



AMERICAN
BANKRUPTCY
INSTITUTE

2018 Winter Leadership Conference

Sharpening the Tools in Your Mediation Toolkit

*Hosted by the Mediation and
Unsecured Trade Creditors
Committees*

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Sharpening the Tools in Your Mediation Toolkit

Saturday, December 8, 2018

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Presentation Exhibits:

Ex. 1- Examples of different local bankruptcy rules and standing orders with and without mediation requirements

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

Ex. 3- Sample mediator's confirmation letter

Ex. 4- Sample mediation statement

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

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

Rule 9019-5 Mediation.

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

(c) The Mediation Process.

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

(iv) Attendance at Mediation Conference.

(A) Persons Required to Attend. Except as provided by subsection (j)(ix)(A) herein, or unless excused by the Mediator upon a showing of hardship, which, for purposes of this subsection shall mean serious or disabling illness to a party or party representative; death of an immediate family member of a party or party representative; act of God; state or national emergency; or other circumstances of similar unforeseeable nature, the following persons must attend the mediation conference personally:

(1) Each party that is a natural person;

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

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

(4) The attorney who has primary responsibility for each party's case, including Delaware counsel if engaged at the time of mediation regardless of whether Delaware counsel has primary responsibility for a party, unless Delaware counsel requests to be and is excused from attendance by the mediator in advance of the mediation conference; and

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

(j) Alternative Procedures for Certain Avoidance Proceedings.

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

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

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

(viii) Scheduling Order.

(A) Effect of Scheduling Order. Any scheduling order entered by the Court at the initial status conference or otherwise shall apply to the parties and claims which are subject to mediation under this subsection; provided, however, that: (1) the referral to mediation under this subsection (j) shall operate as a stay as against the parties to the mediation of any requirement under Fed. R. Bankr. Proc. 7026 to serve initial disclosures, and a stay as against the parties to the mediation of such parties' right and/or obligation (if any) to propound, object or respond to written discovery requests or other discovery demands to or from the parties to the mediation; and (2) as further provided in subsection (j)(ix)(B) hereof, after the conclusion of mediation the time frames set forth in the scheduling order entered by the Court shall be adjusted so that such time frames are calculated from the date of completion of mediation (as evidenced by the date of entry on the adversary docket of the Certificate of Completion). The stay provided for under this subsection shall automatically terminate upon the filing of the Certificate of Completion.

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

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

AMERICAN BANKRUPTCY INSTITUTE

U.S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

AMENDMENT TO GENERAL ORDER


RE: PROCEDURES IN ADVERSARY PROCEEDINGS

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

3. Mediation.

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

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


Chief Judge

U. S. BANKRUPTCY COURT
DISTRICT OF DELAWARE

GENERAL ORDER

RE: PROCEDURES IN ADVERSARY PROCEEDINGS

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

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

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

2. Disclosures and Discovery Planning.

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

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

3. Mediation.

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

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

(b) The bankruptcy estate, or if there is no bankruptcy estate the plaintiff in the adversary proceeding, shall pay the fees and costs of the mediator.

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

4. Post-Mediation Procedures and Trial Date.

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

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

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

/s/ Mary F. Walrath
Chief Judge

Local Rules for Bankruptcy Court for the District of Minnesota [mediation allowed]

Rule 9019-2. Mediation

The court may refer any adversary proceeding or contested matter for mediation by any other federal judge or any mediator chosen by the parties.

Local Rules for Bankruptcy Court for the Western District of Texas (excerpted) [mediation allowed via motion of Court or parties]

L. Rule 1001. Scope Of Rules And Forms; Short Title

(h) Mediation and Alternative Dispute Resolution Provisions. (1) The Court on its own motion or upon the motion of any party or party-in-interest may order parties to participate in mediation and may order the parties to bear expenses in such proportion as the Court finds appropriate. (2) The ADR provisions found at Appendix L-1001-h are adopted.

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

B-9019-2. ALTERNATIVE DISPUTE RESOLUTION

(c) Referral to Mediation: Process

(1) Motion to Refer to Mediation

Any party may file a motion to refer a matter to mediation (“Motion to Refer to Mediation”). If a party’s Motion to Refer to Mediation certifies that all parties to the matter consent to mediation and have been served with the motion, and the Court finds the motion to be appropriate under the circumstances, the Court may enter an order referring the matter to mediation without further notice or hearing. If a motion does not so certify, the motion shall be set for hearing. The Bankruptcy Judge may decide not to grant a motion to refer a particular matter to mediation if the Court determines that the motion was filed to delay the case or proceeding or if the matter involved is not likely to be resolved by mediation, given the issue or the parties involved.

(2) Court’s Referral to Mediation

(A) Court's Notice of Status Conference to Discuss Mediation

The Court may refer a matter to mediation on its own by setting a status conference to consider the referral. At the status conference, the parties can oppose the referral or indicate consent. After the hearing, the Court may enter an order referring the matter to mediation.

(f) Compensation

Unless otherwise agreed by the parties or ordered by the Court, the compensation and costs of the mediation shall be borne equally by the parties to the mediation. If one of the parties is a trustee or debtor-in-possession, the amount of compensation to be paid by that party shall be treated as an administrative expense and paid by the estate.

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

Rule 9060-1 Mediation And Arbitration

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

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

In re Corinthians Colleges, Inc., et al., Bankr. Case No. 15-10952 (Bankr. D. Del.) (two procedures orders, one for cases under \$75,000 (mediation first) and one for over \$75,000 (discovery first))

In re Draw Another Circle, LLC, et al., Bankr. Case No. 16-11452 (Bankr. D. Del.) (one procedure order only, all go to mediation prior to discovery)

In re Xhibit Corp., et al. (Skymall), Case No. 2:15-bk-00679-BKM (Bankr. D. Ariz.) (one procedures order, mediation required *unless* defendants opt out within 30 days of entry of order).

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

A.I. 1501, 1506, 1510

747

Federal Rules of Bankruptcy Procedure (the “Bankruptcy Rules”), establishing streamlined procedures governing all adversary proceedings with total amount in controversy greater than \$75,000.00 brought by Plaintiff under sections 502, 547, 548, 549 and 550 of the Bankruptcy Code, which are identified in Exhibit 2 annexed hereto (each an “Avoidance Action,” collectively, the “Avoidance Actions”); and this Court having jurisdiction to consider and determine the Procedures Motion as a core proceeding in accordance with 28 U.S.C. §§ 157, 1331 and 1334; and any objections raised and heard at a hearing at which all parties were permitted to present their arguments and contentions; and it appearing that the relief requested by the Procedures Motion is necessary and in the best interests of the parties; and due notice of the Procedures Motion having been provided; and it appearing that no other or further notice of the Procedures Motion need be provided; and sufficient cause appearing therefor, it is hereby:

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

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

A. Effectiveness of the Procedures Order

1. This Procedures Order approving the Procedures Motion shall apply to all Defendants in the Avoidance Actions.³ To the extent a Party is subject to this Procedures Order as well as the Procedures Order covering those cases with an amount in controversy less than or equal to \$75,000.00.00 in connection with another Avoidance Action, the Parties shall meet and confer to decide whether the actions should proceed under one procedures order or the other. If an agreement cannot be made, the parties may apply to the Court for resolution.

³ This Procedures Order pertains only to the Avoidance Actions identified in Exhibit 2 annexed hereto. Additional avoidance actions filed by the Plaintiff related to the underlying bankruptcy cases, after entry of the Proposed Procedures Order, and which have a total amount in controversy greater than \$75,000.00, shall be subject to the same conditions stated herein. The parties will file, under certification of counsel, a scheduling order which conforms to the same format but which contains extended deadlines as necessary

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

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

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

C. Waiver of Requirement to Conduct Pretrial Conference

4. Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016 and Local Rules 7004-2 and 7016-1 (i.e., pretrial conferences), is hereby waived and not applicable with respect to the Avoidance Actions. Neither the Plaintiff nor any Defendant shall be required to appear at the initial pretrial conference, including any pretrial originally scheduled for July 20, 2017 or any subsequently scheduled pretrial conferences.

D. Waiver of Requirement to Conduct Scheduling Conference

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

E. Discovery and Mediation Schedule

6. In accordance with Bankruptcy Rule 7026(a)(1), the disclosures required under such Rule (the “Initial Disclosures”) shall be made by the later of 30 days after: (1) the date an answer to a complaint is filed in an Avoidance Action or (2) the Procedures Order is entered on the docket of this Court.
7. Except as set forth herein, all written interrogatories, document requests and requests for admission, if any, may be served upon the adverse party any time after the service of Initial Disclosures or in conjunction with the service of the Initial Disclosures. All written interrogatories, document requests and requests for admission, if any, must be served upon the adverse party no later than October 31, 2017. Local Rule 7026-2(b)(ii) shall be modified to allow the counsel for Plaintiff and each Defendant serving the discovery request or response to be the custodian of such discovery material.

