governed by agreement of the parties, by this rule, or by the mediator.

The proposed Mediation Order shall be accompanied by a verified statement by the mediator stating that such person does not hold or represent an interest adverse to the estate, except as specifically disclosed therein, and that such person is disinterested.

(c) *Mediation Procedures*.

(i) Unless the Court orders otherwise, the mediator and the mediation participants shall agree on the time and location for the initial mediation conference, which shall take place as soon as practicable after the entry of the Mediation Order, but no later than 30 days after the entry of the Mediation Order. The mediator may require the mediation participants to submit or exchange documents or information, including a mediation statement, before the initial mediation conference.

(ii) Each mediation participant that is an individual shall attend the mediation conference in person. Each mediation participant that is a government entity shall attend in person by a representative who has, to the extent practicable, authority to settle the matter. All other mediation participants shall attend the mediation conference in person

through a representative with authority to settle the matter. The mediator may permit telephonic or video participation in the mediation conference in appropriate circumstances.

(iii) The mediator shall determine the time and place for the mediation, including mediation conferences and caucuses between the mediator and a mediation participant, and the submission or exchange of documents or information. The mediator may not require a mediation participant who is represented by counsel to meet with the mediator without counsel present.

(iv) The mediator may set a deadline for the mediation participants to respond to a settlement proposal, including a settlement proposal by the mediator.

(v) Additional mediation procedures for the mediation may be agreed upon by the mediator and the mediation participants during the mediation process.

(d) *Settlement Proposals by the Mediator*.

The mediator may, but shall not be required to, make a settlement proposal to the mediation participants. A settlement proposal by the mediator that is not accepted by the mediation participants shall not be disclosed to the Court.

(e) *Failure to Comply with the Mediation Rule.*

If a mediation participant willfully fails to participate in good faith in the mediation process, then the mediator shall submit to the Clerk and serve on the mediation participants a report of the failure to participate. The report shall not be electronically filed, shall state on the first page at the top right corner that it is being submitted to the attention of the Clerk, and shall state that it is a report of a failure to mediate in good faith that should not be filed or given to the Judge. The report shall not be sent to the Judge presiding over the matter. The Clerk shall deliver the report to the Judge designated by the Chief Judge for mediation, who will take appropriate action, including holding a conference or hearing in person or telephone, and who may, in appropriate circumstances, impose sanctions.

(f) *Post-Mediation Procedures*.

(i) If the mediation participants reach an agreement, then the mediator shall serve upon the parties and file electronically with the Court a report stating that the matter has been settled.

(ii) If the mediation participants do not reach an agreement, and the mediator concludes that the mediation is at an impasse, then the mediator shall serve upon the parties and file with the Court a report stating that the mediation has reached an impasse and should be concluded.

(iii) Upon the filing of the mediator's report, the mediation will be placed in suspense and the mediator will be excused from undertaking any further actions, unless otherwise requested by the mediation participants or directed by the Court.

(g) *Withdrawal from Mediation*.

At any time, the Court may withdraw a matter from mediation if the Court determines that the mediation referral is no longer appropriate. At any time, a party in interest, the United States trustee, or the mediator may request a conference with the Court or file a motion to withdraw a matter from mediation for cause.

(h) *Mediator Compensation*.

The mediator shall be compensated on terms that are satisfactory to the mediator and the mediation participants. The mediator's compensation shall be subject to Court approval if the estate is to pay any part of the expense. The mediator and the mediation participants shall set forth the terms of the mediator's compensation in the Mediation Order. Absent agreement or order to the contrary, the mediation participants shall pay equal shares of the mediator's compensation. If the mediator and the mediation participants cannot agree on compensation terms, the Court shall fix terms that are reasonable and just. The Court may also request the mediator serve *pro bono* or on a reduced fee basis.

(i) *Qualifications of the Mediator.*

The Clerk shall maintain a Mediation Register. Appointments to the Mediation Register shall be for 5-year terms. To qualify for appointment to the Mediation Register, a person must:

(i) file an application in the form established by the Clerk;

(ii) not have been suspended from a professional organization or have had a professional license revoked, not have pending any proceeding to suspend or revoke such license, not have resigned from any applicable professional organization while an investigation into allegations of misconduct which would warrant suspension, disbarment,

or professional license revocation was pending; and not been convicted of a felony;

(iii) not have been employed by the Court during the 36-month period preceding the date of such person's appointment to the Mediation Register; and

(iv) meet the following minimum qualifications:

(A) For Lawyers Applying to be a Mediator: A lawyer must:

(1) be, or have been, a member in good standing of the New York State bar for at least 5 years;

(2) be admitted to practice in one of the district courts in the Second Circuit;

(3) have completed at least 12 hours of mediation training;

(4) be willing to undertake a minimum of 5 *pro bono* mediation assignments during the course of the 5-year term;

(5) file with the application original and current certificates of good standing from the department of the Supreme Court of New York Appellate Division in which he or she is admitted and from one of the district courts within the Second Circuit, or if retired, have been a member in good standing in such courts; and

(6) be certified by the Chief Judge.

(B) For Other Professionals Applying to be a

Mediator: A person must:

(1) be, or have been, authorized to practice for at least 5 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 occupation;

(2) be an active member in good standing and submit to the Clerk proof of his or her professional status, or if retired, have been a member in good standing, of any applicable professional organization;

(3) have completed a mediation course or courses consisting of at least 12 hours of training;

(4) be willing to undertake a minimum of five *pro bono* mediation assignments during the course of the 5-year term; and

(5) be certified by the Chief Judge.

The Chief Judge may waive any of the requirements of this subdivision for good cause set forth in the application. Each person certified as a mediator shall take an oath or affirmation before his or her appointment to the Mediation Register.

(j) *Removal from the Mediation Register*.

A person may be removed from the Mediation Register at the person's request or by the Chief Judge.

(k) *The Mediation Register*.

The Clerk shall maintain the Mediation Register at the Court's Website and in the Clerk's office. The Mediation Register shall list the persons appointed to the Mediation Register, together with a brief biography and fee information supplied by the mediator to the Clerk. The Clerk shall also maintain for public inspection the applications filed by persons appointed to the Mediation Register.

(l) *Confidentiality.*

Any oral or written statements made by the mediator, the mediation participants, or others during the mediation process shall not be disclosed by any of the mediation participants, their agents, or the mediator, except that such statements may be disclosed to a Judge designated to hear a matter under subdivision (e) of this rule. Matters not to be disclosed include, without limitation:

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

(ii) whether a participant indicated a willingness to accept a proposal for settlement made by the mediator;

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

(iv) statements or admissions made by a participant; and

(v) documents prepared for use in the mediation.

Records, reports, or other documents received by a mediator shall be confidential and shall not be provided to the Court except as required by subdivision (e) of this rule. The mediator shall not be compelled to testify or disclose any information concerning the mediation in any forum or proceeding, except as required by subdivision (e) of this rule. Unless the mediation participants and the mediator agree or the Court orders otherwise, 60 days after the mediator files a report under subdivision (f) of this rule, the mediator may discard the submissions made by the mediation participants and any other documents or information relating to the mediation.

Rule 408 of the Federal Rules of Evidence and any applicable federal or state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement discussions, mediation, or other alternative dispute resolution procedure shall apply to statements and information that may not be disclosed pursuant to this rule. Information otherwise discoverable or admissible in evidence shall not be immunized from discovery or inadmissible in evidence because it was disclosed in the mediation.

(m) *Immunity*.

The mediator shall be immune from claims arising out of acts or omissions arising

from or relating to his or her service as a Court appointee, to the maximum extent allowed by law.

REFERENCE: Federal Rule of Evidence 408

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK

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In re	Chapter 11
51 ELDERT LLC,	Case No. 10-46346-ess
Debtor.	

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PRE-HEARING ORDER

WHEREAS, on July 2, 2010, 51 Eldert LLC filed a voluntary petition for relief under Chapter 11 of the Bankruptcy Code; and

WHEREAS, on June 2, 2011, a status conference and hearing on approval of the First Amended Disclosure Statement were held at which the Debtor, the United States Trustee, and Valley National Bank appeared and were heard; and

WHEREAS, the parties dispute the value of the Debtor's property, and the Court will conduct an evidentiary hearing to determine that issue.

NOW, THEREFORE, it is hereby

ORDERED, that the parties concerned shall confer and then prepare, execute, and file with the Court on or before June 23, 2011, a joint document captioned "Joint Pre-Hearing Statement" that provides:

1. A statement of the material facts in dispute.

2. A statement of the material facts not in dispute.

3. A description of the legal and factual issues to be decided by the Court, and any anticipated dispositive motion practice.

4. The estimated length of the evidentiary hearing.

5. A statement as to whether any attempts have been made at resolving any of the

issues in dispute and any results of such attempts, and whether non-binding mediation under the Court's Alternative Dispute Resolution program, pursuant to Rule 9019-1 of the Local Rules for the United States Bankruptcy Court for the Eastern District of New York, would be of assistance.

6. A list of the exhibits to be offered by each party, and whether an objection to admissibility is anticipated.

7. A list of the fact and expert witnesses to be called by each party and a statement as to which disputed issues of fact such witness' testimony will be directed.

It is expected that a single Joint Pre-Hearing Statement will be filed. However, if a single Joint Pre-Hearing Statement cannot be filed, then the parties may file separate Pre-Hearing Statements, together with an affirmation of counsel explaining why a joint statement could not be filed, with proof that each has been served upon all parties. And it is further

ORDERED, that each party shall provide the Court with three sets of pre-marked exhibits to be offered in a tabbed and indexed binder; and it is further

ORDERED, that the parties shall appear on June 30, 2011, at 1:00 p.m., for a hearing on the valuation of the property before the Honorable Elizabeth S. Stong, United States Bankruptcy Court for the Eastern District of New York, 271 Cadman Plaza East, Courtroom 3585, Brooklyn, New York 11201.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
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In re	Chapter 7
DAVID DEBTOR,	Case No. 13-46260-ess
Debtor.	

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PAMELA PLAINTIFF,	Adv. Pro. No. 13-01030-ess
Plaintiff,	
v.	
DAVID DEBTOR,	
Defendant.	

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MEDIATION REFERRAL ORDER

WHEREAS, on January 27, 2013, Pamela Plaintiff commenced an adversary proceeding against David Debtor, seeking to determine the nondischargeability of a debt pursuant to Bankruptcy Code Section 523, and for other relief; and

WHEREAS, on May 30, 2013, the Court held a hearing at which the parties, by their respective counsel, appeared and were heard, and consented to submit certain unresolved issues in this adversary proceeding to mediation.

NOW THEREFORE, it is hereby

ORDERED, that the parties are referred to mediation pursuant to Rule 9019-1 of the Local Rules for the United States Bankruptcy Court for the Eastern District of New York; and it is further

ORDERED, that on or before June 14, 2013, the parties shall select a mediator from the

Mediation Register of approved mediators kept by the Clerk of Court and available on the Court's website, or from the register of approved mediators of the United States Bankruptcy Court for the Southern District of New York, or alternatively, the parties may also consider and select a suitably qualified mediator who is not on these panels; and it is further

ORDERED, that on or before June 14, 2013, the parties shall submit a stipulation and mediation order (a proposed form of which is annexed hereto) to be so-ordered by this Court, which authorizes the appointment of the jointly-selected mediator and sets forth the terms of the mediation; and it is further

ORDERED, that in the event that the parties are not able jointly to select a mediator on or before June 14, 2013, then they shall advise the Court in writing and a telephone conference with the Court shall be scheduled; and it is further

ORDERED, that an individual with final authority to settle this controversy and to bind the party shall attend the mediation on behalf of each party; and it is further

ORDERED, that an adjourned status conference in this case shall be held on September 20, 2013, at 9:30 a.m. at the United States Bankruptcy Court for the Eastern District of New York, 271 Cadman Plaza East, Brooklyn, New York 11201, Courtroom 3585.

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF NEW YORK
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In re	Chapter 7
DAVID DEBTOR,	Case No. 13-46260-ess
Debtor.	
----------x	
PAMELA PLAINTIFF,	Adv. Pro. No. 13-01030-ess
Plaintiff,	
v.	
DAVID DEBTOR,	
Defendant.	
----------x	

STIPULATION AND MEDIATION ORDER

IT IS HEREBY STIPULATED AND AGREED by and between the undersigned parties:

1. The parties shall participate in mediation, whereby a neutral and impartial person will assist them in attempting to reach a mutually acceptable negotiated resolution of the dispute between them (the "Mediation").

2. The parties jointly accept _____ to provide mediation services to them (the "Mediator").

3. The Mediation shall be non-binding.

4. The Mediator shall not have authority to render a decision that shall bind the parties.

5. The parties are not obligated to agree to any proposals which are made during the Mediation.

6. No party shall be bound by anything said or done during the Mediation, unless either a written and signed stipulation is entered into or the parties enter into a written and signed agreement.

7. The Mediator may meet in private conference with less than all of the parties.

8. Information obtained by the Mediator, either in written or oral form, shall be

confidential and shall not be revealed by the Mediator unless and until the party who provided that information agrees to its disclosure.

9. The Mediator shall not, without the prior written consent of both parties, disclose to the Court any matters which are disclosed to him or her by either of the parties or any matters which otherwise relate to the Mediation.

10. The Mediation shall be considered a settlement negotiation for the purpose of all federal and state rules protecting disclosures made during such conferences from later discovery or use in evidence. The entire procedure shall be confidential, and no stenographic or other record shall be made except to memorialize a settlement record. All communications and conduct, oral or written, during the Mediation by any party or a party's agent, employee, or attorney are confidential and, where appropriate, are to be considered work product and privileged. Such conduct, statements, promises, offers, views and opinions shall not be subject to discovery or admissible for any purpose, including impeachment, in any litigation or other proceeding involving the parties; provided, however, that evidence otherwise subject to discovery or admissible is not excluded from discovery or admission in evidence simply as a result of it having been used in connection with this Mediation process.

11. The Mediator and his or her agents shall have the same immunity as judges and court employees have under Federal law and the common law from liability for any act or omission in connection with the Mediation, and from compulsory process to testify or produce documents in connection with the Mediation.

12. The parties (i) shall not call or subpoena the Mediator as a witness or expert in any proceeding relating to the Mediation, the subject matter of the Mediation, or any thoughts or impressions which the Mediator may have about the parties in the Mediation; (ii) shall not subpoena any notes, documents or other material prepared by the Mediator in the course of or in connection with the Mediation; and (iii) shall not offer in evidence any statements, views, or opinions of the Mediator.

13. The Mediator's compensation shall be on such terms as are satisfactory to the Mediator and the parties, and shall be subject to Court approval if the estate is to be charged with such expense. Absent agreement or Court order to the contrary, the parties to the Mediation shall pay equal shares of the Mediator's compensation.

14. An individual with final authority to settle the matter and to bind the party shall attend the Mediation on behalf of each party.

Dated: _____

_____	_____
Plaintiff	Defendant
_____	_____
Attorneys for Plaintiff	Attorneys for Defendant

Consented to:

_____

_____
Mediator

IT IS SO ORDERED

_____
Elizabeth S. Stong
United States Bankruptcy Judge

Dated: Brooklyn, New York
_____, 2013

Model Rule 1
Mediation

(a) Types of Matters Subject to Mediation. The court may assign to mediation any dispute arising in a bankruptcy case, whether or not any adversary proceedings or contested matters is presently pending with respect to such dispute. Parties to an adversary proceeding, contested matter and a dispute not yet pending before the court, 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 U.S. Code, the Bankruptcy Rules 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. Any party may seek such delay or stay, and the court, after notice and hearing, may enter appropriate orders.

(c) The Mediation Conference.

(i) Informal Mediation Discussions. The mediator shall be entitled to confer with any or all a) counsel, b) pro se parties, c) parties represented by counsel, with the permission of counsel to such party and d) other representatives and professionals of the parties, with the permission of a pro se party or counsel to a party, prior to, during or after the commencement of the mediation conference (the “Mediation Process”). The mediator shall notify all Mediation Participants of the occurrence of all such communications, but no advance notice or permission from the other Mediation Participants shall be required. The topic of such discussions may include all matters which the mediator believes will be beneficial at the mediation conference or the conduct of the Mediation Process, including, without limitation, those matters which will ordinarily be included in a Submission under Local Rule 1(c)(iii). . All such discussions held shall be subject to the confidentiality requirements of subsection (d) of this Local Rule 1.

(ii) Time and Place of Mediation Conference. After consulting with the parties and their counsel, as appropriate, 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. The mediation conference may be concluded after any number of sessions, all of which shall be considered part of the mediation conference for purposes of this Local Rule.

(iii) Submission Materials. Each Mediation Participant (as defined below) shall submit directly to the mediator such materials (the "Submission") as are directed by the mediator after consultation with the Mediation Participants. The mediator may confer with the Mediation Participants, or such of them as the mediator determines appropriate, to discuss what materials would be beneficial to include in the Submission, the timing of the Submissions and what portion of such materials, if any, should be provided to the mediator but not to the other parties. No Mediation Participant shall be required to provide its Submission, or any part thereof, to another party without the consent of the submitting Mediation Participant. The Submission shall not be filed with the

Model Rule 1
Mediation

court and the court shall not have access to the Submission. A Submission shall ordinarily include an overview of the facts and law, a narrative of the strengths and weaknesses of a party's case, the anticipated cost of litigation, the status of any settlement discussions and the perceived barriers to a negotiated settlement.

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Unless excused by the mediator upon a showing of hardship, or if the mediator determines that it is consistent with the goals of the mediation to excuse such party, the following persons (the " Mediation Participants") 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 authority to negotiate and settle the matter on behalf of the party, and prompt access to any board, officer, government body or official necessary to approve any settlement that is not within the authority previously provided to such representative;

3) The attorney who has primary responsibility for each party's case;

4) Other interested parties, such as insurers or indemnitors, whose presence is necessary, or beneficial to, reaching a full resolution of the matter assigned to mediation, and such attendance shall be governed in all respects by the provisions of this subparagraph (c)(iv) of this Local Rule 1.

(B) Persons Allowed to Attend. Other interested parties in the bankruptcy case who are not direct parties to the dispute, i.e., representatives of a creditors committees, may be allowed to attend the mediation conference, but only with the prior consent of the mediator and the Mediation Participants, who will establish the terms, scope and conditions of such participation. Any such interested party that does participate in the mediation conference will be subject to the confidentiality provisions of Local Rule 1(d) and shall be a Mediation Participant.

(C) Failure to Attend. Willful failure of a Mediation Participant to attend any mediation conference, and any other material violation of this Local Rule, may be reported to the court by any party, and may result in the imposition of sanctions by the court. Any such report shall comply with the confidentiality requirement of Local Rule 1(d).

