

Hearing Date and Time: April 26, 2011 at 10:00 a.m. (ET)
Objection Deadline: April 15, 2011 at 4:00 p.m. (ET)

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as Trustee for the Oldco M Distribution Trust*

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re: : Chapter 11
: :
OLDCO M CORPORATION, : Case No. 09-13412 (MG)
(f/k/a Metaldyne Corporation), *et al.*, :
: :
: Jointly Administered
:

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

Movant, Executive Sounding Board Associates Inc. (the “Trustee” or “Movant”), the liquidating trustee of the Oldco M Distribution Trust (the “Trust”) established pursuant to the *Second Amended Joint Plan of Liquidation of Debtors and Debtors in Possession* (the “Plan”) [Docket No. 1180], by and through its undersigned counsel, hereby moves this Court (the “Court”) for entry of an order, substantially in the form annexed hereto as Exhibit “A,” establishing certain procedures (the “Proposed Procedures”) to govern adversary proceedings to be commenced by the Trustee pursuant to 11 U.S.C. §§ 547 and 550 (the “Motion”) and, in support hereof, avers the following:

JURISDICTION AND VENUE

1. The Court has subject matter jurisdiction over this matter pursuant to 28 U.S.C. §§ 157 and 1334.
2. Venue in this district is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
3. Consideration of this Motion is a core proceeding pursuant to 28 U.S.C. §§ 157(b)(2)(A), (B), (F), (H) and (O).

BACKGROUND

4. On May 27, 2009 (the “Petition Date”), Oldco M Corporation (f/k/a Metaldyne Corporation) and 30 of its domestic direct and indirect subsidiaries, as debtors and debtors in possession (collectively, the “Debtors”), filed voluntary petitions for relief under chapter 11 of title 11 of the United States Code (the “Bankruptcy Code”).
5. By an order entered on May 29, 2009, the Debtors’ chapter 11 cases were consolidated for procedural purposes and thereafter were jointly administered. [Docket No. 65].
6. On January 11, 2010, the Debtors filed the Plan and related disclosure statement.

7. On February 23, 2010, the Court entered an Order confirming the Plan (the “Confirmation Order”) [Docket No. 1384] and substantively consolidated these bankruptcy estates into one consolidated estate.

8. On March 30, 2010, the Plan became effective (the “Effective Date”).

9. Pursuant to the Plan and as of the Effective Date, the Debtors were dissolved and the Oldco M Distribution Trust was created in order to, *inter alia*: (i) liquidate the Debtors’ remaining assets (including any claims and causes of action possessed by the Debtors); (ii) litigate and resolve claims filed against the Debtors’ estates; (iii) make distributions to creditors; and (iv) take other actions permitted by Section III.C of the Plan.

10. In accordance with the terms and conditions of the Plan, the Trustee, subsequent to the Effective Date, commenced a formal investigation of potential claims against third parties.

11. In connection thereto, the Trustee, in July and August of 2010, sent demand letters (the “Demand Letters”) to approximately 525 transferees requesting the return of transfers the Trustee believed were preferential pursuant to Bankruptcy Code sections 547 and 550. Additional demand letters may be issued to a number of other transferees to whom demands were not previously sent.

12. Since then, the Trustee has worked with each transferee that responded to the Demand Letters to evaluate the particular defenses raised by that responding transferee.

13. As of the date of this Motion, the Trustee has successfully resolved approximately 115 claims without the need for litigation.

14. While this process is ongoing, the two year statute of limitations for bringing these actions is fast approaching.

15. The Trustee anticipates that he will have to file adversary proceedings (the “Avoidance Actions”) in this Court against approximately 410 parties (each a “Defendant” and collectively, the “Defendants”) to avoid and recover preferential transfers pursuant to Bankruptcy Code sections 547 and 550.

16. This extremely large volume of Avoidance Actions may present logistical issues for the Court, the Clerk’s Office and the parties.

17. In addition to these logistical issues, a large percentage of the potential Avoidance Actions have a relatively small dollar amount at issue (*i.e.*, less than \$50,000). While the Trustee believes that it is in the best interests of the Trust to pursue these claims as collectively they aggregate approximately \$2 million, the Trustee also believes that by modifying certain aspects of the Federal Rules of Civil Procedure, made applicable hereto by the Federal Rules of Bankruptcy Procedure, associated with the litigation of such claims, it will avoid logistical challenges, facilitate a more efficient and streamlined process and, hopefully, avoid expensive and protracted litigation of claims that are relatively small in dollar amount.

RELIEF REQUESTED

18. By this Motion, the Trustee respectfully requests that the Court implement the Proposed Procedures in connection with the prosecution of the Avoidance Actions by entering an order substantially in the form annexed hereto as Exhibit “A” (the “Proposed Order”).

19. The Proposed Procedures are intended to avoid burdening the Court with the logistical challenges of handling more than 400 adversary proceedings as well as permit and/or facilitate a fair resolution of the Avoidance Actions, thus enabling the parties to bring those actions to a swift conclusion in an efficient and cost-effective manner.