8. The parties to the Avoidance Actions shall have through and including February 28, 2018 to complete non-expert written fact discovery, excluding depositions of fact witnesses.
9. The standard provisions of Federal Rule of Civil Procedure 33, made applicable herein pursuant to Bankruptcy Rule 7033, shall apply to the Avoidance Actions. Responses to interrogatories are due 60 days after service.
10. The standard provisions of Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, including F.R.C.P. 34(b)(2)(E) regarding production of electronically stored information and Local Rule 7026-3, shall apply to the Avoidance Actions. Document production and responses to document requests are due 60 days after service.
11. The standard provisions of Federal Rule of Civil Procedure 36, made applicable herein pursuant to Bankruptcy Rule 7036, shall apply to the Avoidance Actions. Responses to requests for admission are due 60 days after service.
12. Should a discovery dispute arise, the complainant shall file with the Court a letter outlining said issues and forward a copy to chambers. Respondent must reply within two (2) business days. The letter, excluding exhibits, shall be no longer than two (2) pages. The Court shall then inform the parties if it will require a conference call or formal motion.
13. Any open Avoidance Actions that have not been resolved and/or settled by February 28, 2018 (the “Remaining Avoidance Actions”), shall be referred to mediation. Upon mutual agreement of the parties to any Avoidance Action, mediation may be conducted prior to February 28, 2018.
14. Between March 1, 2018 and March 15, 2018 Defendants in the Remaining Avoidance Actions shall choose a mediator from the list of proposed mediators (each a “Mediator,” collectively, the “Mediators”) qualified to handle these types of Avoidance Actions and are listed on the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 (the “Mediator List”), attached to the Procedures Motion as Exhibit D. Concurrently, Defendants in the Remaining Avoidance Actions shall notify Plaintiff’s counsel of the Defendant’s choice of Mediator by contacting: 1) for cases for which The Rosner Law Group is sole Plaintiff’s counsel, in writing, via email to Jason Gibson at gibson@teamrosner.com, or via letter correspondence addressed to The Rosner Law Group LLC, 824 N. Market Street, Suite 810, Wilmington, DE 19801 and 2) for cases for which ASK LLP is co-counsel, to Plaintiff’s counsel’s paralegal, Laurie N. Miskowiec, in writing, via email at lmiskowiec@askllp.com or via letter correspondence addressed to ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121. If a Defendant in a Remaining Avoidance Action does not timely choose a Mediator from the Mediator List and notify Plaintiff’s counsel of the same, Plaintiff will assign such Remaining Avoidance Action to one of the Mediators from the Mediator List.

15. Upon notification of such selection or assignment, the selected Mediator shall have an opportunity to run conflicts checks on the Defendant(s) and, in the event of a conflict, may abstain from acting in the particular mediation.
16. On March 16, 2018, Plaintiff, working with the Mediators, will commence scheduling mediations. Each Mediator will provide to Plaintiff the dates on which the Mediator is available for mediation and the parties shall cooperate with the Mediators and each other regarding the scheduling of mediations. Plaintiff's counsel shall contact Defendant or Defendant's counsel with a list of proposed dates for mediation provided by the mediator. Mediation will then be scheduled on a first-come, first-served basis.
17. Plaintiff will give at least 21 days' written notice of the first date, time and place of the mediation in each Remaining Avoidance Action (the "Mediation Notice"), which notice shall be filed on the docket of such proceeding.
18. Within 7 calendar days after the conclusion of the mediation, the Mediator shall file a report (the "Mediator's Report") in the Remaining Avoidance Action, which shall be limited to stating only whether the Remaining Avoidance Action settled or did not settle.
19. All mediations of the Remaining Avoidance Actions must be concluded by May 31, 2018.
20. Should mediation fail to resolve a Remaining Avoidance Action, Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' case-in-chief experts, if any, shall be made to the adverse party within 30 days after the Mediator's Report is filed.
21. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' rebuttal experts, if any, shall be made to the adverse party within 60 days after the Mediator's Report is filed.
22. All fact and expert discovery, including fact and expert witness depositions, shall be concluded the earlier of 120 days after the Mediator's Report is filed or on September 30, 2018.
23. The standard provisions of Federal Rule of Civil Procedure 26(e), made applicable herein pursuant to Bankruptcy Rule 7026, shall apply to the Avoidance Actions with respect to supplementation of discovery responses.

F. Mediation Procedures and Requirements

24. Because the Remaining Avoidance Actions are proceedings before this Court, Delaware is the proper forum for mediation. Local Rule 9019-5 and the Court's mediation order, Delaware Bankruptcy Court General Order re Procedures in Adversary Proceedings, dated April 7, 2004, as amended April 11, 2005

(establishing mediation procedures for all adversary proceedings), shall govern the mediations, except as otherwise set forth herein.

25. The Mediators shall be required to file disclosures prior to the scheduling of mediation. Local Rule 9019-2(e)(iii)(B) shall apply.
26. The parties in each Remaining Avoidance Action will participate in the mediation, as scheduled and presided over by the chosen Mediator, in good faith and with a view toward reaching a consensual resolution. At least *one counsel for each party and a representative of each party having full settlement authority* shall attend the mediation in person *except* that, a Mediator, in his or her discretion, may allow a party representative to appear telephonically, and except where the parties otherwise agree. **Any such request to appear telephonically must be made prior to ten (10) business days before the scheduled mediation date, or Defendant is deemed to waive such request.** To the extent a Mediator grants a party's request to appear telephonically, the requesting party is responsible for arranging for and paying any fees associated with teleconference services. Should a dispute arise regarding a Mediator's decision on whether to allow a party representative to appear telephonically rather than in person, a party may apply to the Court, in advance of the mediation, by sending a letter outlining said issues to chambers. The Court may then schedule a conference call to address the issues.
27. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties' presentations, and the rules of evidence will not apply. Each Mediator may implement additional procedures which are reasonable and practical under the circumstances.
28. The Mediator, in the Mediation Notice (by language provided to Plaintiff by the Mediator) or in a separate notice that need not be filed, may require the parties to provide to the Mediator any relevant papers and exhibits, a statement of position, and a settlement proposal. In the Mediator's discretion, upon notice (which need not be filed), the Mediator may adjourn a mediation or move a mediation to a different location within the same jurisdiction. The Mediator may also continue a mediation that has been commenced if the Mediator determines that a continuation is in the best interest of the parties.
29. The parties must participate in the scheduling of mediation and mediate in good faith. If the mediator feels that a party to the mediation is not attempting to schedule or resolve the mediation in good faith, the mediator may file a report with the Court. The Court may, without need for further motion by any party, schedule a hearing. If the Court determines that the party is not cooperating in good faith with the mediation procedures, the Court may consider the imposition of sanctions. Additionally, if either party to the mediation is not attempting to schedule or resolve the mediation in good faith, the opposite party may file a motion for sanctions with the Court. Litigation with respect to the issuance of sanctions shall not delay the commencement of the Mediation. Sanctions may include, but are not limited to, attorney's fees and costs and fees of the Mediator.

30. Upon notice and a hearing, a party's failure to appear at the mediation or otherwise comply with the Procedures Order with respect to mediation, may result in a default judgment or dismissal being obtained against the party failing to comply with the mediation provisions. The Mediator shall promptly file with the Court a notice when any party fails to comply with the mediation provisions set forth in the Procedures Order.
31. The fees of the Mediator shall be paid by the Plaintiff on a per case basis. The Mediator's fees shall be fixed as follows:
 - (a) cases with a claim amount (as reflected in the complaint) of less than \$250,000: \$3,000.00 per case;
 - (b) cases with a claim amount (as reflected in the complaint) equal to or greater than \$250,000 and less than \$1,000,000: \$4,000 per case; and
 - (c) cases with a claim amount (as reflected in the complaint) equal to or greater than \$1,000,000: \$6,000 per case.
32. In addition to the fixed fee, the Plaintiff shall pay the Mediator a \$250.00 administrative fee upon acceptance of appointment. The Plaintiff shall pay one-fourth of the Mediator's fee at least 7 calendar days before the commencement of mediation (the "Pre-Mediation Fee"). If the parties settle prior to mediation, the mediator must be informed of the settlement prior to 7 calendar days before the scheduled mediation, or the Pre-Mediation Fee is non-refundable.
33. Mediation that is continued for more than one calendar day will be continued on an hourly fee basis at the rate of \$500.00 per hour to be paid by the Plaintiff.
34. Defendants that have multiple Avoidance Actions in the underlying bankruptcy cases against them may mediate all related Avoidance Actions at one time. The Mediator's fees will be based upon the combined total claim amount for all related Avoidance Actions.
35. Mediation statements are due seven (7) calendar days prior to the mediation to the Mediator. Unless otherwise directed by the Mediator, the mediation statements shall be shared with the opposing party, except that any party that has confidential information may share the same solely with the Mediator. The Mediator will direct the parties as to further instructions regarding the mediation statements.
36. Without the prior consent of both parties, no Mediator shall mediate a case in which he/she or his/her law firm represents a party. If a Mediator's law firm represents any Defendant in the Avoidance Actions, then: (a) the Mediator shall not personally participate in the representation of that Defendant; (b) the law firm shall notate the file to indicate that the Mediator shall have no access to it; and (c) any discussions concerning the particular Avoidance Action by employees of the law firm shall exclude the Mediator. The Mediator's participation in mediation pursuant to the

Procedures Order shall not create a conflict of interest with respect to the representation of such Defendants by the Mediator's law firm.