(v) Mediation Conference Procedures. After consultation with the Mediation Participants or their counsel, as appropriate, the mediator may establish procedures for the mediation conference.

(vi) Settlement Prior to Mediation Conference. In the event the parties reach an agreement in principle after the matter has been assigned to mediation, but prior to the mediation conference, the parties shall promptly advise the mediator in writing. If the parties agree that a settlement in principle has been reached, the mediation conference shall be continued (to a date certain or generally as the mediator determines) to provide the parties sufficient time to take all steps necessary to finalize the settlement. As soon as practicable, but in no event later that thirty (30) days after the parties report of an agreement in principle, the parties shall confirm to the mediator that the settlement has been finalized. If the agreement in principle has not been finalized, the mediation conference shall go forward, unless further extended by the mediator, or by the court.

(d) Confidentiality of Mediation Proceedings.

(i) Protection of Information Disclosed at Mediation. The mediator and the Mediation Participants are prohibited from divulging, outside of the mediation, any oral or written information disclosed by the Mediation Participants or by witnesses in the course of the mediation (the "Mediation Communications"). No person, including without limitation, the Mediation Participants and any person who is not a party to the dispute being mediated or to the Mediation Process (a "Person") , may rely on or introduce as evidence in any arbitral, judicial or other proceeding, evidence pertaining to any aspect of the Mediation Communications, including but not limited to: (A) views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (B) the fact that another party had or had not indicated willingness to accept a proposal for settlement made by the mediator; (C) proposals made or views expressed by the mediator; (D) statements or admissions made by a party in the course of the mediation; and (E) documents prepared for the purpose of, in the course of, or pursuant to the mediation. In addition, without limiting the foregoing, Rule 408 of the Federal Rules of Evidence, any applicable federal or state statute, rule, common law or judicial precedent relating to the privileged nature of settlement discussions, mediations or other alternative dispute resolution procedures shall apply. Information otherwise discoverable or admissible in evidence does not become exempt from discovery, or inadmissible in evidence, merely by being used by a party in the mediation. However, except as set forth in the previous sentence, no Person shall seek discovery from any of the Mediation Participants with respect to the Mediation Communications.

(ii) Discovery from Mediator. The mediator shall not be compelled to disclose to the court or to any Person outside the mediation conference any of the records, reports, summaries, notes, Mediation Communications or other documents received or made by the mediator while serving in such capacity. The mediator shall not testify or be compelled to testify in regard to the mediation or the Mediation Communications 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 final report as required herein, or from otherwise complying with the obligations set forth in this Local Rule 1.

(iii) Protection of Proprietary Information. The Mediation Participants and the mediator shall protect proprietary information. Proprietary information should be designated as such by the Mediation Participant seeking such protection, in writing, to all Mediation Participants, prior to any disclosure of such proprietary information. Such designation shall not require the disclosure of the proprietary information, but shall include a description of the type of information for which protection is sought. Any disputes as to the protection of proprietary information may be decided by the court.

(iv) Preservation of Privileges. 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 parties, or any of them, but not to the court.

(f) Post-Mediation Procedures.

(i) Filings by the Parties. If an agreement in principle for settlement is reached (even if the agreement in principle is subject to the execution of a definitive settlement agreement or court approval, and is not binding before that date) during the mediation conference, one or more of the Mediation Participant shall file a notice of settlement or, where required, a motion and proposed order seeking court approval of the settlement.

(ii) Mediator's Certificate of Completion. After the conclusion of the mediation conference (as determined by the mediator), the mediator shall file with the court a certificate in the form provided by the court ("Certificate of Completion") notifying the court about whether or not a settlement has been reached. Regardless of the outcome of the Mediation Process, the mediator shall not provide the court with any details of the substance of the conference or the settlement, if any.

(iii) If the Agreement in Principle is not completed. If the parties are not able or willing to consummate the agreement in principle that was reached during the mediation conference, and the agreement in principal never becomes a binding contract, the substance of the proposed settlement shall remain confidential and shall not be disclosed to the court by the mediator or any of the Mediation Participants.

(g) Withdrawal from Mediation. Any matter assigned to mediation under this Local Rule may be withdrawn from mediation by the court at any time. Any Mediation Participant may file a motion with the court seeking authority to withdraw from the mediation or

seeking to withdraw any matter assigned to mediation by court order from such mediation.

(h) Termination of Mediation. Upon the filing of a mediator's Certificate of Completion under Local Rule 1(f) (ii) or the entry of an order withdrawing a matter from mediation under Local Rule 1(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 Process 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. However, the court shall always have the discretion to reinstitute the Mediation Process if the court determines that such action is the most appropriate course under the circumstances. In such event, Local Rule 1 and Local Rule 2 shall apply in the same manner as if the mediation were first beginning pursuant to Local Rule 1(a).

(i) Applicability of Rules to a Particular Mediation. The court may, upon request of one or more parties to the mediation, or on the court's own motion, declare that one or more of provisions of this Local Rule may be suspended or rendered inapplicable with respect to a particular mediation except Local Rule 1(d) and Local Rule 1(j). Otherwise these Local Rules shall control any mediation related to a case under the Bankruptcy Code.

(j) Immunity. Aside from proof of actual fraud or other willful misconduct, mediators shall be immune from claims arising out of acts or omissions incident or related to their service as mediators appointed by the bankruptcy court. See, Wagshal v. Foster, 28 F.3d. 1249 (D.C. Cir. 1994). Appointed mediators are judicial officers clothed with the same immunities as judges and to the same extent set forth in Title 28 of the United States Code.

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ADR Meets Bankruptcy: Cross-Purposes or Cross-Pollination?

*387 SOME REFLECTIONS FROM THE BENCH ON ALTERNATIVE DISPUTE RESOLUTION IN BUSINESS BANKRUPTCY CASES

Elizabeth S. **Stong**

> The notion that most people want black-robed judges, well-dressed lawyers and fine paneled courtrooms as the setting to resolve their disputes is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.
>
> Chief Justice Warren E. Burger,
>
> *Our Vicious Legal Spiral*, 16 JUDGES J. 23, 49 (Fall 1977).

More than ten years ago, I wrote a short article for the ALI-ABA publication *The Practical Litigator* entitled "A User's Guide to Alternative Dispute Resolution in Business Cases." At the time, I was a commercial litigator at a large New York-based law firm, and my practice was concentrated in complex business cases, generally representing defendants. My interest in alternative dispute resolution flowed from my growing conviction that the best litigator should know how to take a problem-solving approach to a case. I also began to see that often, even an imperfect settlement can be a better outcome for the client than a good trial. I became trained as a mediator, joined the mediator panel of the federal district court, and helped to establish a court-annexed **mediation** program for New York State Supreme Court's Commercial Division, in Manhattan. I also served from time to time as an arbitrator. But overwhelmingly, my practice and perspective remained that of a big-firm litigator.

Fast forward about ten years, to late 2009. It has been my privilege to serve as a bankruptcy judge for more than six years, since September 2003. I go to work in a federal courthouse, I wear a robe rather than a suit in the courtroom, and I conduct conferences, motions, and trials nearly every day. I have presided over thousands of bankruptcy cases, and issued more orders determining more issues than I can count. Our docket, like many courts' dockets, is largely made up of individual consumer cases, and my work is divided about equally between consumer and business cases.

It would be reasonable to assume that having traversed the divide between bar and bench, and having become part of the adjudicatory process--the very dispute resolution process to which **mediation** and other ADR techniques posit themselves as "alternative"--I would no longer look to ADR tools as effective means of dispute resolution. But it would also be wrong.

The fact is, as a bankruptcy judge, I see more, not fewer, reasons for counsel, clients, and parties to consider ADR tools and techniques, including facilitated negotiations and **mediation**, to resolve and even to avoid disputes. The purpose of this article is to revisit some of the topics from ten years ago with the additional *388 per-

spective of the bench, and to consider how these topics apply in the simultaneously broad and specialized context of dispute resolution in business bankruptcy cases.

I. ADR: THE BIG PICTURE

Ask most lawyers to define alternative dispute resolution and you'll usually get a list of the formal and informal processes for resolving disputes between parties that do not entail bringing the dispute to closure in a court proceeding. Ask most judges and you'll hear answers ranging from deep knowledge and engagement in the issues to a gentle mistrust that such processes belong in, or even near, a courthouse.

Ten years ago, I wrote that ADR is more than the processes it encompasses, and that in the business dispute setting especially, the best way to think about ADR is in terms of its goals. The goals of ADR in business disputes always include resolving the parties' dispute, but they often go farther. An important goal in one situation may be preserving the parties' relationship. In another it may be managing and minimizing the costs and burdens of the dispute. And in yet another it may be addressing the underlying issues that gave rise to the dispute so that future disputes can be avoided. Or in the most common case there may be a combination of goals, some more apparent than others.

As a bankruptcy judge, this seems even truer. The bankruptcy process is well served by counsel and parties who know their case and the applicable law, understand the business, and can navigate effectively the bankruptcy process as set forth in the Bankruptcy Code and Rules. But it is also essential that counsel appreciate their role as problem solvers. In a federal civil action, the parties may litigate for months or even years without encountering the judge. In a business bankruptcy case, the parties may appear in court on “first-day” motions within the first hours or days after the petition commencing the case is filed. Those hearings address matters that are the life-blood of the company's potential reorganization, including whether the company may use its cash collateral, pay its workers, and borrow funds to keep the door open and the lights on. These “first-day” motions may begin as contested matters and end up in a consensual resolution, often with significant input from the bankruptcy judge.

So how do these goals of ADR measure up against the problem-solving goals of the bankruptcy process? One commonly articulated goal is preserving the parties' relationships. In the reorganization of a business, the company's financial distress may have damaged key relationships with any or all of lenders, suppliers, landlords, and customers. The failure to repair any one of these relationships can spell disaster for the company's prospects to reorganize successfully. Another often-cited goal is keeping costs down. Of course, this is essential in a bankruptcy case. And a third goal can be to address the underlying issues that caused the difficulties in the first place-- this is a fundamental challenge in a business restructuring. If the company ***389** does not address the underlying causes of its financial distress, it is likely not to succeed in its reorganization efforts.

Courts have been supportive of ADR initiatives by parties to disputes before them. As one court observed:

> We recognize that [ADR] is an evolving concept and that new mechanisms, often borrowing on more traditional ones, are being created. Although we would not likely be inclined to enforce an agreement to resolve a dispute through trial by combat or ordeal, we do not wish to put a straightjacket on the creative development of new forms of [ADR] that individual parties, or industries, find useful and preferable to litigation.

Annapolis Prof'l Firefighters Local 1926 v. City of Annapolis, 642 A.2d 889, 895 n. 6 (Md. Ct. Spec. App.

1994).

So ten years ago, as a litigator, I wondered why so many lawyers seem to mistrust ADR for the resolution of business disputes. And I questioned why so many ADR practitioners, including "neutrals" who conduct ADR processes such as **mediation**, arbitration, and early neutral evaluation, mistrust business lawyers who seek to have a role in ADR? Now I would ask two additional questions: why do some courts seem to avoid ADR as a case management tool, and why are some ADR professionals, including arbitrators and mediators, concerned about courts embracing these techniques?

Then and now, my answer is the same--not for any good reason. Courts can only improve their case management by understanding and incorporating ADR tools where appropriate. These are simply additional tools, and potentially very effective tools, to achieve a creative, efficient, and productive resolution to a business problem.

Similarly, skilled ADR professionals have nothing to fear from the involvement of courts in the dispute resolution process. A judge who understands the **mediation** process can help the parties address both their positions and their interests. It is often easier for a judge than for counsel to identify both strengths and weaknesses of the parties' positions, and to suggest the possibility of settlement. The court can also remind the parties that the alternative to a negotiated resolution is a prompt hearing or trial date and a decision that will leave at least one party, and perhaps many parties, worse off than a negotiated resolution.

As a lawyer, I found that well-prepared lawyers can be among the most highly skilled and creative negotiators and can provide needed information and guidance to clients attempting to solve their business disputes. They are also most aware of their clients' "BATNA"--the best alternative to a negotiated agreement.

As a bankruptcy judge, it's apparent that it would be impossible to function effectively as a business bankruptcy lawyer without a problem-solving approach to disputes and the skills necessary to accomplish that result, including through the ***390** thoughtful use of ADR. And courts should be able to promote, not inhibit, consensual resolutions through case management. Bankruptcy litigation moves at an accelerated pace, but it still imposes significant burdens in attorneys' fees, client time, and negative publicity. It can damage a company's business relationships at a time when they may already be fragile. And there is likely to be the distraction of uncertainty about the ultimate outcome. Equally important, courtroom contests can shift the parties' focus toward past disagreements rather than future opportunities, and can damage or even destroy the parties' prospects for a reorganization that would be a mutually beneficial outcome.

II. THE HISTORICAL BACKGROUND OF ADR

In many respects, the goals and processes of ADR are not new. Since 1937, the Federal Rules of Civil Procedure have authorized courts to conduct judicial settlement conferences, with the aim of achieving early and cost-effective settlements. In its present form, Rule 16(a)(1) authorizes the court to direct the attorneys for the parties and any unrepresented parties to attend a conference "for such purposes as ... expediting the disposition of the action." Rule 16(c)(2)(I) also directs that, at the pre-trial conference, the court may take "appropriate action" as to "settling the case and using special procedures to assist in resolving the dispute when authorized by statute or local rule." The Rule further provides that the court may require "a party or its representative [to] be present or reasonably available by other means to consider possible settlement." FED. R. CIV. P. 16(c). *See generally Wagshal v. Foster*, 28 F.3d 1249, 1252-53 (D.C. Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995) (comparing process of **mediation** to obligations under Rule 16); *Nick v. Morgan's Foods, Inc.*, 270 F.3d 590,

595 (8th Cir. 2001); *Negron v. Woodhull Hosp.*, 173 F. App'x 77, 79 (2d Cir. 2006); *Bulkmatic Transp. Co. v. Pappas*, No. 99Civ. 12070(RMB)(JCF, 2002 WL 975625, at *2 (S.D.N.Y. May 9, 2002). Even in its original 1937 incarnation, Rule 16 authorized courts to "direct the attorneys for the parties to appear before it for a conference to consider ... [t]he simplification of the issues [and] [s]uch other matters as may aid in the disposition of the action." FED. R. CIV. P. 16, *as adopted*, 308 U.S. 645; Cong. Rec., vol. 83, pt. 1, p. 13, Exec. Comm. 905; H. Doc. 460 and H. Doc. 588, 75th Cong. (1938).

Rule 16's provisions authorizing courts to promote settlement and "resolv[e] the dispute" through case administration are made applicable to bankruptcy litigation by Federal Rule of Bankruptcy Procedure 7016 and its predecessor, Bankruptcy Rule 716, which provide that Rule 16 applies in bankruptcy adversary proceedings. As the 1973 Advisory Committee's Note to Rule 716 explains, "[t]he economies of time and money and greater efficiency in the judicial process attainable by the use of pre-trial procedures should be available in adversary proceedings in bankruptcy cases." *See* Leon R. Yankwich, *The Impact of the Federal Rules of Civil Procedure in Bankruptcy*, 42 CAL. L. REV. 738, 756 (1954); Bankr. R. 716 advisory ***391** committee's note (1973, superseded 1983). *Compare* Bankr. R. 716 (1973) *with* FED. R. BANKR. P. 7016 (no substantive change).

Congress dramatically expanded the role of ADR in the federal courts in 1990, with the adoption of the Civil Justice Reform Act ("CJRA"), 28 U.S.C. §§ 471-82. Recognizing that the expansion of ADR was one of the "cornerstone principles" of the CJRA, the Senate Judiciary Committee stated:

> [T]he last 15 years have witnessed the burgeoning use of dispute resolution techniques other than formal adjudication by courts .... While the data is not yet complete, studies of various ADR programs have shown generally favorable results .... As the Federal Courts Study Committee concluded: 'Experience to date provides solid justification for allowing individual federal courts to institute ADR techniques in ways that best suit the preferences of bench, bar and interested publics ....' The [Judiciary] committee strongly agrees with this assessment.

S. REP. NO. 101-416, at 28 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6802, 6831.

In the CJRA, Congress required every federal district court to adopt a Civil Justice Expense and Delay Reduction Plan, and directed each district court, in developing its Plan, to consider whether "to refer appropriate cases to [ADR] programs." 28 U.S.C. § 473(a)(6) (2006). Some courts have reached well beyond the requirements of the plans adopted under the CJRA, and have specifically required lawyers to review the relative costs and merits of ADR and litigation with their clients. *See, e.g., Schwarzkopf Tech. Corp. v. Ingersoll Cutting Tool Co.*, 142 F.R.D. 420, 423-24 (D. Del. 1992) (in response to the CJRA, court directed attorneys to certify that they had discussed with their clients both the probable expense of the litigation and any available ADR measures that might resolve the dispute more efficiently).

In 1998, Congress expanded on these steps and passed the Alternative Dispute Resolution Act of 1998, codified at 28 U.S.C. §§ 651-58. The Act amends the United States Code to require that each district court authorize the use of ADR processes in all civil actions. 28 U.S.C. § 651(b) (2006). The Act further encourages the use of ADR by mandating that district courts require litigants in all civil actions to consider the use of ADR at "an appropriate stage in the litigation." 28 U.S.C. § 652(a) (2006).

Bankruptcy courts have similarly embraced the notion of court-annexed ADR. Many courts have adopted court-annexed **mediation** programs to assist in managing the heavy caseload that we face and to promote the productive resolution of disputes. Some courts have adopted specialized ADR procedures for certain kinds of

disputes, such as preference actions. In 2004, for example, the bankruptcy court in the District of Delaware, where many large business bankruptcy cases are filed, adopted a General Order providing for the mandatory **mediation** of claims to avoid ***392** a preferential transfer. General Order of the U.S. Bankruptcy Court for the District of Delaware dated April 7, 2004 (Walrath, C.J.). That same year, the district court in the District of Delaware, where appeals from bankruptcy court decisions are generally heard, adopted an order providing for the mandatory **mediation** of bankruptcy appeals. General Order of the U.S. District Court for the District of Delaware dated July 23, 2004 (Robinson, C.J.).

III. FACILITATIVE AND EVALUATIVE ADR

As a lawyer, I wrote that ADR can take many forms, and there may be as many styles of ADR as there are business problems. Now, as then, commentators agree that two general and complementary approaches exist: facilitative ADR and evaluative ADR. From a lawyer's perspective, facilitative ADR is often shorthand for **mediation**, and evaluative ADR is understood to refer to processes that lead to an assessment or decision, including early neutral evaluation and arbitration.

Taking the view from the bench, it's clear that facilitative and evaluative techniques complement each other in alternative dispute resolution--and also exist in case management, especially in a business reorganization case, where the case may require an immediate conference on an unexpected impasse in the parties' negotiations at one moment, a prompt evidentiary hearing and decision at another, and a full day for hearings and caucuses among the parties at the next. That is, the spectrum of approaches from facilitative to evaluative dispute resolution is analogous to the range of roles that may be assumed by a bankruptcy judge in a business bankruptcy case.

