M-143

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

In re: COURT ANNEXED MEDIATION PROGRAM: ADOPTION OF PROCEDURES GOVERNING MEDIATION OF MATTERS IN BANKRUPTCY CASES AND ADVERSARY PROCEEDINGS

AMENDED GENERAL ORDER

IT IS ORDERED that a court mediation program for matters not involving a governmental unit is established under the following Rules:

1.0 Assignment of Matters to Mediation.

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

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

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

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the court to mediation.

1.4 Mediation Procedures. Upon assignment of a matter to mediation, this General Order shall become binding on all parties subject to such mediation.

2.0 The Mediator.

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

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

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

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

(a) A person must have been authorized to practice for at least four years under the laws of the State of

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

(b) Be an active member in good standing, or if retired, have been a member in good standing, of any applicable professional organization;

(c) Not have:

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

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

(3) Have been convicted of a felony.

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

2.2 Appointment of the Mediator.

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

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

C. If the mediator is unable to serve, the mediator shall file within seven (7) days after receipt of the notice of appointment, a notice of inability to accept appointment and immediately serve a copy upon the appointed alternate mediator. The alternate mediator shall become the mediator for the matter if such person fails to file a notice of inability to accept appointment within seven (7) days after filing of the original mediator's notice of inability. If neither can serve, the court will appoint another mediator and alternate mediator.

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

disqualification if that person were a justice, judge or magistrate.

3.0 The Mediation.

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

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

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

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

3.4 Post-Mediation Procedures. Promptly upon conclusion of the mediation conference, and in any event no later than 3:00 P.M. two (2) business days prior to the date fixed for hearing referred to in paragraph 1.1, the mediator shall file a final report showing compliance or noncompliance with the requirements of this General Order by the parties and the mediation results. If in the mediation the parties reach an agreement regarding the disposition of the matter, they shall determine who shall prepare and submit to the court a stipulated order or judgment, or joint motion for approval of compromise of controversy (as appropriate), within twenty (20) days of the conference. Failure to timely file such a stipulated order or judgment or motion when agreement is reached shall be a basis for the court to impose appropriate sanctions. Absent such a stipulated order or judgment or motion, no party shall be bound by any statement made or action taken during the mediation

process. If the mediation ends in an impasse, the matter will be heard or tried as scheduled.

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

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

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

5.0 Confidentiality.

5.1 Confidentiality as to the Court and Third Paries. Any statements made by the mediator, by the parties or by others during the mediation process shall not be divulged by any of the participants in the mediation (or their agents) or by the mediator to the court or to any third party. All records, reports, or other documents received or made by a mediator while

serving in such capacity shall be confidential and shall not be provided to the court, unless they would be otherwise admissable. The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in connection with any arbitral, judicial or other proceeding, including any hearing held by the court in connection with the referred matter. Nothing in this section, however, precludes the mediator from reporting the status (though not content) of the mediation effort to the court orally or in writing, or from complying with the obligation set forth in 3.2 to report failures to attend or to participate in good faith.

5.2 Confidentiality of Mediation Effort. Rule 408 of the Federal Rules of Evidence shall apply to mediation proceedings. Except as permitted by Rule 408, no person may rely on or introduce as evidence in connection with any arbitral, judicial or other proceeding, including any hearing held by this court in connection with the referred matter, any aspect of the mediation effort, including, but not limited to:

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

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

C. Proposals made or views expressed by the mediator.

6.0 Immunity. The Mediators shall be immune from claims arising out of acts or omissions incident to their service as

court appointees in this Mediation Program. See Wagshal v. Foster, 28 F.3d 1249, D.C. Cir. 1994.

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

8.0 Compliance With the U.S. Code, Federal Rules of Bankruptcy Procedure, and Court Rules and Orders. Nothing in this General Order shall relieve any debtor, party in interest, or the U.S. Trustee from complying with any other court orders, U.S. Code, the Federal Rules of Bankruptcy Procedure, or this court's Local Rules, including times fixed for discovery or preparation for any court hearing pending on the matter.

Dated: New York, New York
January 17, 1995

Burton R. Lifland
Chief U.S. Bankruptcy Judge