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

G. Avoidance Actions Omnibus Hearings

39. The initial pretrial conference shall have been deemed to be held on July 20, 2017 at 2:00 p.m. (ET). Thereafter, except as otherwise ordered by the Court, the pretrial conference shall be adjourned to quarterly status conferences to be held on the omnibus hearing dates provided by the Court. All matters concerning any Avoidance Actions shall be heard only at status conferences before the Honorable Kevin J Carey (collectively, the "Avoidance Actions Omnibus Hearings"), at which there may be status conferences, final pre-trial conferences and hearings on motions, if any.
40. Defendants are not required to appear at any Avoidance Actions Omnibus Hearings unless: (a) a motion pertaining to the Defendant's Avoidance Action is calendared to be considered at the Avoidance Actions Omnibus Hearing; or (b) the Court has directed the Defendant to appear. To the extent a Defendant in any Avoidance Action wishes to appear at an Avoidance Actions Omnibus Hearing, and it has not otherwise notified the Plaintiff through a notice of motion, the Defendant or its counsel must notify Plaintiff's counsel of the same, in writing, 5 days prior to said hearing so that Plaintiff may properly prepare to address any issues or concerns at the Avoidance Actions Omnibus Hearing or in advance thereof.
41. Unless the Court orders otherwise, all motions, pleadings, requests for relief or other materials that purport to set a hearing on a date or time other than an Avoidance Actions Omnibus Hearing shall automatically, and without Court order, be scheduled to be heard at the next Avoidance Actions Omnibus Hearing that is at

least 30 calendar days after such motion, pleading, request for relief or other materials are filed and served.

42. Plaintiff shall file a report one week prior to each Avoidance Actions Omnibus Hearing setting out the status of each of the Avoidance Actions and shall contemporaneously deliver a copy of the report to the Court's chambers.
43. If, after all discovery has been completed in an Avoidance Action, mediation has concluded but was not successful, the parties to the applicable Avoidance Action shall so inform the Court at the next scheduled Avoidance Actions Omnibus Hearing. At such time, the Court will address additional issues arising subsequent to the Procedures Order, set additional deadlines, if necessary, establish dispositive motion deadlines, a due date by which the parties must file a joint pretrial order, and schedule a trial on the Avoidance Action that is convenient to the Court's calendar.

H. Miscellaneous

44. The Local Rules for the United States Bankruptcy Court for the District of Delaware shall apply, except that the Procedures Order shall control with respect to the Avoidance Actions to the extent of any conflict with other applicable rules and orders.
45. The deadlines and/or provisions contained in the Procedures Order may be extended and/or modified by the Court upon written motion and for good cause shown or consent of the parties pursuant to stipulation, which stipulation needs to be filed with the Court; and it is further

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

Dated: July 20, 2017
Wilmington, Delaware



HONORABLE KEVIN J CAREY
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

<p>In re:</p> <p>Draw Another Circle, LLC, <i>et al.</i>¹</p> <p>Post-Confirmation Debtors.</p> <hr/> <p>Curtis R. Smith, as Liquidation Trustee of the Hastings Creditors' Liquidating Trust,</p> <p style="text-align: right;">Plaintiff,</p> <p>vs.</p> <p>Defendants Listed on Exhibits "1" and "2,"</p> <hr/> <p style="text-align: right;">Defendants.</p>	<p>Chapter 11</p> <p>Case No. 16-11452 (KJC)</p> <p>(Substantively Consolidated)</p> <p>Re: Docket Index: <u>1405</u></p>
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**ORDER REGARDING MOTION OF CURTIS R. SMITH AS LIQUIDATION
TRUSTEE OF THE HASTINGS CREDITORS' LIQUIDATION TRUST
ESTABLISHING PROCEDURES GOVERNING ASSOCIATED ADVERSARY
PROCEEDINGS BROUGHT PURSUANT TO 11 U.S.C. §§ 547, 548 AND 550**

Upon the *Motion of Curtis R. Smith As Liquidation Trustee of The Hastings Creditors' Liquidation Trust For Order Establishing Procedures Governing Associated Adversary Proceedings Brought Pursuant To 11 U.S.C. §§ 547, 548 and 550*, (the "Procedures Motion")² dated July 21, 2017, filed by Curtis R. Smith, as Liquidation Trustee of the Hastings Creditors' Liquidating Trust, (the "Plaintiff" or "Trustee"), by and through his undersigned counsel, for entry of a procedures order (the "Procedures Order") pursuant to sections 102(1) and 105(a) of title 11 of the United States Code (the "Bankruptcy Code"), Rules 7016, 7026 and 9006 of the Federal

¹ The Debtors and the last four digits of their respective federal taxpayer identification numbers are as follows: Draw Another Circle, LLC (2102); Hastings Entertainment, Inc. (6375); MovieStop, LLC (9645); SP Images, Inc. (7773); and Hastings Internet, Inc. (0809). Under the confirmed *First Amended Joint Combined Disclosure Statement and Plan of Liquidation* (the "Plan"), all of the Debtors' bankruptcy cases aside from that of Draw Another Circle, LLC have been closed.

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

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

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

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

A. Effectiveness of the Procedures Order

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

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

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

C. Waiver of Requirement to Conduct Pretrial Conference

4. Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016 and Local Rules 7004-2 and 7016-1 (i.e., pretrial conferences), is hereby waived and not applicable with respect to the Avoidance Actions. Neither the Plaintiff nor any Defendant shall be required to appear at the initial pretrial conference, including any pretrial originally scheduled for August 30, 2017 or any subsequently scheduled pretrial conferences.

D. Waiver of Requirement to Conduct Scheduling Conference

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

E. Discovery and Mediation Schedule

6. The parties' obligation to conduct formal discovery in each Avoidance Action shall be, and hereby is, stayed until the Mediation Process is concluded; provided that the stay of formal discovery shall in no way preclude, with respect to any Avoidance Action, the Plaintiff and applicable Defendant from informally exchanging documents and information in an attempt to resolve such Avoidance Action in advance of, or during, the Mediation Process; provided further, that the proposed stay also will not preclude either party from requesting pre-mediation formal discovery. If any party to an Avoidance Action requests pre-mediation formal discovery, then:
 - i. Should the non-requesting party consent to pre-mediation formal discovery, the parties shall conduct a Rule 26(f) conference and submit a discovery scheduling order to the Court (each such order, a "Scheduling Order") that will provide for the completion of fact and expert discovery in advance of mediation; and
 - ii. If the non-requesting party does not consent to pre-mediation formal discovery:
 - a. The requesting party may request relief from the stay of discovery by filing with the Court (with copy to chambers and to the other party to the Avoidance Action) a letter, not to exceed two pages including exhibits, outlining the dispute;

- b. Any reply to such letter (if any) must be filed with the Court (with copy to chambers and to the other party to the Avoidance Action) within two business days after the filing of the letter set forth in Paragraph 6.ii.a. above and shall also be no longer than two pages, including exhibits;
 - c. The Court will inform the parties if it will require a conference call or formal motion to resolve the dispute; and
 - d. Upon resolution of the dispute, either by agreement of the parties or at the direction of the Court, the parties shall either (a) continue with informal discovery and the Mediation Process; or (b) conduct a Rule 26(f) conference and submit a Scheduling Order to the Court.
7. Any open Avoidance Actions that have not been resolved and/or settled by December 1, 2017 (the “Remaining Avoidance Actions”), shall be referred to mandatory mediation (except with respect to any Avoidance Action as to which a Scheduling Order has been entered as provided in Paragraph 6 of this Order).
8. Between December 1, 2017 and December 15, 2017, Defendants in the Remaining Avoidance Actions shall choose a mediator from the list of proposed mediators (each a “Mediator,” collectively, the “Mediators”) qualified to handle these types of Avoidance Actions and are listed on the Register of Mediators and Arbitrators Pursuant to Local Rule 9019-4 (the “Mediator List”), attached to the Procedures Motion as Exhibit D. Concurrently, Defendants in the Remaining Avoidance Actions shall notify Plaintiff’s counsel of the Defendant’s choice of Mediator by contacting: 1) for cases on Exhibit A for which ASK LLP is counsel, to Plaintiff’s counsel’s paralegal, Laurie N. Miskowiec, in writing, via email at lmiskowiec@askllp.com or via letter correspondence addressed to ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121 and 2) for cases on Exhibit B for which Kelley Drye & Warren LLP is counsel, to Charlie Liu in writing, via email to cliu@kelleydrye.com, or via letter correspondence addressed to Kelley Drye & Warren LLP, 101 Park Ave., New York, NY 10178, Attn: Charlie Liu. If a Defendant in a Remaining Avoidance Action does not timely choose a Mediator from the Mediator List and notify Plaintiff’s counsel of the same, Plaintiff will assign such Remaining Avoidance Action to one of the Mediators from the Mediator List.
9. Upon notification of such selection or assignment, the selected Mediator shall have an opportunity to run conflicts checks on the Defendant(s) and, in the event of a conflict, may abstain from acting in the particular mediation. Once the mediator selection period closes and a Mediator is selected or assigned, as applicable, the Plaintiff will file a notice of mediation indicating which mediator was selected.
10. On December 18, 2017, Plaintiff, working with the Mediators, will commence scheduling mediations. Each Mediator will provide to Plaintiff the dates on which the Mediator is available for mediation and the parties shall cooperate with the Mediators and each other regarding the scheduling of mediations. Plaintiff’s counsel shall contact Defendant or Defendant’s counsel with a list of proposed

dates for mediation provided by the mediator. Mediation will then be scheduled on a first-come, first-served basis.