What is facilitative ADR? In a facilitative ADR effort, the neutral encourages the parties to communicate with each other and to assess their own interests and the realistic prospects for a settlement. In a purely facilitative **mediation**, the neutral does not opine as to how the dispute should be resolved, or what a likely outcome would be in court. Rather, the neutral emphasizes that the parties control the process, and encourages the parties to develop their own resolution to the dispute.

How does facilitative ADR compare with an evaluative process? As a lawyer, I wrote that in an evaluative ADR session, the neutral may assume a role that is much more akin to the role conventionally undertaken by a judge, and provide the parties with an assessment of the merits of some or all aspects of the case. The mediator's assessment may come in the form of a mediator's proposal of a possible framework and terms for settlement. Some forms of ADR are explicitly evaluative, such as arbitration and early neutral evaluation, and the objective of the ADR proceeding is for the neutral, as arbitrator or evaluator, to assess and even decide the dispute. I also noted that there are risks associated with evaluation because the parties may feel that the neutral is taking sides. *See generally* Kimberlee K. Kovach & Lela P. Love, *"Evaluative" **Mediation** is an Oxymoron*, 14 ALTERNATIVES 31, 31 (1996); E. Patrick McDermott & Ruth Obar, *"***393**What's Going On" in **Mediation**: An Empirical Analysis of the Influence of a Mediator's Style on Party Satisfaction and Monetary Benefit*, 9 HARV. NEGOT. L. REV. 75, 97 (2004). One or both parties may feel that the neutral has underestimated the merits of their positions. At a minimum, one or both parties may feel that the neutral has prejudged, or misjudged, the dispute to its disadvantage, and may conclude that the **mediation** has failed.

Now, after six years on the bench, I appreciate that in the business bankruptcy context, the role of the judge is both facilitative and evaluative, so the comparison may not be so stark. And in a complex business bankruptcy dispute, a mediator may combine aspects of facilitation and evaluation to get the best results. In this setting, the

neutral's evaluation of the merits of the dispute, including the parties' likelihood of success in court and the associated timetable and uncertainty, may well prove a potent catalyst for the ultimate resolution of the dispute. This may be especially true when the mediator is a judge, and therefore viewed by the parties as having special insight into these issues. The mediator's assessment may be based on the record of the case, written submissions provided by the parties, oral statements made at the **mediation** session by the parties or their attorneys, and the mediator's own background and experience in the field. And it may be offered in a conference among all of the participants or in a caucus with one of the parties.

When I mediate as a judge, I am reluctant to offer an assessment or proposal too early in the process. But once a framework has been established for productive discussions, a judicial "mediator's proposal" to bridge the gap has often helped parties to overcome an impasse. While this can take place in a conference among all of the participants or in a caucus with one of the parties, the fact that we are proceeding in a courtroom generally leads me to take this up with parties individually--both so that they can tell me what I may be overlooking, and to avoid the impression that I am "ruling" in the matter. The neutral's evaluation of aspects of the parties' positions often becomes the starting point, and even the destination, for settlement.

IV. ADR TOOLS: MEDIATION, ARBITRATION, EARLY NEUTRAL EVALUATION, AND MORE

Ten years ago, it seemed useful to review the basic ADR tools from a lawyer's perspective--**mediation**, arbitration, and early neutral evaluation. In bankruptcy court, **mediation** is overwhelmingly the preferred process in court-annexed ADR programs, but a review of the basic attributes of these three processes remains helpful.

A. Mediation

Mediation is a private, confidential, structured process where parties are joined by a neutral mediator in a structured session aimed at assisting the parties to reach a negotiated resolution to their dispute. One court has described **mediation** as "a process in which a mediator facilitates communication and negotiation between ***394** parties to assist them in reaching a voluntary agreement regarding their dispute." *Cook Children's Med. Ctr. v. New England PPO Plan of Gen. Consol Mgmt.*, 491 F.3d 266, 276 (5th Cir. 2007) (quoting UNIF. MEDIATION ACT § 2 (2001)).

Courts may direct parties to participate in **mediation**, but only the parties can reach an agreement in **mediation**. Settlements reached through **mediation** are often broader in scope than purely economic settlements of lawsuits, and creative mediators, lawyers, and parties can achieve results that could not be directed by a court. As another court found, "**mediation** stands in stark contrast to formal adjudication, and even arbitration, in which the avowed goal is to uncover and present evidence of claims and defenses in an adversarial setting." *State v. Williams*, 866 A.2d 1258, 1266 (N.J. 2005); *see In re Yellowstone Mountain Club, LLC*, 410 B.R. 659, 663 (Bankr. D. Mt. 2009) ("Perhaps with [the mediator's expertise], the parties may reach some realistic and consensual middle ground in this case ...."). Courts have also noted that "**mediation** is the one option which is most likely to preserve an ongoing business relationship that might otherwise break down during a more acrimonious adversarial proceeding." *Poly Software Int'l, Inc. v. Su*, 880 F. Supp. 1487, 1494 n.10 (D. Utah 1995).

Although there is plenty of room for creativity in structuring the **mediation** process, it generally has several defined phases. Before the parties meet with the mediator, they may submit written statements of their positions on the relevant factual and legal issues. An effective submission also provides the context necessary to under-

stand the interests that underlie the dispute. These submissions are generally confidential, and provided only to the mediator. The mediator may conduct telephone conferences with counsel and the parties to become familiar with the issues and the status of the parties' own negotiations.

When I mediate as a judge, I am always interested in any written submissions that the parties may choose to make, but I also pay close attention to the docket in the case and in any related proceedings. Often, I speak with the parties both together and separately before convening an in-person joint session, in order to hear their perspectives on the law and the facts, and also to understand their interests and the opportunities and potential obstacles to a settlement.

At the **mediation**, the mediator generally opens the proceedings with a description of his or her role and the confidentiality of the proceedings. Next, each side may make an opening statement. Skilled lawyers recognize that the audience for this statement includes the mediator, the opposing lawyer, and the client. Witnesses are not called, rules of evidence do not apply, and cross-examination does not occur.

The mediator may ask for a caucus with one of the parties and that party's attorney, with only the attorneys, or perhaps even only the parties. Caucuses provide additional or more complete information about the facts, a party's needs and positions. They also provide an opportunity to test possible methods for resolution. Communications during a caucus are not shared with other participants in the **mediation** unless the participants specifically authorize the mediator to do so.

***395** How does this change when the mediator is a judge, and the setting is a courtroom? Mediating as a judge creates special opportunities, and perhaps also some special challenges. Judges usually function as decision-makers, and assess the law and the facts on a daily basis. In a bankruptcy court, it's not unusual for a judge to determine dozens of matters in a single motion calendar. This role may give the judge greater credibility than another mediator, and parties may be less willing to take, or more easily persuaded to move away from, unreasonable positions in that setting.

In addition, counsel and clients alike appreciate that a federal courthouse is a special setting, and they take the process seriously. At the same time, a judicial **mediation** in a courtroom is still **mediation**, not adjudication--I often note at the outset that nothing can happen to a party unless that party agrees. I open the session on the record, taking the appearances of all who are present, and then ask whether anyone would like to state anything on the record, noting that it is absolutely not required to do so. We then go off the record for the hard work of the **mediation** session, beginning jointly, and breaking into caucus as appropriate.

Mediation sessions can last hours or days, and if the matter is complex, they may be scheduled over a period of weeks or even months. Telephone sessions, sessions with a single party and its counsel, and sessions with counsel only, may be conducted between joint sessions. **Mediation** may open a dialog among the parties that leads to settlement on its own. Most **mediations** end in a settlement of some or all of the issues. As one commentator notes, "[i]t is generally agreed that 75 percent to 90 percent of cases that reach the **mediation** table will settle there." Michael G. Ornstil, *Nailing Down **Mediation** Agreements*, 32 TRIAL 18 (June 1996); *see* MASSACHUSETTS SUPERIOR COURT CIVIL PRACTICE MANUAL § 10.1 (2d ed. 2008) ("The importance of discussing ADR alternatives is underscored by many studies, which have indicated that the success rate for **mediation** is approximately 75 to 85 percent."); Wayne D. Brazil, *Thoughts About Spiritual Fatigue: Sustaining Our Energy by Staying Centered*, 2008 J. DISP. RESOL. 411, 420 (2008) ("The data [that the Northern District of California] collects about the **mediations** it sponsors ... indicate that, while about 60% of the cases settle

through our **mediations**, some 80% of the parties and lawyers believe that overall, ... the benefits of being involved in the **mediation** process outweigh the costs.") (quotation omitted); Nicole L. Waters & Michael Sweikar, *Efficient and Successful ADR in Appellate Courts: What Matters Most?* 62 DISP. RESOL. J. 42, 44 (Aug.-Oct. 2007) ("[I]n one study of three California early **mediation** programs ... and two voluntary programs in the Superior Courts [approximately] 7,900 cases attended and participated in **mediation**. Sixty percent of those cases settled as a direct result of **mediation**."); Sylvia Shaz Shweder, *Judicial Limitations in ADR: The Role and Ethics of Judges Encouraging Settlements*, 20 GEO. J. LEGAL ETHICS 51, 57 n.42 (2007) (reporting that approximately sixty percent of cases in the Eastern District of New York settle after **mediation**).

***396** *B. Arbitration*

Federal policy strongly favors arbitration, as reflected in the Federal Arbitration Act, 9 U.S.C. §§ 1-16. *See, e.g., Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 268 (1995) (the FAA applies to all disputes, up to the the maximum limit of Congress' power under the commerce clause); *Kowalewski v. Samandarov*, 590 F. Supp. 2d 477, 489 (S.D.N.Y. 2008) ("The Second Circuit has ... recognized that because of the strong federal policy favoring arbitration ... doubts as to whether a claim falls within the scope of [the] agreement should be resolved in favor of arbitrability ... [A]rbitration must not be denied unless a court is positive that the clause it is examining does not cover the asserted dispute.") (citations omitted).

Business contracts often include a provision requiring that disputes arising under the contract must be resolved in arbitration, and courts routinely enforce such provisions when they are challenged. At least one court has found that "'arbitration' in the FAA is a broad term that encompasses many forms of dispute resolution," such as arbitration and early neutral evaluation. *Fisher v. GE Med. Sys.*, 276 F. Supp. 2d 891, 893 (M.D. Tenn. 2003) (quotations omitted). Many state and federal courts incorporate some form of arbitration into their court-annexed ADR programs.

Arbitration is similar in many respects to a trial. Discovery may be available to the parties before the hearing. The arbitrator may hold a pre-hearing conference. Evidence and arguments are presented to the arbitrator, and witnesses may be called to testify and to be cross-examined. Depending on the forum procedures and the arbitrator's practice, the rules of evidence may not be strictly applied. Ex parte contacts with the arbitrator are not allowed, and while the arbitrator may encourage the parties to consider settlement, the arbitrator cannot become involved in settlement discussions. After the hearing is completed, the arbitrator issues a decision that is binding on the parties and enforceable in a court.

C. Early Neutral Evaluation

Early neutral evaluation ("ENE") has been incorporated as an option into several court-annexed ADR programs. ENE aims to provide the parties with a neutral, expert assessment of the strengths and weaknesses of their respective positions.

In a typical ENE proceeding, the parties, through their lawyers, make written submissions setting forth their positions and the supporting evidence. Additional presentations may be made at a face-to-face meeting with the neutral. Following the submission of evidence and argument, the ENE neutral provides a non-binding assessment of the merits of the parties' respective positions, either orally or in writing. As in arbitration, the neutral provides an assessment of the merits of the dispute, but unlike arbitration, the neutral's assessment is not bind-

ing. And like **mediation**, the process is informal and not bound by established processes, but ***397** unlike **mediation**, the role of the neutral is explicitly evaluative. After the parties hear the neutral's evaluation, they may well proceed to settlement, using the neutral's evaluation as a starting point for meaningful compromise.

D. "Med-Arb"

"Med-arb" is a hybrid procedure that combines **mediation** and arbitration. In the usual med-arb proceeding, **mediation** is attempted, but if it is unsuccessful, then the parties move to arbitration, often before the same neutral who served as mediator. The arbitration may be binding or non-binding. In a binding arbitration, the arbitrator's decision ends the matter. In non-binding arbitration, if the arbitrator's decision is not satisfactory to either side, the parties may return to litigation and trial.

E. Summary Jury Trials and Mini-Trials

Summary jury trials and mini-trials are two additional forms of ADR. Here, the parties conduct mock trials before a jury or a judge, and receive an evaluation of the case based upon their presentations. Like arbitration, these proceedings have much in common with a trial, and they can be costly. Like ENE, these proceedings can assist the parties in gaining a realistic assessment of the strengths and weaknesses of their legal and factual claims.

V. THE ROLE OF THE ADR NEUTRAL

If the parties have the ability to choose the ADR neutral, either from a court panel or from a private service, what attributes should they seek out? One commentator, Judge Harold Baer, Jr. of the Southern District of New York, identified several important qualities in a mediator, including patience, the ability to listen, and the ability to make the parties feel at home. Hon. Harold Baer, Jr., ***Mediation**--Now is the Time*, 21 LITIGATION 5, 6 (Summer 1995). (It may be that not only a mediator, but also a judge, would be well served by these qualities.) The specialized and accelerated nature of the bankruptcy process, and the complex issues presented in many business reorganizations, suggest that some knowledge of financial matters and perhaps even the particular business environment, as well as the ability to move quickly without sacrificing the patience necessary for a productive process, are also important attributes.

Some view the characteristics of a successful mediator as quite different from those of a successful arbitrator. One commentator describes the difference as follows:

> In arbitration, the neutral employs mostly "left brain" or "rational" mental processes--analytical, mathematical, logical, technical ***398** administrative; in **mediation**, the neutral employs mostly "right brain" or "creative" mental processes--conceptual, intuitive, artistic, holistic, symbolic, emotional .... Because the role of the mediator involves instinctive reactions, intuition, keen interpersonal skills, the ability to perceive subtle psychological and behavioral indicators, in addition to logic and rational thinking, it is much more difficult than the arbitrator's role to perform effectively. It is fair to say that while most mediators can effectively perform the arbitrator's function, the converse is not necessarily true.

John W. Cooley, *Arbitration vs. **Mediation**--Explaining the Differences*, 69 JUDICATURE 263, 263-64 (1986).

These considerations raise an interesting question for court-annexed **mediation** programs in which judges of the court may be appointed to serve as mediators in cases before other judges of the court. Our court and others have made this option available, and long before the CJRA, judges referred matters for settlement conference purposes to other judges of their court. Can a judge serve as an effective mediator or "settlement judge"? The answer seems to be yes, but only if the judge remains keenly mindful of the different role that he or she has taken on. The judge's role in deciding a dispute is challenging indeed, but the judge-mediator's role in facilitating a productive negotiation among the parties can be vastly more difficult--after all, when the judge is presiding and rendering a decision, no-one but the judge needs to agree on the outcome. Consensus is desirable, but a decision is inevitable. By contrast, in **mediation**, the judge may bring knowledge, perspective, and process skills to the role of mediator, but he or she lacks the ability to render a decision.

The neutral's training and experience with the ADR procedures that the parties intend to use are also important factors to consider. Many courts have mandatory **mediation** programs, but not all courts require that the court-appointed mediators have training and experience in **mediation** skills. The court-annexed ADR programs in the U.S. District and Bankruptcy Courts for the Southern and Eastern Districts of New York require such training. *See* Richard C. Reuben, *The Lawyer Turns Peacemaker*, 82 A.B.A. J. 54, 60-61 (Aug. 1996) (discussing the risks attendant to the provision of ADR services by untrained neutrals). And the trend favors training in these process skills--ten years ago, the court-annexed ADR program operated by the Commercial Division of New York Supreme Court had no training requirement at all, but now that court and all New York State courts require mediators in court-annexed **mediation** programs to have completed a minimum of forty hours of approved training and recent experience mediating cases in the relevant subject area. *See* Administrative Order of the Chief Administrative Judge of the Courts, Part 146.4(b) (June 18, 2008). The skills necessary to be an effective mediator are, in many respects, quite different from the skills acquired by a seasoned litigator, so years or even decades of experience as a courtroom litigator ***399** may not be a sign that a potential mediator can be effective. And as noted above, they can also be quite different from the skill set generally employed by a judge.

Experience in the particular subject matter can also assist an ADR neutral in performing effectively. For example, in the case of early neutral evaluation, a neutral that is recognized in the field may be able to give a far more credible assessment of the parties' positions than a neutral that is unfamiliar with the area. For similar reasons, a judge who is serving as a mediator may be able to provide an assessment of the strengths and weaknesses of the parties' positions with some authority. A neutral that is closely identified with a particular side of an issue--for example, a lawyer who represents exclusively landlords or tenants in a landlord-tenant dispute, or a lawyer who represents exclusively employees or management in employment litigation--might be perceived by the other side as biased.

As a lawyer, I found that lawyers had an important role to play in selecting the neutral. Much of a lawyer's skill and training is aimed at identifying the issues and arguments on behalf of the client, and at tailoring the presentation of the matter to the audience, whether adversary, judge, or jury. Where the parties have a role in selecting the neutral, the lawyer can contribute to the success of the proceedings by applying these skills, and even instincts, to this task.

As a judge referring my own cases to **mediation**, I have been asked to assist the parties in selecting a mediator from our court's roster. Input from the parties is critical--are there conflicts issues to be aware of? Is there a history between the parties that is likely to make one mediator more effective than another? What is the reason for the impasse, and why have the parties not been able to overcome these issues and reach a settlement on their

own? Sometimes the most valuable information can be discussed candidly among the attorneys, but cannot be taken up with the judge.

CONCLUSION

Ten years ago, I concluded that ADR has much to offer in the resolution of business disputes. Now I would add that ADR has much to offer in the effective management of business bankruptcy cases. Business reorganizations are more likely to succeed when all of the parties pursue not only their legal positions, but also their interests. The prospect of a successful reorganization may be lost if the parties spend their time in contentious and costly litigation about past events, rather than productive engagement about future prospects that may be mutually beneficial.

In each of the principal forms of ADR that are used in court-annexed ADR programs--**mediation**, arbitration, and ENE--skilled lawyers who are familiar with the effective use of ADR techniques can dramatically enhance the likelihood of success of the ADR process. Equally important, bankruptcy courts that are effective in the targeted use of court-annexed ADR programs, including **mediation**, can enhance the likelihood of success of business reorganizations, and reduce the costs of the process. And ADR professionals should embrace those efforts.

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Mediation Matters

By Louis H. Kornreich[1]

Achieving a Balance Between Absolute Neutrality and a Participant's Desires in Mediation

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This is not another article on mediation tips, tricks or practice pointers, nor is it about the benefits of mediation in bankruptcy practice. Those benefits are well known, and mediation is now accepted as a cost-effective way of resolving all sorts of bankruptcy disputes of different sizes and complexity.

Rather, this article is about the broad meaning given to "mediation" by many of its devotees in bankruptcy practice — and the desire of many judges, lawyers and parties to engage mediators who are willing to be more than neutral facilitators. Many mediation participants in bankruptcy cases want mediators who are willing to step outside of their traditional roles if and when there is consent of the parties for case evaluation and settlement direction. For some mediators, this expectation violates a fundamental precept of mediation: absolute neutrality of the mediator. For others, it presents an opportunity to strike a balance between absolute neutrality and the desires of participants.

When "Mediation" Isn't "Mediation"

Historically, mediation has been accepted by practitioners and participants as a discrete aspect of alternative-dispute resolution (ADR) involving confidential negotiations that are willingly entered into by parties who accept the assistance of a neutral facilitator known as a mediator. By training and inclination, mediators view themselves as neutral facilitators who understand that they have not been engaged to evaluate claims and defenses or to direct a result. They also know that a settlement might not be achieved in every case.

A well-trained mediator will attempt to dispel the notion that he/she is a settlement-expeditor with pointed remarks at the pre-mediation conference, a statement at the beginning of the initial mediation session and constant reminders throughout the negotiations.[2]

Alas, such disclaimers often fall on deaf ears. Parties might say that they want to mediate, they might ask the court for a referral to mediation, they might *genuinely* want the services of a judicial or private mediator, and they might be prepared for consensual resolution of a thorny dispute for any number of reasons. However, they do not always want, expect or appreciate the services of a traditional neutral facilitator.

To the contrary, in my experience, participants in bankruptcy mediation frequently expect the mediator to point the parties in the "right" direction. Their predilection for evaluation and direction is understandable. In bankruptcy cases, resources are limited and time is precious. While under intense pressure, few participants worry about the philosophy of neutrality or the proper role of a mediator. Surely, participants want a mediator with experience and training in the art of mediation. However, if given a choice between one who is a purest when it comes to neutral facilitation and one who possesses what is known in the military as command presence, they might want to choose the latter — believing that such an individual is more likely to help them achieve a settlement.

1 I wish to thank **Robert J. Keach**, practice head of the Business, Restructuring and Insolvency Group at Bernstein Shur and a former ABI president, for his support; **Andrew C. Helman** of Marcus | Clegg for his helpful comments; **Daniel Keenan** of Bernstein Shur for his research; and Karla Quirk of Bernstein Shur for her editorial assistance.

2 My own evaluative and directive tendencies were beaten out of me by the coaches and classmates at the ABI/St. John's Bankruptcy Mediation Training Program. The next training program will be held Dec. 3-7 at St. John's Manhattan campus, and it is only open to 30 attendees. More information will be posted at abi.org/events.

The reality is this: We might be witnessing a paradigm shift. Mediation has been redefined in bankruptcy practice to encompass more than neutral facilitation; mediation has become a synonym for the full range of facilitative, evaluative and directive ADR activities. Judges employ this broad definition when they assign a matter to a judicial colleague, order unwilling parties to engage in mediation or choreograph mediation into case management as the primary means of resolving post-confirmation avoidance actions and disputed claims on an expedited schedule.

Five Examples of the Paradigm Shift

Here are five personal experiences to illustrate this point and highlight issues for mediators, lawyers and judges to consider.

The first example, involving a civil case in a U.S. district court, is not a bankruptcy case, but involved a form of "jump-and-run" mediation that is not unusual in bankruptcy cases. This experience had a powerful effect on my thinking of mediation as embracing more than neutral facilitation. The second example does not involve any contribution to negotiations by a facilitator; however, it presents an extreme example of judicial engagement upon the request of parties to help them resolve a complex cross-border case. The remaining examples are composites from real life, covering three recurring ways in which mediation is used in nontraditional ways in bankruptcy cases. These include parties in multi-party adversary proceedings using mediation to drag a reluctant party to settlement, courts embracing the use of mediation as a clearing-house for post-confirmation litigation, and the way mediation might be used to educate parties on the realities of consumer issues.

Example #1: Jump-and-Run Mediation

When I was a bankruptcy judge, I was asked by a district court judge to mediate a civil case the moment before the district court judge was to have instructed the jury. The district court judge thought that I could quickly evaluate the claims and defenses, and help counsel and the parties hammer out a settlement while the jury was on hold. I accepted the task and led the parties to a settlement within a few hours. By all accounts, it was a successful afternoon. Even so, I left the courthouse with an uneasy feeling because I had forfeited the role as a neutral facilitator in order to achieve a directed settlement. Instead of letting the parties work things out in due course, I sized up the case and nudged them into an agreement.

Several factors were in play: My judicial proclivity to decide cases, the challenge of producing a settlement while a jury was on hold late on a Friday afternoon, the desire of counsel and the parties to find a quick way out of a difficult case, and perhaps my ego. Reflecting upon this experience has made me more conscious of how a mediator's role is perceived by the referring judge and the participants when time is a crucial factor.

Example #2: Using Judicial Intervention to Prompt a Negotiated Outcome

Not long ago, a train carrying a load of volatile oil crashed and burned just across the border from Maine in the town of Lac Megantic, Quebec. The devastation and loss of life was immense, as the entire downtown was destroyed and 50 lives were lost. The train was operated by a Maine entity with a Canadian affiliate. Bankruptcy reorganizations were commenced in Maine and Quebec.

> **Bankruptcy lawyers and judges work under unique time pressures and with limited resources, which makes our practice pragmatic and creative.**

The case drew international attention because it was one among many tragedies arising from the transcontinental rail shipments of oil. Litigation was commenced in several North American jurisdictions for wrongful death, tort and property damage. There were also disputes involving insurance coverage, secured claims, and the attribution of responsibility for the tragedy. Parties included the debtors, the estate fiduciaries in each case, every entity in the trail of the oil shipment from its inception to its end point, the wrongful-death claimants, the committees, agencies of the federal and provincial governments in Canada, and many more parties. Early on, protocols for cooperation were established between the U.S bankruptcy court and the Quebec Superior Court.

After months of negotiations, several parties asked that the two bankruptcy courts hold a joint international hearing for the specific purpose of directing the parties to the negotiating table. After allowing everyone to be heard at a joint hearing, the Canadian colleague and I strongly urged the parties to engage in negotiations. Break-out sessions ensued in the courthouse for the better part of the day. It took months before agreements were reached, and more time before reorganization plans and settlement agreements were confirmed on both sides of the border. At the behest of the parties, a judicial prompt for a negotiated outcome began the process of conciliation and plan confirmation in a particularly complex case.

This example does not involve mediation, yet it shows that creative action by parties and the cooperation of the court might result in successful voluntary negotiations.

Example #3: Strategic Mediation

A common happening in bankruptcy litigation is the commencement of voluntary mediation by willing participants to a multiparty dispute who have reached an impasse in their own negotiations. With competent counsel and knowledgeable parties, neutral facilitation usually works. However, mediation is occasionally commenced for a strategic purpose, such as when there is a tacit agreement among all but one of the parties. The hold-out is sometimes a primary plaintiff or defendant; other times, it is a guarantor or an insurance company. When this occurs, the group in agreement will expect the mediator to nudge or prod the hold-out. As the day progresses, pressure on the mediator mounts. Like most mediators who have been in similar circumstances, I keep reminding myself that not every case will settle. However, it gets dicey when everyone, including the recalcitrant party,

asks for a case evaluation, or when all parties ask for help in fashioning a result.

Example #4: Post-Confirmation Mediation

Post-confirmation mediation of disputed claims and avoidance actions is now part of the landscape. It is often invoked by a rule or court order, and it is a cost-effective way of stimulating settlements. Reorganized debtors and plan trustees rely on this form of mediation to wrap up cases. The selection of mediators might be from a registry or list of approved candidates, or the mediation order might establish a category of acceptable mediators like bankruptcy judges or retired judges. The orders tend to follow an established pattern and may not allow meaningful input from claimants or defendants. The process works, and it is especially helpful in "mega" cases. Compensation of the mediator is sometimes at market rates, while at other times it is determined according to a less-than-market schedule pegged to the amount in controversy.

This form of mediation might not fall within the classic definition of confidential negotiations that are willingly entered into by parties who accept the assistance of a neutral facilitator, because limited resources and time pressures will affect the level of energy devoted to matters by the participants and mediator in each event. Yet this form clearly falls within the broad definition of mediation in bankruptcy practice.

Example #5: Consumer Cases

When I was a bankruptcy judge, I was often invited to mediate disputes in consumer cases. These invitations would come from counsel, usually at the suggestion of a judicial colleague. There was rarely any time pressure, but every case involved limited resources and small dollars (comparatively speaking). More often than not, these cases involved parties lacking sophistication in bankruptcy law. In these cases, it was impossible to sustain the posture of a neutral facilitator because doing so would have caused every case to crash and burn. To be effective, I had to educate lawyers and clients on why their claims or defenses under state law were of little consequence in bankruptcy. Of course, these comments were given with the caveat that I was not rendering legal advice, and I always sought and obtained the consent of the trustee or the other party before giving an explanation. These explanations often helped the parties reach an agreement, but sometimes the cases went back to the trial judge.

It was gratifying work most of the time, but it was rarely mediation in the classic sense of the term. Even so, this form of mediation is common and can be effective at resolving cases in which the economic circumstances of the parties or the amounts in controversy make private mediation unaffordable.

Conclusion

Bankruptcy lawyers and judges work under unique time pressures and with limited resources, which makes our practice pragmatic and creative. Given this reality, it should come as no surprise that the culture of mediation in bankruptcy practice is different than it is in general civil litigation. Mediation in bankruptcy practice now encompasses traditional mediation and other forms of ADR services. abi

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SAMPLE PLAN PROVISIONS RELATING TO LIQUIDATING TRUST

The following provisions are excerpts taken from the Joint Combined Disclosure Statement and Plan of Liquidation Under Chapter 11 of the Bankruptcy Code in the case of *In re: Boomerang Systems, Inc., et al.*, Case No. 15-11729 (MFW), filed in the District of Delaware, in which Sullivan & Worcester LLP represented the jointly administered debtors.

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July, 2017

SAMPLE PLAN PROVISIONS RELATING TO LIQUIDATING TRUST

Establishment of the Liquidating Trust.

On the Effective Date, the Liquidating Trustee shall sign the Liquidating Trust Agreement and, in his capacity as Liquidating Trustee, accept all Liquidating Trust Assets on behalf of the beneficiaries thereof, and be authorized to obtain, seek the turnover, liquidate, and collect all of the Liquidating Trust Assets not in his possession. The Liquidating Trust will then be deemed created and effective without any further action by the Bankruptcy Court or any Person as of the Effective Date. In the event of any conflict between the terms of this Plan and the terms of the Liquidating Trust, the terms of this Plan shall govern. On the Effective Date, the Debtors shall execute the Liquidating Trust Agreement and shall take all other steps necessary to establish the Liquidating Trust.

Purpose of the Liquidating Trust.

In accordance with Treasury Regulation section 301.7701-4(d), the Liquidating Trust shall be established for the purposes of (i) liquidating any non-Cash Liquidating Trust Assets; (ii) prosecuting and resolving the Causes of Action; (iii) maximizing recovery of the Liquidating Trust Assets for the benefit of the beneficiaries thereof; and (iv) distributing the proceeds of the Liquidating Trust Assets to the beneficiaries in accordance with this Plan and the Liquidating Trust Agreement, with no objective to continue or engage in the conduct of a trade or business, except only in the event and to the extent necessary for, and consistent with, the liquidating purpose of the Liquidating Trust.

Appointment of the Liquidating Trustee.

The initial Liquidating Trustee shall be selected by the Committee, and appointed through the Confirmation Order. The Liquidating Trustee shall act in such capacity, and shall have the same powers, as the board of directors and officers of the Debtors. The Liquidating Trustee may resign at any time without penalty or liability therefor; provided, however, that notice of the resignation shall be Filed not less than twenty-five (25) Business Days prior to the effective date of such resignation, and such resignation shall not be effective until a successor Liquidating Trustee is designated and approved.

Compensation to Liquidating Trustee.

The Liquidating Trustee shall be compensated in accordance with the relevant provisions of the Liquidating Trust Agreement and any other applicable orders of the Bankruptcy Court.

Liquidating Trust Assets.

On the Effective Date, or as soon thereafter as is practicable, all of the property of the Estates shall be transferred and distributed to and shall vest in the Liquidating Trust without further action or Court order, including, without limitation, (i) all of the Debtors' unencumbered assets; (ii) the Debtor Causes of Action; (iii) the Liquidating Trust Assets; and (iv) all Cash; provided, however, that the Professional Excess Sale Proceeds shall be used to satisfy unpaid Allowed Professional fee Claims (other than the Committee's Professionals, but including

Professionals of the PrePetition Administrative Agent) in excess of the Budget attached to the Final DIP Order. The Liquidating Trustee may abandon or otherwise not accept any non-Cash Liquidating Trust Assets that the Liquidating Trustee believes, in good faith, have no value to the Liquidating Trust. Any non-Cash Liquidating Trust Assets that the Liquidating Trustee so abandons or otherwise does not accept shall not be property of the Liquidating Trust.

The Liquidating Trust shall have the power to act with respect to the aforementioned assets being assigned and distributed to the Liquidating Trust, and shall have the right and power, as representative and attorney in fact for the Estates, to prosecute the aforementioned rights, claims and causes of action, including, without limitation, objections to Claims and Avoidance Actions, without further Bankruptcy Court approval. From and after the Effective Date, prosecution and settlement of all Causes of Action transferred to the Liquidating Trust shall be the sole responsibility of the Liquidating Trust pursuant to this Plan and the Confirmation Order. From and after the Effective Date, the Liquidating Trust shall have exclusive rights, powers, and interests of the Debtors' Estates to pursue, settle or abandon such Causes of Action as the sole representative of the Debtors' Estates pursuant to Bankruptcy Code section 1123(b)(3) and shall be subject to all rights and defenses against the Debtors' Estates (including without limitation any valid rights of setoff or recoupment and any cross-claims or counterclaims) held by any defendants to such Causes of Action. The Estates shall retain the right, title and interest in and to all rights, claims and Causes of Action against third parties in order to preserve such rights, claims and Causes of Action; and the Liquidating Trustee, as representative of the Estates appointed for such purpose, pursuant to section 1123(b)(3)(B) of the Bankruptcy Code, may enforce such claims as he deems appropriate.

Tax Treatment of Transfer of Property to Liquidating Trust.

The transfer of property from the Debtors to the Liquidating Trust shall be treated for all purposes of the IRC as a transfer to the beneficiaries of the Liquidating Trust to the extent such Claims are Allowed as of the Effective Date, followed by a deemed transfer by such beneficiaries to the Liquidating Trust. The beneficiaries of the Liquidating Trust shall be treated as the grantors and deemed owners of the Liquidating Trust. The Liquidating Trustee shall file returns for the Liquidating Trust as a grantor trust pursuant to Treasury Regulations section 1.671-4(a). The Liquidating Trustee and the beneficiaries of the Liquidating Trust shall value the property transferred to the Liquidating Trust consistently, and such valuation shall be used for all federal income tax purposes. The Debtors may request the Court to value the property transferred to the Liquidating Trust at confirmation of the Plan, or any time thereafter. The beneficiaries of the Liquidating Trust shall be responsible for payment of any taxes due with respect to the operations of the Liquidating Trust.

The Liquidating Trust may request an expedited determination of taxes of the Debtors or of the Liquidating Trust under Bankruptcy Code section 505(b) for all tax returns filed for, or on behalf of, the Debtors and the Liquidating Trust for all taxable periods through the dissolution of the Liquidating Trust. The Liquidating Trust shall be responsible for filing all federal, state, and local tax returns for the Debtors and the Liquidating Trust. The Liquidating Trust shall comply with all withholding and reporting requirements imposed by any federal, state, or local taxing authority, and all distributions made by the Liquidating Trust shall be subject to any such withholding and reporting requirements.

Debtors' Tax Returns. The Liquidating Trustee or his designee shall have the authority to sign and file the Debtors' final local, state and federal tax returns or similar documents.

Responsibilities & Powers of the Liquidating Trustee.

The Liquidating Trustee shall be the exclusive trustee of the Liquidating Trust and the Liquidating Trust Assets for purposes of 31 U.S.C. § 3713(b) and 26 U.S.C. § 6012(b)(3). The powers, rights, and responsibilities of the Liquidating Trustee shall be specified in the Liquidating Trust Agreement and shall include the authority and responsibility to: (a) receive, manage, invest, supervise, and protect the Liquidating Trust Assets; (b) pay taxes or other obligations incurred by the Liquidating Trust; (c) retain and compensate, without further order of the Bankruptcy Court, the services of employees, professionals and consultants to advise and assist in the administration, prosecution and distribution of Liquidating Trust Assets; (d) calculate and implement Distributions of Liquidating Trust Assets; (e) investigate, prosecute, compromise, and settle, in accordance with the specific terms of the Liquidating Trust Agreement, Causes of Action vested in the Liquidating Trust; (f) resolve issues involving Claims and Interests in accordance with this Plan; (g) undertake all administrative functions of the Plan Debtors' Chapter 11 Cases, including the payment of fees payable to the United States Trustee and the ultimate closing of the Debtors' Chapter 11 Cases. The Liquidating Trust is the successor to the Debtors and their Estates.

On the Effective Date, the Liquidating Trust shall: (a) take possession of all books, records, and files of the Debtors and their respective Estates; and (b) provide for the retention and storage of such books, records, and files until such time as the Liquidating Trust determines, in accordance with the Liquidating Trust Agreement, that retention of same is no longer necessary or required.

The Liquidating Trust may invest Cash (including any earnings thereon or proceeds therefrom) as permitted by Bankruptcy Code section 345 or in other prudent investments, provided, however, that such investments are permitted to be made by a liquidating trust within the meaning of Treasury Regulation section 301.7701-4(d), as reflected therein, or under applicable IRS guidelines, rulings, or other controlling authorities.

The Liquidating Trust shall have the right to object to Claims not otherwise Allowed in connection with post-Effective Date Claims allowance process.