11. Plaintiff will give at least 21 days written notice of the first date, time and place of the mediation in each Remaining Avoidance Action (the "Mediation Notice"), which notice shall be served on the applicable defendant
12. Within 14 calendar days after the conclusion of the mediation, the Mediator shall file a report (the "Mediator's Report") in the Remaining Avoidance Action, which shall be limited to stating only whether the Remaining Avoidance Action settled or did not settle.
13. All mediations of the Remaining Avoidance Actions must be concluded by May 31, 2018.
14. Any open Avoidance Actions shall be required to provide the disclosures required under Rule 7026(a)(1) (the "Initial Disclosures") on or before June 30, 2018.
15. All written interrogatories, document requests and requests for admission, if any, may be served upon the adverse party any time after the Mediator's Report is filed. All written interrogatories, document requests and requests for admission, if any, must be served upon the adverse party concurrently with the deadline to provide Initial Disclosures or no later than July 15, 2018. Local Rule 7026-2(b)(ii) shall be modified to allow the counsel for Plaintiff and each Defendant serving the discovery request or response to be the custodian of such discovery material.
16. The parties to the Avoidance Actions shall have through and including September 30, 2018 to complete non-expert fact discovery, including depositions of fact witnesses.
17. The standard provisions of Federal Rule of Civil Procedure 33, made applicable herein pursuant to Bankruptcy Rule 7033, shall apply to the Avoidance Actions.
18. The standard provisions of Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, including F.R.C.P. 34(b)(2)(E) regarding production of electronically stored information and Local Rule 7026-3, shall apply to the Avoidance Actions.
19. The standard provisions of Federal Rule of Civil Procedure 36, made applicable herein pursuant to Bankruptcy Rule 7036, shall apply to the Avoidance Actions.
20. Should a discovery dispute arise, the complainant shall file with the Court a letter outlining said issues and forward a copy to chambers. Respondent must reply within two (2) business days. The letter, excluding exhibits, shall be no longer than two (2) pages. The Court shall then inform the parties if it will require a conference call or formal motion.

21. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' case-in-chief experts, if any, shall be made to the adverse party on or before November 15, 2018.
22. Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, disclosures and reports of the parties' rebuttal experts, if any, shall be made to the adverse party on or before January 5, 2019.
23. All expert discovery, including expert witness depositions, shall be concluded on or before February 15, 2019.
24. The standard provisions of Federal Rule of Civil Procedure 26(e), made applicable herein pursuant to Bankruptcy Rule 7026, shall apply to the Avoidance Actions with respect to supplementation of discovery responses.

F. Mediation Procedures and Requirements

25. Because the Remaining Avoidance Actions are proceedings before this Court, Delaware is the proper forum for mediation, except as otherwise agreed to by the parties. Local Rule 9019-5 and the Court's mediation order, Delaware Bankruptcy Court General Order re Procedures in Adversary Proceedings, dated April 7, 2004, as amended April 11, 2005 (establishing mediation procedures for all adversary proceedings), shall govern the mediations, except as otherwise set forth herein.
26. The Mediators shall be required to file disclosures prior to the scheduling of mediation. Local Rule 9019-2(e)(iii)(B) shall apply.
27. The parties in each Remaining Avoidance Action will participate in the mediation, as scheduled and presided over by the chosen Mediator, in good faith and with a view toward reaching a consensual resolution. At least one counsel for each party and a representative of each party having full settlement authority shall attend the mediation in person except that, a Mediator, in his or her sole discretion, by request of one of the parties, may allow a party representative to appear telephonically while its counsel appears in person, and except where the parties otherwise agree. **Any such request must be made prior to ten (10) business days before the scheduled mediation date, or Defendant is deemed to waive such request.** Should a party representative appear by telephone, counsel appearing in person for that party shall have full settlement authority. To the extent a Mediator grants a party's request to appear telephonically, the requesting party is responsible for arranging for and paying any fees associated with teleconference services. Should a dispute arise regarding a Mediator's decision on whether to allow a party representative to appear telephonically rather than in person, a party may apply to the Court, in advance of the mediation, by sending a letter outlining said issues to chambers. The Court may then schedule a conference call to address the issues.
28. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties' presentations, and the rules of evidence will not

apply. Each Mediator may implement additional procedures which are reasonable and practical under the circumstances.

29. The Mediator, in the Mediation Notice (by language provided to Plaintiff by the Mediator) or in a separate notice that need not be filed, may require the parties to provide to the Mediator any relevant papers and exhibits, a statement of position, and a settlement proposal. In the Mediator's discretion, upon notice (which need not be filed), the Mediator may adjourn a mediation or move a mediation to a different location within the same jurisdiction. The Mediator may also continue a mediation that has been commenced if the Mediator determines that a continuation is in the best interest of the parties.
30. The parties must participate in the scheduling of mediation and mediate in good faith. If the mediator feels that a party to the mediation is not attempting to schedule or resolve the mediation in good faith, the mediator may file a report with the Court. The Court may, without need for further motion by any party, schedule a hearing. If the Court determines that the party is not cooperating in good faith with the mediation procedures, the Court may consider the imposition of sanctions. Additionally, if either party to the mediation is not attempting to schedule or resolve the mediation in good faith, the opposite party may file a motion for sanctions with the Court. Litigation with respect to the issuance of sanctions shall not delay the commencement of the Mediation. Sanctions may include, but are not limited to, attorney's fees and costs and fees of the Mediator.
31. Upon notice and a hearing, a party's failure to appear at the mediation or otherwise comply with the Procedures Order with respect to mediation, may result in a default judgment or dismissal being obtained against the party failing to comply with the mediation provisions. The Mediator shall promptly file with the Court a notice when any party fails to comply with the mediation provisions set forth in the Procedures Order.
32. The fees of the Mediator shall be paid by the Plaintiff on a per case basis. The Mediator's fees shall be fixed as follows:
 - i. cases with a claim amount (as reflected in the complaint) of less than \$250,000: \$3,000.00 per case;
 - ii. cases with a claim amount (as reflected in the complaint) equal to or greater than \$250,000 and less than \$1,000,000: \$4,000 per case; and
 - iii. cases with a claim amount (as reflected in the complaint) equal to or greater than \$1,000,000: \$6,000 per case.

The Plaintiff shall pay one-fourth of the Mediator's fee at least 7 calendar days before the commencement of mediation (the "Pre-Mediation Fee"). If the parties settle prior to mediation, the mediator must be informed of the settlement prior to 7 calendar days before the scheduled mediation, or the Pre-Mediation Fee is non-refundable.

33. In addition to the fixed fee, the Plaintiff shall pay the Mediator a \$250.00 administrative fee upon acceptance of appointment.
34. Defendants that have multiple Avoidance Actions in the underlying bankruptcy cases against them may mediate all related Avoidance Actions at one time and, in such event, the Mediation Fee shall be based upon the combined total claim amount for all related Avoidance Actions.
35. Mediation statements are due 7 calendar days prior to the mediation to the Mediator. Unless otherwise directed by the Mediator, the mediation statements shall be shared with the opposing party, except that any party that has confidential information may share the same solely with the Mediator. The Mediator will direct the parties as to further instructions regarding the mediation statements.
36. Without the prior consent of both parties, no Mediator shall mediate a case in which he/she or his/her law firm represents a party. If a Mediator's law firm represents any Defendant in the Avoidance Actions, then: (a) the Mediator shall not personally participate in the representation of that Defendant; (b) the law firm shall notate the file to indicate that the Mediator shall have no access to it; and (c) any discussions concerning the particular Avoidance Action by employees of the law firm shall exclude the Mediator. The Mediator's participation in mediation pursuant to the Procedures Order shall not create a conflict of interest with respect to the representation of such Defendants by the Mediator's law firm.
37. The Mediator shall not be called as a witness by any party except as set forth in this paragraph. No party shall attempt to compel the testimony of, or compel the production of documents from, the Mediators or the agents, partners or employees of their respective law firms. Neither the Mediators nor their respective agents, partners, law firms or employees (a) are necessary parties in any proceeding relating to the mediation or the subject matter of the mediation, nor (b) shall be liable to any party for any act or omission in connection with any mediation conducted under the Procedures Order. Any documents provided to the Mediator by the parties shall be destroyed 30 days after the filing of the Mediator's Report, unless the Mediator is otherwise ordered by the Court. However, subject to court order, a Mediator may be called as witness by any party and may be compelled to testify on a limited basis in proceedings where it is alleged that a party failed to comply with mediation as is required in the foregoing paragraphs of this Procedures Order. Local Rule 9019-5(d) shall apply.
38. All proceedings and writing incident to the mediation shall be privileged and confidential, and shall not be reported or placed in evidence. Local Rule 9019-(5)(d) shall apply.