Proceeds recovered from all Causes of Action will be deposited into the Liquidating Trust and will be distributed by the Liquidating Trustee to the beneficiaries in accordance with the provisions of the Plan and Liquidating Trust Agreement. All Causes of Action that are not expressly released or waived under this Plan are reserved and preserved and vest in the Liquidating Trust in accordance with this Plan. No Person may rely on the absence of a specific reference in this Plan, the Plan Supplement, or the Disclosure Statement to any Cause of Action against it as any indication that the Debtors or Liquidating Trustee will not pursue any and all available Causes of Action against such Person. The Liquidating Trustee expressly reserves all Causes of Action, except for any Causes of Action against any Person that are expressly released or waived under this Plan, and, therefore, no preclusion doctrine, including the doctrines of res

judicata, collateral estoppel, issue preclusion, claim preclusion, estoppel (judicial, equitable, or otherwise), or laches, shall apply to such Causes of Action upon, after, or as a consequence of confirmation or consummation of this Plan. No claims or Causes of Action against the Released Parties shall be transferred to the Liquidating Trust, the Liquidating Trustee shall not have standing to pursue such claims or Causes of Action, and all such claims and Causes of Action shall be waived, released and discharged pursuant to the Plan.

Preservation of Investigation Rights.

The preservation for the Liquidating Trust of any and all rights to conduct investigations pursuant to Bankruptcy Rule 2004 is necessary and relevant to the liquidation and administration of the Liquidating Trust Assets. Accordingly, any and all rights to conduct investigations pursuant to Bankruptcy Rule 2004 held by the Debtors or the Committee prior to the Effective Date shall vest with the Liquidating Trust and shall continue until dissolution of the Liquidating Trust.

Bond.

The Liquidating Trustee shall not be required to post a bond with respect to the performance of the obligations and liabilities of the Liquidating Trustee under the Plan or the Liquidating Trust.

Beneficiaries.

The beneficiaries of the Liquidating Trust shall consist of Holders of Class 4 and Class 5 Claims. Such beneficiaries shall be bound by the Liquidating Trust Agreement. The interests of the beneficiaries in the Liquidating Trust shall be uncertificated and nontransferable except upon death of the interest holder or by operation of law.

Expenses Incurred on or After the Effective Date.

The Liquidating Trustee may incur Liquidating Trust Expenses as set forth more fully in the Liquidating Trust Agreement. The Liquidating Trustee may retain and compensate attorneys and other professionals to assist in its duties on such terms (including on a contingency or hourly basis) as it deems reasonable and appropriate without Bankruptcy Court approval. As set forth herein, the fees and expenses of the Liquidating Trustee and the Liquidating Trust's Professionals shall be paid from the assets of the Liquidating Trust, with a higher priority than any payments made to Allowed Claimants herein.

Distributions from the Liquidating Trust.

The Liquidating Trustee shall make all applicable distributions and deliveries required under the Plan as set forth more fully in the Liquidating Trust Agreement. Any distributions to beneficiaries of the Trust shall be made at a time, and in a manner, that the Liquidating Trustee determines, in his sole discretion, is reasonable and appropriate under the circumstances. Any fees, expenses, costs or other payments required by the Liquidating Trust—including compensation to the Liquidating Trustee and his professionals—shall be payable from first money in to the Liquidating Trust, and such fees and expenses must be satisfied in full—or a

reasonable reserve shall be established and maintained to ensure the full satisfaction—prior to distribution to beneficiaries under this Plan or the Liquidating Trust Agreement.

Termination of the Liquidating Trust and Filing of Final Report.

The Liquidating Trust shall terminate without any further action by the Liquidating Trustee upon the earlier of the docketing of a Final Order closing the Case and five (5) years after the Effective Date, unless such termination date is extended by order of the Court upon a finding that the extension is necessary to the liquidating purposes of the Liquidating Trust. Prior to such termination and within thirty (30) days after the Final Distribution Date, the Liquidating Trustee shall file with the Court, and serve on the United States Trustee and the parties appearing on the latest Master Service List, a final report containing a detailed and cumulative statement of all activities of the Liquidating Trust during its existence, as set forth more fully in the Liquidating Trust Agreement.

Litigation of Causes of Action by the Liquidating Trustee.

The Liquidating Trustee shall have the power and authority to bring or continue all Causes of Action, including Avoidance Actions, after the Effective Date. To avoid all doubt, the power granted to the Liquidating Trustee in the foregoing sentence shall include (but not be limited to) the power to bring or continue Avoidance Actions and any and all other claims, actions, causes of action, suits, controversies, and the like not released herein.

Settlement by the Liquidating Trust of any Cause of Action transferred to the Liquidating Trust shall require: (i) approval only of the Liquidating Trustee if the amount claimed by the Liquidating Trust against a defendant is less than one million dollars ($1,000,000); and (ii) approval of the Liquidating Trustee and the Bankruptcy Court, upon notice and a hearing, if the amount claimed by the Liquidating Trust against a defendant is unliquidated or equals to or exceeds one million dollars ($1,000,000). The decision to settle, prosecute or waive any cause of action shall be made by the Liquidating Trustee in his sole discretion--subject to Bankruptcy Court approval as set forth in sub-paragraph (ii) above.

Exculpation.

No recourse will ever be had, directly or indirectly, against the Liquidating Trustee, its members, officers, directors, employees, professionals, representatives, agents, successors or assigns, by legal or equitable proceedings or by virtue of any statute or otherwise, or any deed of trust, mortgage, pledge or note, nor upon any promise, contract, instrument, undertaking, obligation, covenant or agreement whatsoever executed by the Liquidating Trust under this Plan or by reason of the creation of any indebtedness by the Liquidating Trust or the Liquidating Trustee under this Plan. All such liabilities under this Plan will be enforceable only against, and will be satisfied only out of, the Liquidating Trust Assets. The Liquidating Trustee and its agents shall not be deemed to be the agent for any holder of a Claim in connection with Distributions made under this Plan. The Liquidating Trust and the Liquidating Trustee and their respective officers, directors, employees, professionals, representatives, agents, successors or assigns will not be liable for any act they may do, or omit to do hereunder in good faith and in the exercise of their sound judgment; provided, however, that this section will not apply to any gross negligence

or willful misconduct by the Liquidating Trust and the Liquidating Trustee or their respective officers, directors, employees, professionals, representatives, agents, successors or assigns.

SAMPLE DEFINITIONS

"Avoidance Actions" means any cause of action that may be asserted pursuant to chapter 5 and/or section 704 of the Bankruptcy Code and the proceeds therefrom (notwithstanding any definition in any other document).

"Causes of Action" means, without limitation, any and all Claims, causes of action, demands, rights, actions, suits, damages, injuries, remedies, obligations, liabilities, accounts, defenses, offsets, powers, privileges, licenses and franchises of any kind or character whatsoever, known, unknown, accrued or to accrue, contingent or non-contingent, matured or unmatured, suspected or unsuspected, foreseen or unforeseen, whether arising before, on or after the Petition Date, in contract or in tort, in law or in equity, or under any other theory of law, whether asserted or assertable directly or derivatively in law or equity or otherwise by way of claim, counterclaim, cross-claim, third party action, action for indemnity or contribution or otherwise, including, without limitation, all Debtor Causes of Action and all Avoidance Actions.

"Debtor Causes of Action" means all claims, actions, causes of action, chooses in action, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, remedies, rights of set-off, third-party claims, subrogation claims, contribution claims, reimbursement claims, indemnity claims, counterclaims, and crossclaims (including, but not limited to, all claims and any avoidance, recovery, subordination or other actions against insiders and/or any other entities under the Bankruptcy Code, including Avoidance Actions) of (or assertable by) any of the Debtors, the Debtors-in-Possession, and/or the Estates, whether known or unknown, liquidated or unliquidated, fixed or contingent, matured or unmatured, disputed or undisputed, that are or may be pending on the Effective Date or instituted by the Liquidating Trust after the Effective Date against any entity, based in law or equity, including, but not limited to, under the Bankruptcy Code, whether direct, indirect, derivative, or otherwise and whether asserted or unasserted as of the date of entry of the Confirmation Order. Notwithstanding the foregoing and for the avoidance of doubt, Debtor Causes of Action does not include any claims or causes of actions released or enjoined pursuant to Article ___ hereof.

"Final Order" means an order or judgment of the Bankruptcy Court, or other court of competent jurisdiction with respect to the subject matter, which has not been reversed, stayed, modified or amended, and as to which the time to appeal, petition for certiorari or move for reargument or rehearing has expired and no appeal or petition for certiorari has been timely taken, or as to which any appeal that has been taken or any petition for certiorari that has been or may be Filed has been resolved by the highest court to which the order or judgment was appealed or from which certiorari was sought or has been dismissed with prejudice; provided, however, that the possibility that a motion under Rule 60 of the Federal Rules of Civil Procedure, or any analogous rule under the Bankruptcy Rules, may be Filed with respect to such order shall not preclude such order from being a Final Order.

"Liquidating Trust" means the trust established pursuant to that certain Liquidating Trust Agreement.

"Liquidating Trust Agreement" means the trust agreement establishing and governing the Liquidating Trust, substantially in the form of the document annexed as Exhibit "___" to the Plan Supplement and incorporated herein by reference.

"Liquidating Trust Assets" means cash, in the amount of $_____; any and all assets contributed by the Debtor and not used in the ongoing business operations of the Debtor, including the net proceeds of sale from any such assets; and the proceeds derived from litigating and/or settling the Debtor Causes of Action (net of legal fees and expenses).

"Liquidating Trustee" means the individual or entity initially appointed by the [Debtor/Committee] who shall (a) file a declaration of disinterestedness with the Bankruptcy Court; and (b) have the responsibility of administering the Liquidating Trust as set forth more fully in the Liquidating Trust Agreement.

SAMPLE PROVISIONS RELATING TO RETENTION OF JURISDICTION

Pursuant to sections 105(c) and 1142 of the Bankruptcy Code and notwithstanding entry of the Confirmation Order and the occurrence of the Effective Date, the Bankruptcy Court will retain jurisdiction over all matters arising in, arising under and/or related to the Chapter 11 Cases and the Plan to the fullest extent permitted by law, including, among other things, jurisdiction to:

allow, disallow, determine, liquidate, classify, estimate or establish the priority or secured or unsecured status of any Claim or Equity Interest, including the resolution of any request for payment of any Administrative Expense Claim and the resolution of any objections to the allowance or priority of Claims or Equity Interests;

resolve any matters related to the assumption, assumption and assignment or rejection of any executory contract or unexpired lease to which any Debtor is a party or with respect to which any Debtor may be liable and to hear, determine, and, if necessary, liquidate any Claims arising therefrom;

ensure that distributions to Holders of Allowed Claims are accomplished pursuant to the provisions of the Plan;

decide or resolve any motions, adversary proceedings, contested or litigated matters and any other matters and grant or deny any applications involving the Debtors that may be pending on the Effective Date;

enter such orders as may be necessary or appropriate to implement or consummate the provisions of the Plan and all contracts, instruments, releases and other agreements or documents created in connection with the Plan, the Disclosure Statement or the Confirmation Order;

resolve any cases, controversies, suits or disputes that may arise in connection with the consummation, interpretation or enforcement of the Plan, including, without limitation, any other contract, instrument, release or other agreement or document that is executed or created pursuant to the Plan, or any Entity's rights arising from or obligations incurred in connection with the Plan or such documents;

modify the Plan before or after the Effective Date pursuant to section 1127 of the Bankruptcy Code or modify the Confirmation Order, or any contract, instrument, release or other agreement or document created in connection with the Plan, the Disclosure Statement or the Confirmation Order, or remedy any defect or omission or reconcile any inconsistency in any Bankruptcy Court order, the Plan, the Confirmation Order or any contract, instrument, release or other agreement or document created in connection with the Plan or the Confirmation Order, in such manner as may be necessary or appropriate to consummate the Plan;

hear and determine all applications for compensation and reimbursement of expenses of Professionals under the Plan or under sections 327, 330, 331, 363, 503(b), 1103 and 1129(c)(9) of the Bankruptcy Code; provided, however, that from and after the Effective Date the payment of fees and expenses of the Liquidating Trust, including counsel fees, shall be made in the ordinary course of business and shall not be subject to the approval of the Bankruptcy Court;

issue injunctions, enter and implement other orders or take such other actions as may be necessary or appropriate to restrain interference by any Person or Entity with consummation, implementation or enforcement of the Plan or the Confirmation Order;

hear and determine causes of action by or on behalf of the Debtors or the Liquidating Trust;

hear and determine matters concerning state, local and federal taxes in accordance with sections 346, 505 and 1146 of the Bankruptcy Code;

hear and implement such orders as are necessary or appropriate if the Confirmation Order is for any reason or in any respect modified, stayed, reversed, revoked or vacated, or distributions pursuant to the Plan are enjoined or stayed;

determine any other matters that may arise in connection with or related to the Plan, the Confirmation Order or any contract, instrument, release (including the releases in favor of the Released Parties) or other agreement or document created in connection with the Plan or the Confirmation Order;

enforce all orders, judgments, injunctions, releases, exculpations, indemnifications and rulings entered in connection with the Chapter 11 Cases;

hear and determine such other matters as may be provided in the Confirmation Order or as may be authorized under the Bankruptcy Code; and

enter orders closing the Chapter 11 Cases.

LIQUIDATING TRUST AGREEMENT

This LIQUIDATING TRUST AGREEMENT (the "Agreement" or "Liquidating Trust Agreement") is made and entered into, as of _____, by and among the following Debtors and Debtors in Possession: (i) Boomerang Systems, Inc., (ii) Boomerang Sub, Inc., (iii) Boomerang USA Corp., and (iv) Boomerang MP Holdings Inc. (together, the "Debtors"), the official committee of unsecured creditors appointed in the Debtors' Chapter 11 Cases (the "Committee"), and Gavin/Solmonese, LLC (the "Liquidating Trustee"). Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the Plan (as hereinafter defined).

RECITALS

WHEREAS, on August 18, 2015, the Debtors filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the "Bankruptcy Code") in the United States Bankruptcy Court for the District of Delaware (the "Bankruptcy Court"); and

WHEREAS, on January 28, 2016, the Debtors and the Committee filed the First Amended Joint Combined Disclosure Statement and Plan of Liquidation Under Chapter 11 of the Bankruptcy Code Proposed by the Debtors and the Official Committee of Unsecured Creditors (as amended or modified from time to time, the "Plan"); and

WHEREAS, by order dated _____, the Bankruptcy Court confirmed the Plan; and

WHEREAS, under the terms of the Plan, all cash and other property of the Debtors as of the Effective Date of the Plan will be transferred to and held by the Liquidating Trust created by this Liquidating Trust Agreement so that, among other things: (i) the Liquidating Trust Assets can be pursued and/or disposed of in an orderly and expeditious manner; (ii) objections to Claims can be pursued and Disputed Claims can be resolved; and (iii) distributions can be made to the beneficiaries of the Liquidating Trust in accordance with the Plan; and

WHEREAS, this Liquidating Trust is established under and pursuant to the Plan which provides for the appointment of the Liquidating Trustee to administer the Liquidating Trust for the benefit of certain creditors of the Debtors, and to provide administrative services relating to the implementation of the Plan; and

WHEREAS, the Liquidating Trustee has agreed to serve as such upon the terms and subject to the conditions set forth in this Agreement.

NOW, THEREFORE, in accordance with the Plan and in consideration of the promises and of the mutual covenants and agreements contained herein, the parties hereto agree as follows:

DECLARATION OF TRUST

The Debtors hereby absolutely assign to the Liquidating Trust, and to its successors in trust and its successors and assigns, all right, title and interest of the Debtors in and to the Liquidating Trust Assets and any other assets, pursuant to the terms and conditions of the Plan;

TO HAVE AND TO HOLD unto the Liquidating Trust and its successors in trust and its successors and assigns forever;

IN TRUST NEVERTHELESS upon the terms and subject to the conditions set forth herein and for the benefit of the Holders of Allowed Claims, as and to the extent provided in the Plan, and for the performance of and compliance with the terms hereof and of the Plan;

PROVIDED, HOWEVER, that upon termination of the Liquidating Trust in accordance with Article V hereof, this Agreement shall cease, terminate and be of no further force and effect; and

IT IS HEREBY FURTHER COVENANTED AND DECLARED that the Liquidating Trust Assets are to be held and applied by the Liquidating Trustee upon the further covenants and terms and subject to the conditions herein set forth.

I NAME; PURPOSE; TRUST ASSETS

1.1 Name of Trust. The trust created by this Agreement shall be known as the "Boomerang Systems Liquidating Trust" or sometimes herein as the "Liquidating Trust."

1.2 Transfer of Trust Assets. In accordance with the provisions of the Plan, on the Effective Date, the Debtors and their chapter 11 estates shall be deemed to transfer, assign and convey to the beneficiaries of the Liquidating Trust any and all rights and assets of the Debtors and the Estates, including, without limitation, (i) cash and accounts, including, without limitation, any and all moneys held in escrow or separate segregated accounts during the pendency of the Chapter 11 Cases; (ii) all Causes of Action not expressly released, waived or sold under the Plan or related sale of the Debtors' assets; (iii) any and all other assets, interests, rights, claims, defenses and causes of action of the Debtors or Estates; and the Liquidating Trust Assets (all of which shall collectively be referred to herein as the "Trust Assets"), followed by a deemed transfer by such beneficiaries to the Liquidating Trust, to be held by the Liquidating Trustee in trust for the holders, from time to time, of Allowed General Unsecured Claims and Allowed Customer Contract Claims as and to the extent provided in the Plan (such holders collectively, the "Trust Beneficiaries"), on the terms and subject to the conditions set forth herein and in the Plan.

1.3 Purposes. The purposes of the Liquidating Trust are to hold and effectuate an orderly disposition of the Trust Assets and to distribute or pay over the Trust Assets or proceeds thereof in accordance with this Agreement and the Plan, with no objective or authority to engage in any trade or business.

1.4 Acceptance by the Liquidating Trustee. The Liquidating Trustee is willing and hereby accepts the appointment to serve as Liquidating Trustee pursuant to this Agreement and the Plan and agrees to observe and perform all duties and obligations imposed upon the Liquidating Trustee by this Agreement and the Plan, including, without limitation, to accept, hold and administer the Trust Assets and otherwise to carry out the purpose of the Liquidating Trust in accordance with the terms and subject to the conditions set forth herein.

1.5 Further Assurances. The Debtors and any successors in interest will, on request of the Liquidating Trustee, execute and deliver such further documents and perform such further acts as may be necessary or proper to transfer to the Liquidating Trustee any portion of the Trust Assets or to vest in the Trust the powers or property hereby conveyed. The Debtors, for themselves and their predecessors and successors, disclaim any right to any reversionary interest in any of the Trust Assets, but nothing herein will limit the right and power of the Liquidating Trustee to abandon any Trust Assets to the Debtors in the event the Liquidating Trustee determines it is in the best interests of the Liquidating Trust and its beneficiaries to do so.