G. Avoidance Actions Omnibus Hearings

39. The initial pretrial conference shall have been deemed to be held on August 30, 2017 at 10:00 a.m. (ET). Thereafter, except as otherwise ordered by the Court, the pretrial conference shall be adjourned to quarterly status conferences. Except as otherwise ordered by the Court, all matters concerning any Avoidance Actions shall be heard only at status conferences before the Honorable Kevin J Carey (collectively, the “Avoidance Actions Omnibus Hearings”), at which there may be status conferences, final pre-trial conferences and hearings on motions, if any.
40. Defendants are not required to appear at any Avoidance Actions Omnibus Hearings unless: (a) a motion pertaining to the Defendant’s Avoidance Action is calendared to be considered at the Avoidance Actions Omnibus Hearing; or (b) the Court has directed such Defendant to appear. To the extent a Defendant in any Avoidance Action wishes to appear at an Avoidance Actions Omnibus Hearing, and it has not otherwise notified the Plaintiff through a notice of motion, the Defendant or its counsel must notify Plaintiff’s counsel of the same, in writing, 10 days prior to said hearing so that Plaintiff may properly prepare to address any issues or concerns at the Avoidance Actions Omnibus Hearing or in advance thereof.
41. Unless the Court orders otherwise, all motions, pleadings, requests for relief or other materials that purport to set a hearing on a date or time other than an Avoidance Actions Omnibus Hearing shall automatically, and without Court order, be scheduled to be heard at the next Avoidance Actions Omnibus Hearing that is at least 30 calendar days after such motion, pleading, request for relief or other materials are filed and served.
42. Plaintiff shall file a report one week prior to each Avoidance Actions Omnibus Hearing setting out the status of each of the Avoidance Actions and shall contemporaneously deliver a copy of the report to the Court’s chambers.
43. If, after all discovery has been completed in an Avoidance Action and mediation has concluded but was not successful, the parties to the applicable Avoidance Action shall so inform the Court at the next scheduled Avoidance Actions Omnibus Hearing. At such time, the Court will address additional issues arising subsequent to the Procedures Order, set additional deadlines, if necessary, establish dispositive motion deadlines, a due date by which the parties must file a joint pretrial order, and schedule a trial on the Avoidance Action that is convenient to the Court’s calendar.

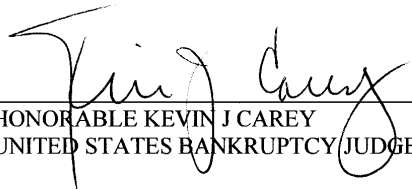
H. Miscellaneous

44. The Local Rules shall apply, except that the Procedures Order shall control with respect to the Avoidance Actions to the extent of any conflict with other applicable rules and orders.
45. The deadlines and/or provisions contained in the Procedures Order may be extended and/or modified by the Court upon written motion and for good cause

shown or consent of the parties pursuant to stipulation, which stipulation needs to be filed with the Court; and it is further

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

Dated: Aug 30, 2017
Wilmington, Delaware


HONORABLE KEVIN J CAREY
UNITED STATES BANKRUPTCY JUDGE

ORDERED ACCORDINGLY.

Dated: March 29, 2017



Brenda K. Martin

Brenda K. Martin, Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF ARIZONA

In re:	In Proceedings Under Chapter 11
XHIBIT CORP., <i>et al.</i> , ¹	Jointly Administered Under
	Case No. 2:15-bk-00679-BKM
Debtors.	

Bryan Perkinson, as Liquidating Trustee of the SM Liquidating Trust,	Adv. No. 2: 17-00100 - BKM
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Plaintiff,
vs.

Vertex, Inc.,
Defendant.

**ORDER GRANTING MOTION
FOR ENTRY OF AN ORDER
ESTABLISHING PROCEDURES
GOVERNING ADVERSARY
PROCEEDINGS COMMENCED
PURSUANT TO SECTIONS 547,
548, AND 550 OF THE
BANKRUPTCY CODE**

Upon consideration of that certain *Motion For Entry of an Order Establishing Procedures Governing Adversary Proceedings Commenced Pursuant to Sections 547, 548, And 550 Of The Bankruptcy Code* (the "Motion") filed by the former liquidating trustee and adopted by the successor trustee Bryan Perkinson, Liquidating Trustee of the SM Liquidating Trust (the "Trustee" or "Plaintiff"), the corresponding Memorandum of

¹ The Debtors in these jointly administered cases are: SkyMall, LLC (Case No. 2:15-bk-00679-BKM); Xhibit Corp. (Case No. 2:15-bk-00680-BKM); Xhibit Interactive, LLC (Case No. 2:15-bk-00682-BKM); FlyReply Corp. (Case No. 2:15-bk-00684-BKM); SHC Parent Corp. (Case No. 2:15-bk-00685-BKM); SpyFire Interactive, LLC (Case No. 2:15-bk-00686-BKM); Stacked Digital, LLC (Case No. 2:15-bk-00687-BKM), and SkyMall Interests, LLC (Case No. 2:15-bk-00688-BKM).

Law, and the entire record before the Court in the above-referenced adversary action, the (“Avoidance Action”), and for good cause appearing therefor,

The following relief is hereby **GRANTED**:

The procedures governing the Avoidance Action is as follows:

- A. **Extensions to Answer or File Other Responsive Pleading to the Complaint.** Defendant’s time to file an answer or other responsive pleading to a complaint filed in the Avoidance Action shall be extended by sixty (60) days such that an answer or other responsive pleading shall be due within a total of ninety (90) days after the issuance of the summons.
- B. **Waiver of Requirement to Conduct Pretrial Conference.** Federal Rule of Civil Procedure 16 (i.e., pretrial conferences), is hereby waived and not applicable with respect to the Avoidance Action. Neither the Plaintiff nor the Defendant shall be required to appear at an initial pretrial conference.
- C. **Waiver of Requirement to Conduct Scheduling Conference.** Federal Rule of Civil Procedure 26(f), made applicable herein pursuant to Bankruptcy Rule 7026 (conference of the parties and planning for discovery) is hereby waived and not applicable with respect to the Avoidance Action except as otherwise set forth in Paragraph D of this Order. Accordingly, parties to the Avoidance Action shall not be required to submit a written report under Federal Rule of Civil Procedure 26(f).
- D. **Stay of Discovery.** The parties’ obligation to conduct formal discovery in the Avoidance Action shall be, and hereby is, stayed until the Mediation Process is concluded; provided that the stay of discovery shall in no way preclude the Plaintiff and the Defendant from informally exchanging documents and information in an attempt to resolve the Avoidance Action in advance of, or during, the Mediation Process; and provided further that the proposed stay also will not preclude formal discovery for the Defendant, if the Defendant opts out of mediation as described in Paragraph E(1). Should Defendant opt out of mediation, the parties shall conduct a Rule 26(f) conference and submit a discovery scheduling order to the Court (each such order, a “Scheduling Order”) that will provide for the completion of fact and expert discovery.
- E. **Mediation.**
 1. If the Defendant wishes to opt out of the Mediation Process, they must notify Plaintiff **no later than 30 days after entry of this order** by contacting Plaintiff in writing, either via mail or via email at:

- 1 lmiskowiec@askllp.com or via letter correspondence addressed to
 2 ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121,
 3 Attn: Laurie Miskowiec. If the Defendant does not opt out within
 4 this time period, Defendant shall be deemed to waive their right to
 5 opt out of mediation and to have consented to voluntary, non-binding
 6 mediation.
- 7 2. If the Avoidance Action has not been settled or otherwise resolved
 8 on or prior to June 1, 2017 (except if a Scheduling Order has been
 9 entered as provided in Paragraph D of this Order), it shall be referred
 10 to mediation and is subject to the following alternative dispute
 11 resolution procedures (the "Mediation Process"):
- 12 3. The Avoidance Action shall be mediated in Arizona, unless
 13 otherwise mutually agreed by the parties. Local Rules 9072-1
 14 through 9072-9 shall govern the mediations, except as otherwise set
 15 forth herein or as further ordered by the Court.
- 16 4. Absent further order of this Court, the mediators shall be chosen from
 17 those listed in Exhibit 1 annexed hereto (the "Mediators"), unless
 18 otherwise mutually agreed by the parties.
- 19 5. If the Avoidance Action is subject to the Mediation Process, between
 20 June 1, 2017 and June 15, 2017, Defendant shall: (a) choose a
 21 Mediator from the list of Mediators; and (b) notify Plaintiff of
 22 Defendant's choice of Mediator in writing, either via email at:
 23 lmiskowiec@askllp.com or via letter correspondence addressed to
 24 ASK LLP, 2600 Eagan Woods Drive, Suite 400, St. Paul, MN 55121,
 25 Attn: Laurie Miskowiec. If the Defendant does not timely choose a
 26 Mediator, Plaintiff shall assign a Mediator to the case.
- 27 6. On June 16, 2017, Plaintiff, working with the Mediator will
 28 commence scheduling the mediation. The Mediator will provide to
 Plaintiff the dates on which the Mediator is available for mediation
 and the parties shall cooperate, in good faith, with the Mediator and
 each other regarding the scheduling of mediation. Plaintiff's counsel
 shall contact Defendant or, if represented, Defendant's counsel with a
 list of proposed dates for mediation as provided by the Mediator.
 Mediation will then be scheduled on a first-come, first-served basis
 with other related avoidance actions.
7. Plaintiff will provide at least twenty-one (21) days' written notice of
 the date, time and place of the mediation (the "Mediation Notice"),
 which notice shall be served on the Defendant.

8. Plaintiff and Defendant shall exchange position statements and provide a copy of such position to the Mediator and the opposing party, which may not (unless agreed in writing by both parties and the Mediator) exceed ten (10) pages double-spaced (exclusive of exhibits and schedules), at least seven (7) calendar days prior to the scheduled mediation. Position statements shall include a summary of the pre-mediation settlement offers, if any, made by each party. The Mediator, however, may require the parties to provide additional papers, exhibits and/or a settlement proposal.
9. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties' presentations and the rules of evidence will not apply (other than Rule 408 of the Federal Rules of Evidence). The Mediator may implement additional procedures that are reasonable and practical under the circumstances.
10. Plaintiff and Defendant will participate in the mediation, as scheduled and presided over by the Mediator, in good faith and with a view toward reaching a consensual resolution. At least one counsel for each party and a representative of each party having full settlement authority shall attend the mediation in person; provided that a Mediator, in his or her discretion, may allow a party representative to appear telephonically. Any such request to appear telephonically should be made at least ten (10) business days prior to the scheduled mediation date, or the party is deemed to waive such request. To the extent a Mediator grants a party's request to appear telephonically, the requesting party is responsible for arranging for, and paying any, fees associated with teleconference services. Should a dispute arise regarding a Mediator's decision on whether to allow a party representative to appear telephonically, a party may file a notice of request for telephonic status hearing on mediation. The Court will inform the parties if it will address the dispute raised in notice informally via a conference call or through formal motion.
11. In the Mediator's discretion, upon reasonable notice (which need not be filed) to the parties, the Mediator may adjourn a mediation or move a mediation to a different location.
12. 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.
13. The Mediator shall file a report (the "Mediator's Report") promptly after the conclusion of mediation as provided in Local Rule 9072-9.

14. The costs of the Mediator (the "Mediation Fee") shall be paid by Plaintiff. If the parties mutually request that a Mediator travel to a location other than Arizona, and the Mediator agrees to the location, the Parties shall split the costs of the Mediator's additional travel fees, if any.
15. Any party who is deemed to have consented to mediation pursuant to paragraph E.1 and does not attend mediation as required, may be subject to a motion for default/dismissal, court imposed sanctions, or other appropriate relief. The Mediator shall promptly file with the Court a notice when any party fails to comply with the mediation provisions set forth in this Order as provided in Local Rule 9072-8(d)(3).
16. No Mediator shall mediate the Avoidance Action in which he/she or his/her law firm represents a party. If a Mediator's law firm represents a Defendant in any other related Avoidance Action, such Mediator shall take all steps necessary to establish an ethical wall as required by the Arizona Rules of Professional Conduct, including, but not limited to, the following: (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 adversary proceeding by employees of the law firm shall exclude the Mediator. So long as an ethical wall is effectively established and maintained, the Mediator's participation in Mediation Process shall not create a conflict of interest with respect to the representation of any such Defendant by the Mediator's law firm.
17. The Mediator shall not be called as a witness by any party except as set forth in this paragraph. No party shall attempt to compel the testimony of, or compel the production of documents from, the Mediator or the agents, partners or employees of the Mediators' respective law firms. Neither the Mediator nor their respective agents, partners, law firms or employees (a) are necessary parties in any proceeding related to the mediation or the subject matter of the mediation, nor (b) shall be liable to any party for any act or omission in connection with any mediation conducted pursuant to this Order. Any documents provided to the Mediator by the parties shall be destroyed thirty (30) days after the filing of the Mediator's Report, unless otherwise ordered by the Court. However, a Mediator may be called as a witness by any party and may be compelled to testify and/or answer discovery on a limited basis in proceedings where it is

alleged that a party failed to comply with mediation as required in this Order.

18. All proceedings and writings incident to the mediation shall be privileged and confidential, and shall not be reported or admitted in evidence for any reason whatsoever.

F. **Discovery Schedule.** Except as provided in a Scheduling Order entered into pursuant to Paragraph D above, the mediation must be concluded prior to November 30, 2017 (the "Mediation Deadline"). The following provisions and deadlines shall apply to the Avoidance Action not settled prior to the Mediation Deadline:

1. The parties to Avoidance Action shall provide the disclosures required under Bankruptcy Rule 7026(a)(1) ("Initial Disclosures") on or prior to December 29, 2017;
2. The parties shall have through and including March 1, 2018 to complete non-expert fact discovery, including depositions of fact witnesses;
3. All written interrogatories, document requests and requests for admission, if any, may be served upon the adverse party any time after the deadline for providing Initial Disclosures through January 15, 2018.
4. The standard provisions of Federal Rule of Civil Procedure 33, made applicable herein pursuant to Bankruptcy Rule 7033, shall apply to the Avoidance Action.
5. The standard provisions of Federal Rule of Civil Procedure 34, made applicable herein pursuant to Bankruptcy Rule 7034, including Rule 34(b)(2)(E) regarding the production of electronically stored information, shall apply to the Avoidance Action.
6. The standard provisions of Federal Rule of Civil Procedure 36, made applicable herein pursuant to Bankruptcy Rule 7036, shall apply to the Avoidance Action.
7. Should a discovery dispute arise, the complainant shall file with the Court a notice of discovery dispute outlining the issues, with a copy to chambers and to the other party to the Avoidance Action. Respondent must reply within three (3) business days. Neither the notice of discovery dispute nor the response, excluding exhibits, may be longer than three (3) pages. The Court will inform the parties if it

will address the dispute raised in notice informally via a conference call or through formal motion pursuant to Bankruptcy Rule 7037.

8. Disclosure and reports of the parties' case-in-chief experts, including Defendant's expert insolvency report (if any), required under Federal Rule of Civil Procedure 26(a)(2), made applicable herein pursuant to Bankruptcy Rule 7026, shall be made to the adverse party on or before April 1, 2018.
9. Disclosure and reports of the parties' rebuttal experts, including Plaintiff's rebuttal insolvency report (if any), required under Federal Rule of Civil Procedure 26(a)(2), shall be made to the adverse party on or before May 1, 2018.
10. All expert discovery, including expert witness depositions, shall be concluded on or before June 1, 2018.
11. The standard provisions of Federal Rule of Civil Procedure 26(e), made applicable herein pursuant to Bankruptcy Rule 7026, shall apply to the Avoidance Action with respect to supplementation of discovery responses.

G. **Omnibus Hearings.**

1. Except as otherwise ordered by the Court, all matters concerning the Avoidance Action shall only be heard at an omnibus hearing before the Honorable Brenda K. Martin (collectively, the "Avoidance Action Omnibus Hearings"), at which there may be status conferences, final pre-trial conferences and hearings on motions, if any. The first Avoidance Action Omnibus Hearing shall be deemed to have been held on the hearing date set for the Motion or, if no hearing is held, the date of the entry of the order. Thereafter, Avoidance Action Omnibus Hearings shall be scheduled at the convenience of the Court, but no more frequently than every ninety (90) days.
2. Defendant is not required to appear at any Avoidance Action Omnibus Hearing unless: (a) a contested motion pertaining to the Defendant's Avoidance Action is calendared to be considered at the Avoidance Action Omnibus Hearing; or (b) the Court has directed the Defendant to appear. To the extent Defendant wishes to appear at an Avoidance Action Omnibus hearing, and has not otherwise notified the Plaintiff of a pending motion or issue by placing the same on the agenda, the motion or issue may be rescheduled to be heard at the next Avoidance Action Omnibus Hearing. Subject to the

requirements of the Court for telephonic appearances, any party wishing to participate at an Avoidance Action Omnibus Hearing may do so by telephone.