II RIGHTS, POWERS AND DUTIES OF LIQUIDATING TRUSTEE

2.1 General. As of the Effective Date, the Liquidating Trustee shall take possession and charge of the Trust Assets and, subject to the provisions hereof and in the Plan, shall have full right, power and discretion to manage the affairs of the Liquidating Trust. Except as otherwise provided herein and in the Plan, the Liquidating Trustee shall have the right and power to enter into any covenants or agreements binding the Liquidating Trust and in furtherance of the purpose hereof and of the Plan and to execute, acknowledge and deliver any and all instruments that are necessary or deemed by the Liquidating Trustee to be consistent with and advisable in connection with the performance of his or her duties hereunder. On and after the Effective Date, the Liquidating Trustee shall have the power and responsibility to do all acts contemplated by the Plan to be done by the Liquidating Trustee and all other acts that may be necessary or appropriate in connection with the disposition of the Trust Assets and the distribution of the proceeds thereof, as contemplated by the Plan, including:

(a) To exercise all power and authority that may be or could have been exercised, commence all proceedings that may be or could have been commenced and take all actions that may be or could have been taken by any partner, member, officer, director or shareholder of the Debtors with like effect as if authorized, exercised and taken by unanimous action of such partners, members, officers, directors and shareholders; including, without limitation, amendment of the certificates of incorporation and by-laws of the Debtors, merger of any Debtor into another Debtor, the dissolution of any Debtor and the assertion or waiver of the Debtors' attorney/client privilege;

(b) To open and maintain bank and other deposit accounts, escrows and other accounts, calculate and implement Distributions to holders of Allowed General Unsecured Claims and Allowed Customer Contract Claims as provided for or contemplated by the Plan and take other actions consistent with the Plan and the implementation thereof, including the establishment, re-evaluation, adjustment and maintenance of appropriate reserves, in the name of the Debtors or the Liquidating Trustee, even in the event of the dissolution of the Debtors;

(c) To make a good faith valuation of the assets of the Liquidating Trust, as soon as possible after the Effective Date;

(d) Subject to the applicable provisions of the Plan, to collect and liquidate all assets of the Debtors' estates pursuant to the Plan and to administer the winding-up of the affairs of the Debtors;

(e) To object to any Claims (Disputed or otherwise), and to defend, compromise and/or settle any Claims prior to or following objection without the necessity of approval of the Bankruptcy Court, and/or to seek Bankruptcy Court approval for any Claims settlement, to the extent thought appropriate by the Liquidating Trustee or to the extent such approval is required by prior order of the Bankruptcy Court;

(f) To make decisions regarding the retention or engagement of professionals, employees and consultants by the Liquidating Trust and to pay, from the Trust Assets, the charges incurred by the Liquidating Trust on or after the Effective Date for services of professionals, disbursements, expenses or related support services relating to the winding down of the Debtors and implementation of the Plan, without application to the Court;

(g) To cause, on behalf of the Liquidating Trust, the Debtors, and their estates all necessary tax returns and all other appropriate or necessary documents related to municipal, State, Federal or other tax law to be prepared or filed timely;

(h) To invest Cash in accordance with section 345 of the Bankruptcy Code or as otherwise permitted by a Final Order of the Court and as deemed appropriate by the Liquidating Trustee in accordance with the investment and deposit guidelines set forth in this Agreement;

(i) To collect any accounts receivable or other claims and assets of the Debtors or their estates not otherwise disposed of pursuant to the Plan;

(j) To enter into any agreement or execute any document required by or consistent with the Plan and perform all of the obligations of the Debtors or the Liquidating Trustee thereunder;

(k) To abandon in any commercially reasonable manner, including abandonment or donation to a charitable organization, any assets that the Liquidating Trustee concludes are of no benefit to creditors of the Debtors or, as provided in the Plan, too impractical to distribute;

(l) To investigate (including pursuant to Bankruptcy Rule 2004), prosecute and/or settle any Causes of Action not expressly released or waived under the Plan, participate in or initiate any proceeding before the Court or any other court of appropriate jurisdiction, participate as a party or otherwise in any administrative, arbitrative or other non-judicial proceeding, litigate or settle such Causes of Action on behalf of the Liquidating Trust and pursue to settlement or judgment such actions;

(m) To approve, without the need for Bankruptcy Court approval, the settlement of any Cause of Action for which the amount claimed by the Liquidating Trust against a defendant is less than one million dollars ($1,000,000) and to seek Bankruptcy Court approval, upon notice and a hearing, of the settlement of any Cause of Action for which the amount claimed by the Liquidating Trust is unliquidated or equals or exceeds one million dollars ($1,000,000);

(n) To use Trust Assets to purchase or create and carry all appropriate insurance policies, bonds, or other means of assurance and protection of Liquidating Trust assets, and pay all insurance premiums and other costs he or she deems necessary or advisable to insure the acts and omissions of the Liquidating Trustee;

(o) To implement and/or enforce all provisions of the Plan;

(p) To maintain appropriate books and records (including financial books and records) to govern the liquidation and distribution of the Liquidation Trust assets;

(q) To collect and liquidate all assets of the Estates pursuant to the Plan and administer the winding-up of the affairs of the Debtors including, but not limited to, closing the Chapter 11 Cases;

(r) To pay fees incurred pursuant to 28 U.S.C. **§ 1930(a)(6) and to file with the Court and serve on the U.S. Trustee quarterly post-confirmation financial reports for each of the Debtors until such time as such reports are no longer required, or the Court orders otherwise, a final decree is entered closing these Cases or the Cases are converted or dismissed;**

(s) To do all other acts or things consistent with the provisions of the Plan that the Liquidating Trustee deems reasonably necessary or desirable with respect to implementing the Plan.

Other than the obligations of the Liquidating Trustee enumerated or referred to under this Agreement or the Plan, the Liquidating Trustee shall have no duties or obligations of any kind or nature respecting the implementation and administration of the Plan or this Agreement.

2.2 Costs. On and after the Effective Date, the Trust Assets shall be used to pay amounts due to the Liquidating Trustee pursuant this Agreement and the fees and expenses of any counsel, accountant, consultant or other advisor or agent retained by the Liquidating Trustee pursuant to this Agreement as well as other expenses of the liquidation of the Debtors. In the event that amounts held in the Trust Assets are insufficient to make payments as provided in this Section 2.2, the Liquidating Trustee shall, unless reserves sufficient for such purpose have otherwise been, or may be, made available from any other sources, or other Liquidating Trust Assets, have no obligation to make such payments.

2.3 Distributions. Pursuant to the Plan, the Liquidating Trustee shall record and account for all proceeds received upon any disposition of Trust Assets (after deduction therefrom of appropriate reserves as provided herein and in the Plan) for distribution in accordance with the provisions of the Plan.

2.4 Limitations on Investment Powers of Liquidating Trustee. Funds in the Liquidating Trust shall be invested in demand and time deposits in banks or other savings institutions, or in other temporary, liquid investments, such as Treasury bills, consistent with the liquidity needs of the Liquidating Trust as determined by the Liquidating and need not be invested in accordance with section 345 of the Bankruptcy Code unless the Bankruptcy Court otherwise requires.

2.5 Liability of Liquidating Trustee.

(a) Standard of Care. Except in the case of bad faith, willful misconduct, reckless disregard of duty, criminal conduct, gross negligence, fraud or self-dealing, the Liquidating Trustee shall not be liable for any loss or damage by reason of any action taken or omitted by him or her pursuant to the discretion, powers and authority conferred, or in good faith believed by the Liquidating Trustee to be conferred, on the Liquidating Trustee by this Agreement or the Plan.

(b) No Liability for Acts of Predecessors. No successor Liquidating Trustee shall be in any way responsible for the acts or omissions of any Liquidating Trustee in office prior to the date on which such successor becomes the Liquidating Trustee, unless a successor Liquidating Trustee expressly assumes such responsibility.

(c) No Implied Obligations. Subject to the terms of this Agreement, the Liquidating Trustee shall not be liable except for the performance of such duties and obligations as are specifically set forth herein, and no implied covenants or obligations shall be read into this Agreement against the Liquidating Trustee.

(d) No Liability for Good Faith Error of Judgment. The Liquidating Trustee shall not be liable for any error of judgment made in good faith, unless it shall be proved that the Liquidating Trustee was grossly negligent in ascertaining the pertinent facts.

(e) Reliance by Liquidating Trustee on Documents or Advice of Counsel or Other Persons. Except as otherwise provided herein, the Liquidating Trustee may rely and shall be protected in acting upon any resolution, certificate, statement, instrument, opinion, report, notice, request, consent, order or other paper or document believed by the Liquidating Trustee to be genuine and to have been signed or presented by the proper party or parties. The Liquidating Trustee also may engage and consult with legal counsel, accountants or other professionals for the Liquidating Trust and other agents and advisors and shall not be liable for any action taken or suffered by the Liquidating Trustee in reliance upon the advice of such counsel, agents or advisors. The Liquidating Trustee shall have the right at any time to seek instructions from the Bankruptcy Court concerning the administration or disposition of the Trust Assets.

(f) No Personal Obligation for Trust Liabilities. Persons dealing with the Liquidating Trustee, or seeking to assert Claims against the Debtors, shall look only to the Trust Assets to satisfy any liability incurred by the Liquidating Trustee to any such Person in carrying out the terms of this Agreement, and neither the Liquidating Trustee, nor his or her company or organization, shall have a personal or individual obligation to satisfy any such liability.

2.6 Selection of Agents. The Liquidating Trustee may engage any employee of the Debtors or other persons, and also may engage or retain brokers, banks, custodians, investment and financial advisors, attorneys (including existing counsel to the Committee or the Debtors), accountants (including existing accountants for the Committee or the Debtors) and other advisors and agents, in each case without Bankruptcy Court approval. The Liquidating Trustee may pay the salaries, fees and expenses of such persons from amounts in the Trust Assets or proceeds thereof. In addition, the parties acknowledge that Trust Assets may be advanced to satisfy such

salaries, fees and expenses. The Liquidating Trustee shall not be liable for any loss to the Liquidating Trust or any person interested therein by reason of any mistake or default of any such Person referred to in this Section selected by the Liquidating Trustee in good faith and without either gross negligence or intentional malfeasance.

2.7 Liquidating Trustee's Compensation, Indemnification and Reimbursement.

(a) As compensation for services in the administration of this Liquidating Trust, the Liquidating Trustee shall be compensated as specified on **Schedule A** attached hereto. The Liquidating Trustee shall also be reimbursed for all documented actual, reasonable and necessary out-of-pocket expenses incurred in the performance of its duties hereunder.

(b) In addition, the Liquidating Trustee shall be indemnified by and receive reimbursement from the Trust Assets against and from any and all loss, liability, expense (including attorneys' fees), or damage which the Liquidating Trustee incurs or sustains, in good faith and without either gross negligence or intentional malfeasance, acting as Liquidating Trustee under or in connection with this Agreement.

(c) The Liquidating Trustee is authorized to use Trust Assets to obtain all reasonable insurance coverage for himself, his agents, representatives, employees or independent contractors, including, without limitation, coverage with respect to the liabilities, duties and obligations of the Liquidating Trustee and his agents, representatives, employees or independent contractors under the Plan and this Agreement.

2.8 Tax Treatment and Obligation to File Returns.

(a) It is intended that the Liquidating Trust qualify as a grantor trust for federal income tax purposes, all of the interests which are owned by the Trust Beneficiaries, such that all items of income, gain, loss, deduction and credit will be included in the income of the Trust Beneficiaries as if such items had been recognized directly by the Trust Beneficiaries in the proportions in which they own beneficial interests in the Liquidating Trust.

(b) The Liquidating Trustee shall comply with all tax reporting requirements and, in connection therewith, the Liquidating Trustee may require Trust Beneficiaries to provide certain tax information as a condition to receipt of Distributions, including, without limitation, filing returns for the Liquidating Trust as a grantor trust pursuant to Treasury Regulation § 1.6714(a).

2.9 Tax Provisions.

(a) Income Tax Status.

(i) The Liquidating Trust is created for the purpose of liquidating the Trust Assets in accordance with Treasury Regulation section 301.7701-4(d) and making Distributions to holders of Allowed General Unsecured Claims. The Liquidating Trust is not otherwise authorized to engage in any trade or business.

(ii) Under the guidelines set forth in Revenue Procedure 94-95, I.R.B. 1994-20.12 and § 1.671-4(a) of the Income Tax Regulations, the Liquidating Trustee will file returns for the Liquidating Trust as a grantor trust. As described more fully in the Plan and Disclosure Statement, the transfer of the Trust Assets will be treated for tax purposes as a transfer to the Trust Beneficiaries, followed by a deemed transfer from such Trust Beneficiaries to the Liquidating Trust.

(iii) In accordance with the provisions of section 6012(b)(3) of the Internal Revenue Code of 1986, as amended, the Liquidating Trustee shall cause to be prepared, at the cost and expense of the Liquidating Trust, the corporate income tax returns (Federal, state and local) that the Debtors are required to file (to the extent such returns have not already been filed by the Effective Date). The Liquidating Trustee shall timely file each such tax return with the appropriate taxing authority and shall pay out of the Trust Assets all taxes due with respect to the period covered by each such tax return. The Debtors hereby agree to furnish to the Liquidating Trustee all information required by the Liquidating Trustee, and generally to cooperate with the Liquidating Trustee, so as to enable the Liquidating Trustee to accurately and timely prepare such tax returns.

(b) Withholding. The Liquidating Trustee may withhold from the amount distributable from the Liquidating Trust at any time to any Trust Beneficiary such sum or sums as may be sufficient to pay any tax or taxes or other charge or charges which have been or may be imposed on such Trust Beneficiary or upon the Liquidating Trust with respect to the amount distributable or to be distributed under the income tax laws of the United States or of any state or political subdivision or entity by reason of any Distribution provided for by any law, regulation, rule, ruling, directive, or other governmental requirement.

(c) Tax Identification Numbers. The Liquidating Trustee may require any Trust Beneficiary to furnish to the Liquidating Trustee its Employer or Taxpayer Identification Number as assigned by the Internal Revenue Service (or Social Security Number, where applicable) and the Liquidating Trustee may condition any Distribution to any Trust Beneficiary upon receipt of such identification number. If after reasonable inquiry, any Trust Beneficiary fails to provide such identification number to the Liquidating Trustee, the Liquidating Trustee shall deem such Trust Beneficiary's claim as disallowed and no Distribution shall be made on account of such Trust Beneficiary's claim.

(d) Annual Statements. The Liquidating Trustee shall annually (for tax years in which Distributions from the Liquidating Trust are made) send to each Trust Beneficiary a separate statement setting forth the Trust Beneficiary's share of items of income, gain, loss, deduction or credit and all such holders shall report such items on their federal income tax returns.

(e) Expedited Determination. The Liquidating Trustee may request an expedited determination of taxes of the Debtors or of the Liquidating Trust under Bankruptcy Code section 505(b) for all tax returns filed for, or on behalf of, the Debtors and the Liquidating Trust for all taxable periods through the dissolution of the Liquidating Trust.

2.10 Conflicting Claims. If the Liquidating Trustee becomes aware of any disagreement or conflicting Claims with respect to the Trust Assets, or is in good faith doubt as to any action that should be taken under this Agreement, the Liquidating Trustee may take any or all of the following actions as reasonably appropriate:

(i) to the extent of such disagreement or conflict, or to the extent deemed by the Liquidating Trustee necessary or appropriate in light of such disagreement or conflict, withhold or stop all further performance under this Agreement with respect to the matter of such dispute (except, in all cases, the safekeeping of the Trust Assets) until the Liquidating Trustee is reasonably satisfied that such disagreement or conflicting Claims have been fully resolved; or

(ii) file a suit in interpleader or in the nature of interpleader in the Bankruptcy Court (or any other court of competent jurisdiction) and obtain an order requiring all Persons involved to litigate in the Bankruptcy Court their respective Claims arising out of or in connection with this Agreement; or

(iii) file any other appropriate motion for relief in the Bankruptcy Court (or any other court of competent jurisdiction).

2.11 Records of Liquidating Trustee. The Liquidating Trustee shall maintain accurate records of receipts and disbursements and other activity of the Liquidating Trust. On or after 90 days from the Effective Date, the books and records maintained by the Liquidating Trustee, as well as any and all other books and records of the Debtors, may be disposed of by the Liquidating Trustee, without notice or a filing with the Bankruptcy Court, at such time as the Liquidating Trustee determines that the continued possession or maintenance of such books and records is no longer necessary for the benefit of the Liquidating Trust or its beneficiaries, or upon the termination of the Liquidating Trust, provided, however, that the Liquidating Trustee shall not dispose or abandon any books and records that are reasonably likely to pertain to pending litigation in which the Debtors or their current or former officers or directors are a party or that pertain to General Unsecured Claims or Customer Contract Claims without further order of the Bankruptcy Court.

III RIGHTS, POWERS AND DUTIES OF BENEFICIARIES.

3.1 Interests of Beneficiaries. The Trust Beneficiaries shall have beneficial interests in the Trust Assets as provided in the Plan. The Trust Beneficiaries' proportionate interests in the Trust Assets as thus determined shall be not be transferable, except upon the death of the Trust Beneficiary or the operation of law.

3.2 Interests Beneficial Only. The ownership of a beneficial interest hereunder shall not entitle any Trust Beneficiary to any title in or to the Trust Assets as such (which title shall be vested in the Liquidating Trustee) or to any right to call for a partition or division of Trust Assets or to require an accounting.

IV AMENDMENT OF TRUST OR CHANGE IN TRUSTEE.

4.1 Resignation of the Liquidating Trustee. The Liquidating Trustee may resign by an instrument in writing signed by the Liquidating Trustee and filed with the Bankruptcy Court, provided that the Liquidating Trustee shall continue to serve as such after his resignation for thirty (30) days or, if longer, until the time when appointment of his successor shall become effective in accordance with Section 4.3 hereof.

4.2 Appointment of Successor Liquidating Trustee. In the event of the death, resignation, termination, incompetence or removal of the Liquidating Trustee, the Bankruptcy Court may appoint a successor Liquidating Trustee on request of any party in interest. Every successor Liquidating Trustee appointed hereunder shall execute, acknowledge and deliver to the Bankruptcy Court and to the predecessor Liquidating Trustee (if practicable) an instrument accepting such appointment and the terms and provisions of this Agreement, and thereupon such successor Liquidating Trustee, without any further act, deed or conveyance, shall become vested with all the rights, powers and duties of the retiring Liquidating Trustee.

4.3 Continuity. Unless otherwise ordered by the Bankruptcy Court, the death, resignation, incompetence or removal of the Liquidating Trustee shall not operate to terminate or to remove any existing agency created pursuant to the terms of this Agreement or invalidate any action theretofore taken by the Liquidating Trustee. In the event of the resignation or removal of the Liquidating Trustee, the Liquidating Trustee shall promptly execute and deliver such documents, instruments, final reports, and other writings as may be reasonably requested from time to time by the Bankruptcy Court, or the successor Liquidating Trustee.