3. Unless the Court orders otherwise, all motions, pleadings, requests for relief or other materials that purport to set a hearing on a date or time other than an Avoidance Action Omnibus Hearing shall automatically, and without Court order, be scheduled to be heard at an Avoidance Action Omnibus Hearing that is at least thirty (30) calendar days after such motion, pleading, request for relief or other materials are filed and served. This does not limit a party's right to seek expedited consideration of a motion or request for other relief pursuant to Local Rule 9013-1(g).
4. If the Avoidance Action is not resolved through the Mediation Process or otherwise settled by Plaintiff and the Defendant, after all discovery has been completed in accordance with the Scheduling Order, the parties to the Avoidance Action shall so inform the Court at the next scheduled Avoidance Action Omnibus Hearing. At such time, the Court may address additional issues arising subsequent to this Order, set additional deadlines as necessary, establish a due date by which the parties must file dispositive motions (if any) and a joint pretrial order, schedule a trial on the Avoidance Action that is convenient to the Court's calendar, and otherwise address any matter appropriate under Rules 16 or 26 of the Federal Rules of Civil Procedure.

H. **Miscellaneous.**

1. The Local Rules shall apply to the Avoidance Action, except that this Order shall control with respect to the Avoidance Action to the extent of any conflict with the Local Rules or any other applicable rules and orders.
2. The deadlines contained in this Order may be extended by the Court upon written motion and good cause shown or consent of the parties pursuant to a stipulation, which stipulation need not be filed with the Court.
3. This Court retains jurisdiction for all matters arising from or related to the implementation of this Order.

DATED AND SIGNED AS INDICATED ABOVE.

Exhibit 1

Mediators List

1. Michael W. Carmel
Law offices of Michael W. Carmel, LTD.
80 E. Columbus Ave.
Phoenix, AZ 85012
2. Jordan Kroop
Perkins Coie LLP
2901 North Central Avenue Suite 2000
Phoenix, AZ 85012-2788
3. Philip R. Rudd
Sacks Tierney P.A.
4250 N. Drinkwater Blvd., Fourth Floor
Scottsdale, AZ 85251

Ex. 3- Sample mediator's confirmation letter



1801 North Highland Avenue
Tampa, Florida 33602
(813) 224-9255 (Phone)
(813) 223-9620 (Fax)
www.bushross.com

Mailing Address:
Post Office Box 3913
Tampa, Florida 33601-3913

JEFFREY W. WARREN
jwarren@bushross.com
(813) 204-6423 (Direct Line)

October 5, 2018

Dear Counsel:

The following is to confirm the mediation in the above-referenced matter has been scheduled for **DATE**, to be held at the offices of **LOCATION**, beginning at **TIME**, under the following terms:

1. The goal of the mediation will be to arrive at a mutually acceptable resolution of the underlying disputes in an informal, cooperative, and non-adversarial manner. My responsibility is to work with the parties and their counsel in an effort to develop proposals to settle and resolve all matters. I will attempt to identify critical issues and to assure that the parties appreciate the strengths and weaknesses of the positions taken in the matters. The parties should be prepared to disclose candidly all facts, theories, and opinions which are relied upon with respect to the matters in dispute. They will be expected to negotiate in good faith toward a settlement and should be willing to consider and evaluate alternative solutions that may satisfy their respective interests.

2. The parties must personally participate in the mediation conference. Corporate representatives must have full settlement authority. I suggest that you discuss in advance who will attend so that any anticipated problems may be dealt with prior to the conference.

3. I shall have the right to meet with the parties and counsel, jointly and separately, for private discussion of the issues in dispute. During such private sessions, any information which is furnished to me in confidence will not be disclosed to the other party.

4. Mediation proceedings are privileged and confidential. The mediation process involves compromise negotiations and offers of settlement and no statements or admissions made during the course of the mediation will be subject to discovery or admissible for any purpose, including impeachment, in this case or in any other proceeding. Of course, evidence that is otherwise admissible will not be rendered inadmissible as a result of its being mentioned during the course of the mediation process.

5. At least by 5:00 p.m., on the day before the mediation conference, you will furnish summaries of your position and copies of any documents that you wish me to review in advance. It would be helpful if each party submitted as its official statement of position the following:

- a. Nature of disputes to be mediated;
- b. Statement of factual issues for mediation;
- c. Applicable statutes or case citations;
- e. Applicable pleadings, motions, etc.;

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October 5, 2018

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- f. Brief statement of your client's position; and
- g. History, if any, of prior settlement discussions.

6. My fee is based upon an hourly rate of \$500.00 per hour, plus any out-of-pocket expenses. I will charge for time to prepare for the mediation as well as for attendance and availability during the mediation sessions. The parties have agreed to be equally responsible for the mediation fee and any applicable costs. **Mediation fees and any applicable costs are due and payable within ten (10) days of the date of the mediation invoice.**

7. In the event agreement is reached, it shall be the responsibility of counsel to draft appropriate settlement documentation.

Please be certain that your clients understand that I will serve as a mediator and not as an attorney. There will be no attorney-client relationship between me and the parties and I will not provide legal services to any party.

I appreciate the opportunity to work with you and your clients in attempting to reach a satisfactory resolution of this case.

Sincerely,

Jeffrey W. Warren

JWW/ml

Ex. 4- Sample mediation statement



Kara E. Casteel, Esq.

Direct Line 651 289 3846 | kcasteel@askllp.com
2600 Eagan Woods Drive, Suite 400 | St. Paul, Minnesota | 55121
phone 651 406 9665 | fax 651 406 9676 | www.askllp.com

August 1, 2017

The Mediator
The Mediator's Firm
The Mediators Address
City, State, Zip
Via email: themediator@themediator.com

Re: The Debtor Company, LLC, et al., Case No. 16-12345
John Smith, as Litigation Trustee of the Debtor Company Litigation Trust v. ABC
Creditor, LLC, Adv. No. 17-12345

PLAINTIFF'S CONFIDENTIAL MEDIATION STATEMENT

Dear Mediator:

Thank you for agreeing to mediate this matter. John Smith, as Litigation Trustee of the Debtor Company Litigation Trust (the "Plaintiff") submits this confidential mediation statement (the "Mediation Statement") in support of his position on the settlement value of the above-captioned adversary proceeding against ABC Creditor, LLC (the "Defendant"). Plaintiff submits this Mediation Statement subject to Rule 408 of the Federal Rules of Evidence. Nothing herein is intended to be, nor should it be construed as, an admission. If the parties are unable to resolve this matter in mediation, the burden is on Defendant to plead and prove all of its defenses.

A. Prior Settlement Discussions

In December of 2016, Plaintiff offered to settle this matter for \$265,000.00. On June 15, 2017, Defendant offered to settle this matter for \$15,000.00. On July 1, 2017, Plaintiff countered at \$245,000.00. To the extent the parties continue settlement negotiations prior to mediation, Plaintiff will provide you with the updated positions of the parties.

B. Case Background

The Debtor Company, LLC was a company that marketed and sold widgets. Despite efforts to correct operational inefficiencies and reduce losses, the debtors were unable to withstand the economic headwinds caused by online widget sales competition and declining mall traffic. Accordingly, the debtors filed for Chapter 11 relief on January 1, 2016 (the "Petition Date"). Pursuant to *The Third Amended Joint Plan of Reorganization Under Chapter 11 of the Bankruptcy Code*, confirmed by the Court on November 25, 2016 [D.I. 800], effective on December 8, 2016, certain assets were transferred to the Trust, including the claims stated herein. As provided in the Plan, Confirmation Order, and Creditor Trust Agreement, the Trustee was appointed to administer the Trust and is authorized and has standing, among other things, to evaluate, file, litigate, settle, or otherwise pursue this avoidance action.

C. Plaintiff's Claims

Plaintiff seeks to recover \$275,000.00 (the “Transfers”) as avoidable preferences pursuant to 11 U.S.C. § 547(b). The 90-day period prior to the Petition Date was October 3, 2015 through and including January 1, 2016 (the “Preference Period”). Attached hereto as **Exhibit 1** is a list of Transfers made to Defendant during the Preference Period. Attached hereto as **Exhibit 2** is a list of the invoices paid by those Transfers. Plaintiff has met the *prima facie* elements of section 547(b).¹

D. Defendant’s Anticipated Defenses

1. Subsequent New Value

Defendant may assert that a portion of its § 547(b) liability is shielded by the “subsequent new value” defense of Bankruptcy Code § 547(c)(4). In order to prevail in this defense, Defendant must establish that, subsequent to receipt of the Transfers, Defendant contributed new value to the Debtors: (i) not secured by an otherwise unavoidable security interest; and (ii) on account of which new value the Debtors did not make an otherwise unavoidable transfer to or for the benefit of Defendant. 11 U.S.C. § 547(c)(4).