4.4 Amendment of Agreement. This Agreement may be amended, modified, terminated, revoked or altered only upon order of the Bankruptcy Court.

V TERMINATION OF TRUST

The Liquidating Trustee shall be discharged and the Liquidating Trust shall be terminated, at such time as (i) all Disputed Claims have been resolved; (ii) all of the Trust Assets have been liquidated; (iii) all duties and obligations of the Liquidating Trustee under this Agreement have been fulfilled; (iv) all Distributions required under the Plan and this Agreement have been made; and (v) the Debtors' Chapter 11 Cases have been closed; provided, however, that in no event shall the Liquidating Trust be dissolved later than three (3) years from the Effective Date unless the Bankruptcy Court, upon motion within the six-month period prior to the third anniversary (or the end of any extension period approved by the Bankruptcy Court), determines that a fixed period extension not to exceed one (1) year is necessary to facilitate or complete the recovery and liquidation of the Liquidating Trust Assets.

VI RETENTION OF JURISDICTION

Subject to the following sentence, the Bankruptcy Court shall have exclusive jurisdiction over the Liquidating Trust, the Liquidating Trustee and the Trust Assets as provided in the Plan, including the determination of all controversies and disputes arising under or in connection with the Liquidating Trust or this Agreement. However, if the Bankruptcy Court abstains or declines to exercise such jurisdiction or is without jurisdiction under applicable law, any other court of

competent jurisdiction may adjudicate any such matter. All Trust Beneficiaries consent to the jurisdiction of the United States District Court for the District of Delaware and the state courts sitting in Delaware over all disputes related to this Agreement.

VII MISCELLANEOUS

7.1 Applicable Law. The Liquidating Trust created by this Agreement shall be construed in accordance with and governed by the laws of the State of Delaware without giving effect to principles of conflict of laws, but subject to any applicable federal law.

7.2 Waiver. No failure or delay of any party to exercise any right or remedy pursuant to this Agreement shall affect such right or remedy or constitute a waiver thereof.

7.3 Relationship Created. Nothing contained herein shall be construed to constitute any relationship created by this Agreement as an association, partnership or joint venture of any kind.

7.4 Interpretation. Section and paragraph headings contained in this Agreement are for convenience of reference only and shall not affect the meaning or interpretation of any provision hereof.

7.5 Savings Clause. If any clause or provision of this Agreement shall for any reason be held invalid or unenforceable by the Bankruptcy Court, such invalidity or unenforceability shall not affect any other clause or provision hereof, but this Agreement shall be construed, insofar as reasonable to effectuate the purpose hereof, as if such invalid or unenforceable provision had never been contained herein.

7.6 Entire Agreement. This Agreement and the Plan constitute the entire agreement by and among the parties and there are no representations, warranties, covenants or obligations with respect to the subject matter hereof except as set forth herein or therein. This Agreement together with the Plan supersedes all prior and contemporaneous agreements, understandings, negotiations and discussions, written or oral, of the parties hereto, relating to such subject matter. Except as otherwise authorized by the Bankruptcy Court or specifically provided in this Agreement or in the Plan, nothing in this Agreement is intended or shall be construed to confer upon or to give any Person other than the parties hereto, and the Trust Beneficiaries any rights or remedies under or by reason of this Agreement.

7.7 Counterparts. This Agreement may be executed by facsimile or electronic transmission and in counterparts, each of which when so executed and delivered shall be an original document, but all of which counterparts shall together constitute one and the same instrument.

7.8 Notices.

(a) All notices, requests or other communications required or permitted to be made in accordance with this Agreement shall be in writing and shall be deemed given five Business Days after first-class mailing, one Business Day after sending by overnight courier, or on the first Business Day after facsimile or electronic transmission.

(i) if to the Liquidating Trustee:

GAVIN /SOLMONESE LLC
Stanley Mastil
919 North Market Street
Suite 600
Wilmington, Delaware 19801

(ii) if to the Debtors:

SULLIVAN & WORCESTER LLP
Jeffrey R. Gleit
1633 Broadway
New York, NY 10019
Tel: (212) 660-3043
Fax: (212) 660-3001

(iii) if to any Trust Beneficiary, to such address as such Trust Beneficiary shall have furnished to the Debtors in writing prior to the Effective Date.

(b) Any Person may change the address at which it is to receive notices under this Agreement by furnishing written notice to the Liquidating Trustee in the same manner as above.

7.9 Effective Date. This Agreement shall become effective as of the Effective Date.

7.10 Successors and Assigns. This Agreement shall be binding upon each of the parties hereto and their respective successors and assigns and shall inure to the benefit of the parties, Committee, the Trust Beneficiaries and, subject to the provisions hereof, their respective successors and assigns.

7.11 Conflict with the Plan. In the event of any conflict between the terms of this Agreement and the Plan, the terms of the Plan shall govern.

IN WITNESS WHEREOF the undersigned have caused this Agreement to be executed as of the day and year first above written.

BOOMERANGS SYSTEMS AND ITS RELATED DEBTORS

By:_____
Name:
Title:

GAVIN/SOLMONESE, LLC LIQUIDATING TRUSTEE
By:_____
Name: Anthony Saccullo
Title: Liquidating Trustee of Boomerang Systems Liquidating Trust

OFFICIAL COMMITTEE OF UNSECURED CREDITORS OF BOOMERANGS SYSTEMS, INC., ET AL.

By:_____
Name: Janna Shacklett
Title: Chairperson

SCHEDULE A

TERMS OF COMPENSATION AND REIMBURSEMENT OF EXPENSES OF THE LIQUIDATING TRUSTEE

1. COMPENSATION

Beginning at the Effective Date (as defined in the Plan), the Liquidating Trustee shall be employed and compensated on an hourly basis at the following hourly rates

Senior Directors & Managing Directors[1]	$400 to $650
Directors[2]	$300 to $425
Senior Consultants and Analysts	$200 to $325
Other Professionals	$125 to $225

2. REIMBURSEMENT OF EXPENSES

The Liquidating Trustee shall be entitled to reimbursement for documented actual and reasonable expenses incurred in performing his duties as the Liquidating Trustee.

[1] Edward T. Gavin, Managing Director of Gavin/Solmonese will be the professional with overall client responsibility on this matter. Mr. Gavin's rate is $625 per hour.

[2] Stan Mastil, a Director of Gavin/Solmonese will be the primary professional at Gavin/Solmonese working on this matter. Mr. Mastil's rate is $400 per hour.

SAMPLE KEY SETTLEMENT PROVISIONS

Jeanne P. Darcey, Esq.
jdarcey@sandw.com
Sullivan & Worcester LLP
Boston, Massachusetts
July, 2017

1. **Mutual Releases**

a. [Party A Releases]. On the Settlement Effective Date and after receipt of all Settlement Amounts (for the avoidance of doubt, without the need for any further steps or actions to be taken by any party), Party A, on behalf of itself and its respective predecessors and predecessors in interest, successors and successors in interest, divisions, directors, officers, administrators, employees, subrogees, assigns, agents, attorneys and representatives, hereby irrevocably and completely releases, acquits, and forever discharges the Party B Released Parties from any and all of the Released Claims.

b. [Party B Releases]. On the Settlement Effective Date (for the avoidance of doubt, without the need for any further steps or actions to be taken by any party), Party B, on behalf of itself and its respective predecessors and predecessors in interest, successors and successors in interest, divisions, directors, officers, administrators, employees, subrogees, assigns, agents, attorneys and representatives, hereby irrevocably and completely releases, acquits, and forever discharges the Party A Released Parties from any and all of the Released Claims.

c. The Parties intend that the releases contained in this Paragraph shall constitute general and full releases of the Released Claims and shall bar each and every claim, demand or cause of action released hereunder. The Parties acknowledge that, by executing this Agreement, and for the consideration received hereunder, it is their intention to release, and they are releasing, all Released Claims, even those of which the Parties are presently unaware and unsuspecting. In furtherance of this intention, the Parties expressly waive and relinquish, to the fullest extent permitted by law, any rights or benefits conferred by the provisions of California Civil Code § 1542 or any similar law.

California Civil Code § 1542 provides:

A GENERAL RELEASE DOES NOT EXTEND TO CLAIMS WHICH THE CREDITOR DOES NOT KNOW OR SUSPECT TO EXIST IN HIS OR HER FAVOR AT THE TIME OF EXECUTING THE RELEASE, WHICH IF KNOWN BY HIM OR HER MUST HAVE MATERIALLY AFFECTED HIS OR HER SETTLEMENT WITH THE DEBTOR.

2. **Waiver of Appeal**

Effective as of the Settlement Effective Date, each Party waives (for the avoidance of doubt, without the need for any further steps or actions to be taken by any Party) its right to appeal the matters set forth in the [Proceeding].

3. **Commercial Accommodation; No Admission of Liability**

The Parties agree that this Agreement shall operate as a commercial accommodation between the Parties and is being entered into for the purpose of reaching a compromise, adjustment, and settlement of the Released Claims. Each of the Parties expressly acknowledges that any and all negotiations, documents, and discussions associated with this Agreement, and any actions taken in compliance with this Agreement, including payment of the settlement

consideration, shall not be construed as an admission or evidence of the merits or lack of merits of any of the legal positions taken or arguments made with respect to the Original Application, the Amended Application or the Supplemental Applications.

4. **Representations and Warranties**

a. The Parties hereby represent and warrant as follows:

(i) Independent Legal Advice. The Parties have received independent legal advice from their attorneys with respect to the advisability of entering into the settlement provided for herein, as well as the advisability of executing this Agreement.

(ii) Reliance. In entering into this Agreement, the Parties do not rely on any statement, representation, or promise of any person or entity whatsoever except as expressly set forth in this Agreement.

(iii) Authority. The signatories to this agreement are empowered to execute this Agreement and to bind their respective clients in accordance with the terms of this Agreement [subject to Bankruptcy Court Approval, as set forth below].

b. The Debtor hereby represents and warrants as follows:

(i) Consents or Approvals. [No] consent or approval of the Bankruptcy Court or of any other third party is required for the Debtor to enter into and perform its obligations under this Agreement.

5. **Federal Rules of Evidence 408**

The Parties agree that this Agreement, its terms and the negotiations surrounding the Agreement, shall be governed by Rule 408 of the Federal Rules of Evidence and shall not be admissible or offered or received into evidence in any suit, action or other proceeding, except upon the written agreement of the Parties hereto, pursuant to an order of a court of competent jurisdiction, or as shall be necessary to give effect to, declare or enforce the rights of the parties with respect to any provision of the Agreement.

6. **Confidentiality**

Each Party agrees not to, and to cause its respective affiliates, directors, officers, employees, investment advisors, agents, financial advisors, representatives, accountants or attorneys not to, (i) disclose to the press or post on any publicly available website (A) any statements of position or other terms of the negotiations in connection with this Agreement, (B) any characterization of any or all of the terms and conditions of this Agreement, or (C) any non-public information regarding any Party or any of its affiliates, directors, officers, or employees that was disclosed to another Party during or in connection with the negotiation of this Agreement; (ii) disseminate or disclose a copy of the Agreement (or a substantial portion thereof) (other than to a court to perform its obligations hereunder), provided, however that it is expressly understood that the general terms and conditions of this Agreement will be publicly disclosed to the Bankruptcy Court; and further provided that the Parties may disclose this

Agreement to their respective affiliates, directors, officers, employees, investment advisors, agents, financial advisors, representatives, accountants or attorneys who need to know such information and agree to keep such information confidential and use it for no purpose other than in connection with the purposes hereof or to the extent required by applicable laws or regulations or by any subpoena or similar legal process or to enforce the terms of this Agreement.

Alternative Provision:

Confidentiality.

The Parties acknowledge and agree that the discussions and communications between the Parties in connection herewith, including, without limitation, all communications in connection with the settlement of the Claims, are strictly confidential, and may not be disclosed to any party without the express consent of all the Parties.

7. **Most Favored Nations**

[Party B - generally a defendant] agrees that, effective upon the date hereof, in the event that Party B enters into any settlement agreement for the payment of general unsecured claims with creditors of Party B on more favorable terms than the terms set forth herein, then [Party A] shall be entitled to the more favorable term or terms and this Settlement Agreement shall be amended to incorporate the more favorable term or terms.

8. **Costs**

The Parties shall bear their own costs, expenses, and attorneys' fees incurred in connection with this Agreement.

9. **Binding Effect**

This Agreement is binding upon and shall inure to the benefit of each of the Parties hereto, and their respective Affiliates and each of the Parties and their respective Affiliates' present and former employees, representatives, officers, directors, divisions, attorneys, assigns, predecessors and predecessors in interest, and successors and successors in interest. Each Party agrees to do everything reasonably necessary to effectuate the performance of, and uphold the validity and enforceability of, this Agreement.

10. **Third Party Beneficiaries**

The Parties agree that Released Parties that are not Parties hereto are intended third-party beneficiaries of this Agreement and are authorized to enforce its terms as applicable to them.

11. **Consent to Jurisdiction; Enforcement**

Any motions, applications, claims or causes of action arising from any disputes relating to this Agreement shall be brought in the Bankruptcy Court.

12. **Entire Agreement**

This Agreement contains the entire, complete, and integrated statement of each and every term and provision agreed to by and among the Parties and is not subject to any condition not provided for herein. This Agreement supersedes any prior and contemporaneous oral and written agreements and communications between or among the Parties regarding the subject matter hereof.

13. **Waiver and Amendment; Preservation of Remedies**

This Agreement may be amended only by an agreement in writing executed by all of the Parties hereto. The failure by any Party hereto to insist upon strict performance of any of the terms or conditions of this Agreement shall not be deemed a waiver of any of the rights or remedies that such Party may have, and shall not be deemed a waiver of any subsequent breach or default. To be effective, any waiver with regard to this Agreement must be in writing and signed by the Party granting the waiver, and any such waiver shall apply only to the matter or instance specifically waived.

14. **No Strict Construction**

The Parties have participated jointly in the negotiation, drafting and editing of this Agreement. In the event an ambiguity or question of intent or interpretation arises with respect to this Agreement, this Agreement shall be construed as if drafted jointly by all Parties, and no presumption or burden of proof shall arise favoring or disfavoring any Party by virtue of the authorship of any of the provisions of this Agreement.

15. **Severability**

If any provision of this Agreement, or application of such provision to any person or circumstance, shall be held invalid by a court of competent jurisdiction, the remainder of this Agreement, or the application of such provision to persons or circumstances other than to those as to which it is held invalid, shall not be affected thereby unless to do so would destroy the essential purpose of this Agreement.

16. **Avoidance/Claw-Back**

In the event [Party A] is compelled by an order of a court of competent jurisdiction or required for any other reason to return, disgorge or repay any portion of the Settlement Amount, or if the payment of any portion of the Settlement Amount is avoided by [Party B] or any person or entity acting on behalf of [Party B] or its respective estate, then (a) the releases given by the Parties will be deemed void; and (b) [Party A] will return to the [Party B] whatever portion of the Settlement Amount it is ordered or required to return, disgorge or repay.

17. **Successors and Assigns**

A Party's rights and obligations under this Agreement may not be assigned without the prior written consent of the other Party. All of the provisions of this Agreement shall be binding

upon and inure to the benefit of each of the Parties and their respective successors and permitted assigns.

18. **Specific Performance**

The Parties agree that, in the event of a breach of the terms of this Agreement, there will be no adequate remedy at law to remedy such breach and, accordingly, the Parties agree that specific performance may be awarded to enforce the terms of this Agreement.

19. **Headings**

The headings contained in this Agreement are inserted for convenience only and shall not affect in any way the meaning or interpretation of this Agreement.

20. **Bankruptcy Court Approval**.

(a) The obligations of the [Debtor] to this Settlement Agreement are subject to Bankruptcy Court approval. Effective upon the Execution Date, [Debtor] shall promptly file a motion with the Bankruptcy Court seeking entry of the Approval Order, and shall reasonably endeavor to obtain the entry and finality of the Approval Order. [Debtor] shall consult in good faith with [Party B] as to such motion and any related pleadings and the Approval Order; and the Parties, their counsel and other agents and representatives, shall in good faith and to the full extent reasonably possible (i) cooperate with each other's reasonable requests regarding such motions and related pleadings, (ii) refrain from issuing any press releases relating to this Settlement Agreement or the Settled Matters, (iii) refrain from making disparaging statements about the other in such motion, pleadings and any other written or oral statements (including without limitation public statements and statements to the media) relating to this Settlement Agreement or the Settled Matters (other than in connection with any action, suit or proceeding to enforce the terms hereof), and (iv) refrain from publicly characterizing the settlement as more favorable to one Party, or as being other than fair, reasonable, equitable, or the like.

(b) In the event that the Bankruptcy Court declines to enter the Approval Order (or a court enters an order precluding the entry of an order that would qualify as the Approval Order or overturning any Approval Order entered by the Bankruptcy Court, and such order has become final and no longer subject to appeal or certiorari proceeding), this Settlement Agreement shall terminate and be of no further force or effect. If this Settlement Agreement terminates in accordance with the preceding sentence, each provision contained in this Settlement Agreement shall be of no further force and effect from and after such date of termination and (without limiting the generality of the foregoing) the mutual releases provided for herein shall be void *ab initio*.

(c) All litigation activity of whatever nature in connection with the Settled Matters (except steps necessary to effectuate the Settlement Agreement) shall be suspended unless and until this Settlement Agreement is terminated in accordance with sub-section (b) above.

SAMPLE MEDIATION ORDER AND MEDIATION PROCEDURES

The following mediation order and procedures are taken from the case of *In re: GT Advanced Technologies Inc., et al.*, Case No. 14-11916 (CJP), filed in the District of New Hampshire, in which Sullivan & Worcester LLP represents the reorganized debtors for purposes of prosecuting avoidance actions.

Jeanne P. Darcey, Esq.
jdarcey@sandw.com
Sullivan & Worcester LLP
Boston, Massachusetts
July, 2017

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re:	:	Chapter 11
GT ADVANCED TECHNOLOGIES INC., et al.[1]	:	Case No. 14-11916-CJP (Lead Case)
	:	(Jointly Administered)
Reorganized Debtor(s)	:	

ORDER ESTABLISHING PROCEDURES FOR THE PROSECUTION AND RESOLUTION OF AVOIDANCE CLAIMS

Upon consideration of the motion (the "Motion") of the above-captioned reorganized debtors (collectively, the "Reorganized Debtors") for entry of an order pursuant to section 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 that certain Order Pursuant to Bankruptcy Code Section 105(a) and Bankruptcy Rule 1015(c) and 9007, Implementing Certain Notice and Case Management Procedures [Docket No. 83] (the "Case Management Order"), establishing Avoidance Action Procedures and the Court having reviewed the Motion; and the Court having determined that the relief requested in the Motion is in the best interests of the Reorganized Debtors, their estates, their creditors, and other parties in interest; and it appearing proper and adequate notice of the Motion has been given and that no other or further notice is necessary; and upon the record herein; and after due deliberation thereon; and good and sufficient cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

[1] The Reorganized Debtors, along with the last four digits of each reorganized debtor's tax identification number, as applicable, are: GT Advanced Technologies Inc. (6749), GTAT Corporation (1760), and GT Advanced Technologies Limited (1721).