Defendant, in neither its previous position statement nor its current mediation statement, discusses the subsequent new value defense at all. However, Plaintiff is aware of one invoice dated after the first payment, Inv. No. 1000, that could qualify for new value. Plaintiff’s has accordingly credited Defendant with \$100.00 worth of allowed new value. Attached hereto as **Exhibit 3** is Plaintiff’s New Value (Only) Analysis, which applies new value to the Transfers and leaves a net preference of \$274,900.00. Plaintiff is willing to provide full credit for any additional new value that Defendant can document.

2. Ordinary Course of Business

Defendant may assert that the Transfers are immune from avoidance and recovery by Plaintiff because they are protected by the “ordinary course of business” defense pursuant to Bankruptcy Code § 547(c)(2). In order to prevail on this defense, Defendant must establish that the Transfers were: in payment of a debt incurred by the Debtors in the ordinary course of business or financial affairs of the Debtors and Defendant; and either (A) made in the ordinary course of business or financial affairs of the Debtors and Defendant or (B) made according to ordinary business terms.

i.) Subjective Test Under 11 U.S.C. § 547(c)(2)(A)

In order to establish the subjective criteria of the ordinary course of business (“OCB”) defense under 11 U.S.C. § 547(c)(2)(A), a creditor must generally produce some evidence of the “baseline of dealings” between the parties to “enable the court to compare the payment practices during the preference period with the prior course of dealings.” *Schick v. Herskowitz (In re*

¹ “[T]he debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition.” 11 U.S.C. § 547(f). Defendant has not presented any evidence to rebut the presumption of the Debtors’ insolvency.

Schick), 234 B.R. 337, 348 (Bankr. S.D.N.Y. 1999). This often involves an examination of the average days to pay in the historical period as compared to the preference period. *See, e.g., AFA Invest. v. Dale T. Smith & Sons Meat Packing Co. (In re AFA Invest. Inc.)*, 2016 WL 908212 (Bankr. D. Del. March 9, 2016) (determining payments not ordinary when made later than historical period); *Burtch v. Prudential Relocation, Inc. (In re AE Liquidation, Inc.)*, 2013 WL 3778141, *6 (Bankr. D. Del. July 17, 2013) (reviewing increase in timing based on change in average); *In re M. Fabrikant & Sons, Inc.*, 2010 WL 4622449 at *3 (“[t]he starting point — and often ending point — involves the consideration of the average time of payment after the issuance of the invoice during the pre-preference and post-preference periods, the so-called ‘average lateness’ computation theory”).

In conjunction with examining the average, the subjective test examines whether the timing and size of a payment was ordinary compared to past behavior. In particular, courts examine:

- (i) the length of time the parties engaged in the type of dealing at issue; (ii) whether the subject transfers were in an amount more than usually paid; (iii) whether the payments at issue were tendered in a manner different from previous payments; (iv) whether there appears to have been an unusual action by the creditor or debtor to collect on or pay the debt; and (v) whether the creditor did anything to gain an advantage (such as obtain additional security) in light of the debtor's deteriorating financial condition.

In re AE Liquidation, Inc., 2013 WL 3778141 at *5 (*emphasis added*). While the Delaware Court examines these multiple factors when determining whether payments were made in the ordinary course of business, it has noted that courts place particular emphasis on the timing of payments. *See Id.* (citing *Burtch v. Detroit Forming, Inc. (In re Archway Cookies)*, 435 B.R. 234, 241-42 (Bankr. D. Del. 2010)); *Radnor Holdings Corp. v. PPT Consulting, LLC (In re Radnor Holdings Corp.)*, 2009 WL 2004226, *5 (Bankr. D. Del. July 9, 2009).

a.) Statistical Analysis of Payment Timing.

Plaintiff has attached as **Exhibit 4** the Debtors’ records of the payment history between the parties during the 250-day period prior to the Preference Period (the “Historical Period”). Statistically, based on a review of the Historical Period, all **(100%)** of the transfers made during the Historical Period paid invoices between 6 to 18 days past invoice date (the “OCB Range”). Attached hereto as **Exhibit 5** is Plaintiff’s Summary Analysis, which compares the Historical and Preference Period payments. While 100% of Historical Payments were made in the Range, only 39.7% of the Transfers made during the Preference Period paid invoices within the Range. *See Exhibits 2 and 5*. Instead, 60% of the Preference Period payments were made later than the OCB range. The weighted average days from invoice date to payment date increased from 8.7 days in the Historical Period to 22.3 days in the Preference Period, over doubling the average payment timing. Such a shift was not ordinary between the parties.

While two invoices totaling \$20,000.00 were paid within the statistical OCB Range, for additional reasons discussed herein additional factors remove even these payments from OCB

protection.

b.) Additional Factors: Payments Were Tendered in a Different Manner.

With the exception of the very last payment prior to the Preference Period, the Debtor previously paid Defendant by check out of account ending 0578. Starting with the last historical transfer, and continuing into the Preference Period, the Debtor paid Defendant by wire out of account ending 0579. This change to a faster payment method was not ordinary between the parties. Regardless of which party determined to make the switch to wire, a change in payment method or actions by the Debtor alone can make payments unordinary. *See Ames Merch. Corp. v. Cellmark Paper, Inc. (In re Ames Dep't Stores, Inc.)*, 450 B.R. 24, 27-28 (Bankr. S.D.N.Y. 2011) *aff'd*, 470 B.R. 280 (S.D.N.Y. 2012) *aff'd*, 506 F. App'x 70 (2d Cir. 2012).

c.) Additional Factors: Two of the Three Payments Were Larger Than Any Previous Transfers Made By the Debtors.

In addition to the shift to later pay and change in payment method, two of the three Transfers were “in an amount more than usually paid,” another factor considered in the subjective analysis. The two Transfers in question were for \$108,444.00 and \$85,291.00. The largest payment in the Historical Period was for \$47,220.00, meaning the \$85k Transfer was nearly double and the \$108k Transfer was well over double of that amount. Additionally, the largest invoice in the Historical Period was for \$47,220.00, while the invoices in Preference Period were as large as \$69,000.00.

d.) Defendant is Not Entitled to a “Justified Lateness” Defense for the Last Transfer Paying an Invoice at 49 Days.

Defendant may assert that the last payment should not be penalized as late because there was some error in transmitting the invoice to the correct billing department. In support of this purported defense, Defendant has produced an email chain concerning the invoice, which is attached hereto as **Exhibit 6**. The case law on this topic does not support Defendant’s position.

Proof of a reason for the lateness of a particular of an invoice does not make any subsequent late payment ordinary—to the contrary, it shows things didn’t go as planned and were not ordinary. This attempted defense was made in the case of *Davis v. All Points Packaging & Distribution, Inc. (In re Quebecor World (USA) Inc.)*, 491 B.R. 363 (Bankr. S.D.N.Y. 2013). In that case, the Defendant claimed that the payment would have been timely, but it should be excused because the defendant overcharged an item on the invoices, and therefore an adjustment needed to be made prior to payment. *Id.* at 370. The Court disagreed: “In evaluating the ordinary course of business defense, it is appropriate to consider when the payment in question was actually made. To consider instead when it would have been made if events had turned out as the debtor intended opens the door of this exception to the preference provision far too wide.” *Id.* at 370 (quoting *In re Cyberrebate. com, Inc.*, 296 B.R. 639, 644 (Bankr. S.D.N.Y. 2003)).

e.) None of the Transfers are Protected by the Subjective OCB Defense

ask ATTORNEYS AT LAW

August 1, 2017

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Accordingly, based on the combination of factors above, including 1) a shift in payment timing, 2) a change in payment method, 3) a change in payment amount, and 4) inability to “excuse” the final payment, Plaintiff takes the position that **none** of the Transfers are protected by the subjective ordinary course of business defense.

ii). Objective Test Under 11 U.S.C. § 547(c)(2)(B)

Defendant has submitted no evidence to suggest that it can meet the burden of establishing that the Transfers were made according to ordinary business terms in the Debtors’ and Defendant’s respective industries. 11 U.S.C. § 547(c)(2)(B). Accordingly, such is an element of proof at trial.

E. Net Preference Analysis

As Plaintiff takes the position that Defendant has failed to establish the ordinary course of business defense under either prong, Plaintiff asserts that the net preference is the amount after subsequent new value is applied, or \$274,900.00. *See Exhibit 3.*

F. Exhibits To Be Presented At Mediation

- Exhibit 1 - List of Transfers that Cleared within the Preference Period.
- Exhibit 2 - Preference Period Invoice to Payment Detail.
- Exhibit 3 - Plaintiff’s New Value (Only) Analysis.
- Exhibit 4 - Historical Period Invoice to Payment Detail.
- Exhibit 5 - Plaintiff’s Summary Analysis of Subjective OCB Range.
- Exhibit 6 – Emails concerning last payment.

Very truly yours,

ASK LLP



Kara E. Casteel

Attorneys for Plaintiff

Encl.: mediation exhibits 1-6