1. The Motion is GRANTED, and the procedures set forth in Exhibit 1 to this Order (the "Avoidance Action Procedures") are hereby approved and shall govern the Avoidance Actions[2], effective as of the date of this Order; provided, however, the Avoidance Actions Procedures shall not apply to (i) that certain adversary proceeding captioned *GT Advanced Technologies Limited v. Tera Xtal Technology Corp.*, Adv. Proc. No. 15-01038-CJP, which was commenced on June 10, 2015, or (ii) the Lien Avoidance Actions.[3]

2. Each of those persons referenced on the proposed mediators list filed in connection with the Motion and listed on Exhibit 2 annexed hereto is hereby approved as an authorized Mediator.

3. The Bankruptcy Code, the Bankruptcy Rules, the Local Bankruptcy Rules and the Case Management Order shall apply to the Avoidance Actions, except to the extent that they conflict with the Avoidance Action Procedures, in which event the Avoidance Action Procedures shall govern.

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

5. Adequate notice of the relief sought in the Motion has been given and no further notice is required.

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[2] The Avoidance Action Procedures shall not apply to the current dispute between the Reorganized Debtors and Tera Xtal Technology Corp. ("TXT") due to extent to which those discussions have progressed.

[3] As defined in the Motion, the "Lien Avoidance Actions" commenced on June 21, 2016 include: (i) *GTAT Corporation v. Green Leaf Construction, LLC*, Case No. 16-01048-CJP; (ii) *GTAT Corporation v. Granite State Plumbing & Heating, LLC*, Adv. Proc. No. 16-01049-CJP; (iii) *GTAT Corporation v. Interstate Electrical Services Corporation and Liquidity Solutions, Inc.*, Adv. Proc. No. 16-01050-CJP; (iv) *GTAT Corporation and GT Advanced Technologies Inc. v. Metro Walls, Inc.*, Adv. Proc. No. 16-01051-CJP; (v) *GTAT Corporation and GT Advanced Technologies Inc. v. Decco, Inc.*, Adv. Proc. No. 16-01052-CJP; and (vi) *GTAT Corporation and GT Advanced Technologies Inc. v. CI Design, Inc.*, Adv. Proc. No. 16-01053-CJP.

6. The Reorganized Debtors shall serve a copy of this Order and the annexed Avoidance Action Procedures upon the defendant in any Avoidance Action either with the Summons and Complaint or as soon after service of the Summons and Complaint is possible.

7. This Order shall be immediately effective and enforceable upon its entry.

8. The Reorganized Debtors are authorized to take all actions necessary to effectuate the relief granted pursuant to this Order.

9. This Court shall retain exclusive jurisdiction to hear and decide any and all disputes related to or arising from the implementation, interpretation and enforcement of this Order.

Signed this 28th day of September, 2016

CHRISTOPHER J. PANOS
UNITED STATES BANKRUPTCY JUDGE

Exhibit 1

Avoidance Action Procedures

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re:	:	Chapter 11
GT ADVANCED TECHNOLOGIES INC., et al.[1]	:	Case No. 14-11916-CJP (Lead Case)
	:	(Jointly Administered)
Reorganized Debtor(s)	:	

PROCEDURES FOR THE
PROSECUTION AND RESOLUTION OF AVOIDANCE CLAIMS

These Avoidance Action Procedures have been approved by the United States Bankruptcy Court for the District of New Hampshire (the "Court") in the above-captioned bankruptcy case by an order dated September 28, 2016, entitled *Order Establishing Procedures for the Prosecution and Resolution of Avoidance Claims* [Docket No. __] (the "Order"). Capitalized terms used but not defined herein shall have the meanings ascribed to the terms in the Motion of the Reorganized Debtors for an order establishing procedures for avoidance actions [Docket No. 3608] (the "Motion"). These procedures apply to all of the several hundred Avoidance Actions that the Reorganized Debtors have commenced or anticipate commencing in the near future.

A. Initial Disclosure. The Reorganized Debtors shall make an initial disclosure (the "Initial Disclosure") including but not limited to documents relevant to an analysis of GTAT's relative solvency or insolvency during the preference period. The Initial Disclosure will be placed into a secure data room, and defendants who so request will be given access to view the Initial Disclosure upon execution of a confidentiality agreement with the Reorganized Debtors.

[1] The Reorganized Debtors, along with the last four digits of each reorganized debtor's tax identification number, as applicable, are: GT Advanced Technologies Inc. (6749), GTAT Corporation (1760), and GT Advanced Technologies Limited (1721).

B. Telephonic Hearing. If any defendant seeks to challenge the adequacy of the Initial Disclosure and believes, in good faith, that additional information is required prior to mediation, the defendant may file a one-page request for a telephonic hearing before this Court. At such a hearing, the defendant will have the opportunity to articulate, with specificity, what additional information is desired. If the Court, in its discretion, orders that the Reorganized Debtors must disclose additional documents (an "Additional Disclosure"), such Additional Disclosure will be made in accordance with paragraph A above.

C. Case-Specific Summons. The Summons issued for each Avoidance Action will vary from the Court's standard form and will be an "Answer Only" summons. The Summons will inform the defendant that it has thirty (30) days from the date of service of the Summons (rather than the date of issuance) to respond to the Complaint. The Summons will not set a pretrial conference date; any pretrial or other scheduling conference will be set only after the completion of the mediation procedures described below unless otherwise ordered by the Court. Counsel to the Reorganized Debtors will submit a proposed form of Summons in MS Word format to the Clerk's office within seven (7) days of entry of the Order.

D. Extension of Time by Which Plaintiff Must Serve the Summons. The time period under Federal Rule of Civil Procedure 4, made applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7004(e), by which the plaintiff must serve the Summonses and Complaints in the Avoidance Actions to defendants in the United States shall be extended by thirty (30) days, without prejudice to the Reorganized Debtors' right to seek further extensions of time for cause shown. It is anticipated, however, that the Reorganized Debtors will serve the Summonses and Complaints as promptly as practicable after issuance of the Summons.

E. Stipulation to Extend Time for Defendants to Respond to the Complaint. Without further order of the Court, the parties may stipulate to one extension of the time of no more than thirty (30) days within which a defendant must respond to a Complaint,

provided, however, that the Reorganized Debtors have agreed to provide Benchmark Electronics (M) Sdn. Bhd and its affiliates (collectively, "Benchmark") with an extension of up to sixty (60) days within which to respond to such a Complaint. The stipulation must be in writing to be binding on the Reorganized Debtors and the Stipulation can be documented via email. Any further or longer extensions of time will require Court approval.

F. **Stay of Requirement to Conduct Scheduling Conference.** Federal Rule of Civil Procedure 26(f), applicable to the Avoidance Actions pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan) shall be stayed for the Avoidance Actions. Upon the filing of the Mediator's Certificate (as described and defined below) with respect to each Avoidance Action that is not resolved through the Mediation Process (as described and defined below) or otherwise, the parties shall conduct a Rule 26(f) conference and file with the Court a proposed discovery and case management plan, that includes proposed dates for automatic disclosures, conclusion of fact discovery and expert discovery, joinder of parties and amendment of pleadings, filing dispositive motions and responses thereto, and submission of a joint pretrial memorandum, which dates may be incorporated into a case management order to be entered by the Court (the "Scheduling Order") prior to the date set for the Pretrial Scheduling Conference (as described and defined below).

G. **Pre-Mediation Call in lieu of Scheduling Conference.** In lieu of the Rule 26(f) conference described in paragraph F above, the parties shall schedule a pre-mediation call at which the parties will attempt to focus the issues in dispute. Within fourteen (14) days following such call, if either party is convinced, in good faith, that mediation would not be fruitful, either party may file a one-page request for a telephonic hearing with the Court. At such hearing, the Court shall determine, in its discretion, whether to permit a party to opt out of the remainder of these mediation procedures or may refer the Avoidance Action to a "settlement judge" for mediation.

H. **Stay of Discovery.** Other than the disclosures made pursuant to these Avoidance Action Procedures, the parties' obligations to conduct formal discovery in each Avoidance Action shall be stayed until the Scheduling Order is entered, provided that the stay of discovery shall in no way preclude the parties from informally exchanging documents and information in an attempt to resolve an Avoidance Action in advance of, or during, the Mediation Process.

I. **Mandatory Mediation Process.** Mediation will be required in all Avoidance Actions in accordance with the following procedures and timetable:

(1) Within forty-five (45) days after the defendant files its Answer to the Complaint, such defendant shall: (i) choose to mediate its Avoidance Action in either Boston, Massachusetts, Manchester, New Hampshire or New York, New York; (ii) choose a mediator from the court-approved list of mediators attached to the Proposed Order as Exhibit 2; and (iii) notify the Reorganized Debtors of defendant's choice of one of the mediators listed in Exhibit 2 to the Proposed Order and the location of the mediation either by letter addressed to Sullivan & Worcester LLP, 1633 Broadway, New York, NY 10019, Attn: Jeffrey R. Gleit or by email to jgleit@sandw.com with copies to jdarcey@sandw.com and nkoslof@sandw.com. If a defendant is unable to identify an acceptable mediator from the court-approved list of mediators attached to the Proposed Order as Exhibit 2, the defendant may suggest alternative mediators to the Reorganized Debtors within the timeframe described above. If the parties, in good faith, remain unable to identify a mutually agreeable mediator, either party may file a one-page request for a telephonic hearing with the Court. At such hearing, the Court shall select an appropriate mediator for the dispute or may refer the Avoidance Action to a "settlement judge" for mediation.

(2) The Reorganized Debtors, working in good faith with the mediators and defendants, will schedule the mediations. Each mediator will provide to the Reorganized Debtors the dates on which the mediator is available for mediation and the Reorganized Debtors will coordinate with the defendants to schedule the mediations on those dates. The Reorganized Debtors shall propose at least three (3) dates for mediation to each defendant and each defendant shall promptly indicate its availability. If a defendant is unavailable for any of the proposed dates, and if the parties are unable to identify another mutually agreeable date and time, either party may file a one-page request for a telephonic hearing with the Court. At such hearing, the Court shall set an appropriate date for mediation.

(3) The Reorganized Debtors will provide at least twenty-one (21) days written notice of the first date, time and place of each mediation, which notice shall be filed on the docket for the relevant Avoidance Action.

(4) At least ten (10) days prior to the scheduled mediation for each Avoidance Action, the parties shall exchange position statements and submit their respective position statements to the mediator. Unless agreed in writing by both parties and the mediator, the position statements shall not exceed seven (7) pages double-spaced (exclusive of exhibits and schedules). The mediator may also require the parties to provide to the mediator any relevant papers and exhibits, and a settlement proposal (collectively with the position statements, the "Submissions"). The mediator may also require that counsel to each party participate in a telephone call with the mediator between the delivery of the Submissions and the mediation to discuss an overview of the Avoidance Action, the mediation process and the prospects for settlement prior to mediation.

(5) No mediator shall mediate an Avoidance Action in which he/she or his/her law firm represents a party to the mediation. If a mediator's law firm currently represents or previously represented creditors in these chapter 11 cases, such mediator may, after disclosure to and consent by the parties, still serve as mediator on Avoidance Actions involving other creditors but shall take all steps necessary to establish an ethical wall, including, but not limited to: (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 that Avoidance Action by employees of the law firm shall exclude the mediator. The mediator's participation in mediations pursuant to the Avoidance Action Procedures shall not create a conflict of interest with respect to the representation of such defendants by the mediator's law firm. Nothing herein constitutes a finding by this Court that the appointment of a particular mediator to a particular mediation is consistent with ethical rules and professional standards applicable to the mediator. Mediators shall take any and all actions necessary to ensure their compliance with said rules before accepting mediation of an Avoidance Action.

(6) The mediator's fees and expenses shall be assumed by the Reorganized Debtors in full unless the Avoidance Action contains a demand amount (as reflected in the Complaint) of $250,000 or more, in which case the defendant shall contribute $1,000 to the total fee. Payment arrangements satisfactory to the mediator must be completed prior to the commencement of the mediation. Payment shall be made simultaneously with the delivery of the Submissions. The mediator's fees and expenses shall be fixed as follows:

- Avoidance Actions with a demand amount (as reflected in the Complaint) of less than $25,000: $1,500 per case;

- Avoidance Actions with a demand amount (as reflected in the Complaint) between $25,000 and $100,000: $2,000 per case;
- Avoidance Actions with a demand amount (as reflected in the Complaint) between $100,000 and $250,000: $3,000 per case;
- Avoidance Actions with a demand amount (as reflected in the Complaint) in excess of $250,000: $4,000 per case (contribution of $1,000 to be made by the defendant);
- In all cases, reasonable out-of-pocket expenses, including but not limited to delivery charges, filing fees, photocopying, printing and travel expenses, will be shared by the parties. The mediator will bill the parties monthly for such disbursements. Payment shall be made within 30 days of receipt of invoice.

(7) The mediator will preside over the mediation with full authority to determine the nature and order of the parties' presentations. The mediator may implement additional procedures which are reasonable and practical under the circumstances. If the mediator so chooses, the mediator may engage the services of a second mediator of his/her choosing to aid in the mediation process. The services of any such second mediator will be provided at no additional cost to the parties, and both mediators will share in the standard fees associated with the mediation services delineated in Section I(6) above.

(8) The parties 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. At least one counsel for each party[2] and a representative of each party having full settlement authority shall attend the mediation in person; provided, however that if a party, in good faith, determines that it is not cost effective to attend the mediation in person, they may participate telephonically or via video conferencing such as Skype.

(9) The length of time necessary to complete the mediation will be within the mediator's discretion. The mediator may also adjourn a mediation that has been commenced if the mediator determines that an adjournment is in the best interests of the parties. At any time after an initial session, if either party is convinced, in good faith, that further mediation would not be fruitful, either party may file a one-page request for a telephonic hearing with the Court. At such hearing, the Court shall determine, in its discretion, whether to permit a party to opt out of the remainder of these mediation

[2] Sullivan & Worcester LLP's attendance at the mediations shall satisfy the requirement that Reorganized Debtors' counsel be present.

procedures or whether to refer the Avoidance Action to a "settlement judge" for mediation.

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

(11) The parties shall make good faith efforts to conclude the mediation no later than 120 days after the date on which the defendant has filed its Answer to the complaint.

(12) If a party (a) fails to submit the required submissions as provided in these Mediation Procedures or as may be agreed to by the mediator or ordered by the Court, or (b) fails to attend the mediation as required, then the non-defaulting party may file a motion for sanctions, a default judgment or an order to dismiss the Avoidance Action.

(13) The full fees and expenses of the mediator shall be paid by any party that cancels or fails to appear at mediation unless the party notifies the mediator of the cancellation by facsimile or email no less than five (5) days prior to the scheduled mediation date (not counting the day scheduled for mediation), subject to further restriction set by any selected mediator.

(14) Within ten (10) days after the conclusion of the mediation, the mediator will file a certificate, drafted with the caption of the Avoidance Action, which need only state (a) the date that the mediation took place, (b) the names of the parties and counsel that appeared (or failed to appear, as applicable) at the mediation, and (c) whether or not the applicable Avoidance Action settled (the "Mediator's Certificate").

(15) If an Avoidance Action has not settled, then the Reorganized Debtors must file with the Court, and serve on the defendant, a notice of Pretrial Scheduling Conference to take place in the Avoidance Action at the next scheduled Omnibus Hearing, provided, however, that a minimum of fourteen (14) days notice of the Pretrial Scheduling Conference is required.

(16) If an Avoidance Action is referred to a settlement judge to mediate, the provisions of subsections 2 through 8, inclusive, 11, and 13 of this Section I shall not apply. The settlement judge shall conduct the mediation as he or she determines is appropriate.

J. **Pretrial Scheduling Conferences/Motion Hearing Dates.** The Court will schedule regular Omnibus Hearing dates in this bankruptcy case, on which dates any post-

mediation pretrial scheduling conferences in the Avoidance Actions will take place. Any pretrial motions filed by the parties in the Avoidance Actions must be set for hearing on one of the Omnibus Hearing dates after the filing of the Mediator's Certificate or unless otherwise ordered by the Court.

K. **Motions Affecting All Avoidance Actions.** Any motions filed by the Reorganized Debtors that affect all of the Avoidance Actions may and should be filed in the Bankruptcy Case, and not in each separately docketed Avoidance Action, provided, however, that each defendant shall receive notice of the filing of the same and any such motion shall be titled "Omnibus Avoidance Action Motion Requesting ..." followed by a description of the relief sought.

L. **Application of Existing Case Management Orders.** The Court's Case Management Order in these Chapter 11 Cases remains in full force and effect, except to the extent that it conflicts with the Avoidance Action Procedures, and in such event, the Avoidance Action Procedures shall govern.

M. **Settlement of Avoidance Actions.** As set forth in the Plan and the Confirmation Order, the Reorganized Debtors are authorized to settle and compromise the Avoidance Actions "without supervision of or approval by the Bankruptcy Court and free of any restrictions of the Bankruptcy Code or the Bankruptcy Rules, other than restrictions expressly imposed by [the] Plan or [the] Confirmation Order." *Plan*, §§ 8.9, 8.13; *Confirmation Order*, ¶13.

N. **Notice of the Avoidance Action Procedures.** A copy of the Avoidance Action Procedures will be served on each defendant with the Summons and Complaint in each Avoidance Action.

Exhibit 2

List of Approved Mediators

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

In re:	:	Chapter 11
GT ADVANCED TECHNOLOGIES INC., et al.[1]	:	Case No. 14-11916-CJP (Lead Case)
	:	(Jointly Administered)
Reorganized Debtor(s)	:	

LIST OF APPROVED MEDIATORS

Mediator Affidavits. Each mediator listed below shall file, on the docket in the main Bankruptcy Case, a sworn affidavit detailing his or her prior involvement in any aspect of the Bankruptcy Case, including any current or prior representation of any creditor of the Reorganized Debtors. Each affidavit may also include a brief (less than one page) biography of the mediator's prior bankruptcy and mediation experience to inform the parties' selection.

[1] The Reorganized Debtors, along with the last four digits of each reorganized debtor's tax identification number, as applicable, are: GT Advanced Technologies Inc. (6749), GTAT Corporation (1760), and GT Advanced Technologies Limited (1721).

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