20. In general, the Proposed Procedures seek to: (a) extend the time limit for service of summonses and complaints by 120 days; (b) extend the defendants' time to answer or otherwise respond to the complaints; (c) stay formal discovery in each Avoidance Action until after such action has been mediated (to the extent such action is not settled); and (d) establish procedures for the mediation of each Avoidance Action.

21. By implementing the Proposed Procedures, the Trustee believes that it will also maximize the potential for settlement before trial either through negotiation or as a result of the mediation process.

BASIS FOR RELIEF

22. Movant seeks entry of the Proposed Order pursuant to sections 105(a), 547 and 550 of the Bankruptcy Code, Rules 7016 and 7026 of the Federal Rules of Bankruptcy Procedure (the "Bankruptcy Rules"), and General Order M-390 of the Court.

23. Bankruptcy Rule 7016 affords courts significant flexibility and discretion in adopting and implementing procedures, such as the Proposed Procedures, in order to facilitate the "just, speedy, and inexpensive disposition of the action." Fed. R. Civ. P. 16 (made applicable to this case via Bankruptcy Rule 7016). Bankruptcy Rule 7016 also provides that courts may enter scheduling and other orders that limit the time to file motions and to complete discovery. In addition, Bankruptcy Rule 7016 provides that such orders may include modifications for the disclosures required under Bankruptcy Rule 7026, dates for conferences and trials and any other matters appropriate under the circumstances of the case. Fed. R. Civ. P. 16.

24. In addition to Bankruptcy Rule 7016, Bankruptcy Code § 105(a) grants bankruptcy courts broad authority and discretion to take such actions and implement such

procedures as are necessary to enforce the provisions of the Bankruptcy Code. That provision provides:

The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

11 U.S.C. § 105(a).

25. In addition to these statutory predicates, courts in this and other districts have entered orders providing for relief similar to the Proposed Procedures in cases where a debtor, committee or trustee anticipates filing a large number of avoidance actions. *See, e.g., In re Creative Group, Inc.*, Case No. 08-10975 (Bankr. S.D.N.Y.) (Docket No. 421); *In re Bernard L. Madoff*, Adversary Case No. 08-01789 (Bankr. S.D.N.Y.) (Docket No. 3141); *In re Circuit City Stores, Inc.*, Case No. 08-35653 (Bankr. E.D. Va.) (Docket No. 8898); *In re SemCrude, L.P., et al.*, Case No. 08-11525 (Bankr. D. Del.) (Docket No. 8394).

PROPOSED PROCEDURES

26. In light of this statutory and historical framework, the Trustee proposes the following procedures to apply to all of the Avoidance Actions:

Extension of Time to Serve Avoidance Actions Pursuant to Bankruptcy Rule 7004

i. The time period pursuant to Federal Rule of Civil Procedure 4(m), made applicable to the Avoidance Actions by Bankruptcy Rule 7004, by which the Trustee must serve the summons and complaint on each Defendant shall be extended for an additional one hundred and twenty (120) days, without prejudice to the Trustee to seek further extensions of time for cause shown. It is anticipated, however, that the Trustee will serve the summons and complaints as promptly as practicable after issuance of the summons.

Stipulation to Extend Time for Defendants to Respond to the Complaint, Mediation before Response

ii. For any Defendant that received more than \$50,000.00 in transfers during the 90 days before the Petition Date, without further order of the Court, the parties may stipulate to up to three (3) separate extensions of time for a Defendant to respond to the Complaint (the “Response Due Date”), with each extension to be of no more than thirty (30) days each. The stipulation must be in writing to be binding on the Trustee.

iii. For any Defendant that received less than \$50,000.00 in transfers during the 90 days before the Petition Date, without further order of the Court, the parties may stipulate to up to five (5) separate extensions of time for a Defendant to respond to the Complaint (the “Response Due Date”), with each extension to be of no more than thirty (30) days each. The stipulation must be in writing to be binding on the Trustee.

iv. If the parties jointly agree in writing (which writing shall be filed in the adversary proceeding) to enter mediation prior to the Response Due Date, the Response Due Date shall be deferred while the mediation is pending. If the mediation does not resolve the Avoidance Action, the Response Due Date shall be extended for an additional thirty (30) days following the completion of mediation and the filing of the mediator’s report.

v. Except as set forth in paragraphs b and c (above), further extensions of the Response Due Date shall not be granted except upon a motion or by stipulation of the parties, approved by Order of this Court.

Stay of Requirement to Conduct Rule 26(f) Conference

vi. The conference required by Federal Rule of Civil Procedure 26(f), made applicable herein pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan), shall be stayed until the completion of mediation and, if the matter is not resolved at the mediation, then after the Defendant’s response is filed. Following the filing of the Mediator’s Report (as defined herein) and assuming the Avoidance Action was not resolved during the mediation, the parties shall conduct a Rule 26(f) conference and submit a discovery scheduling order (the “Scheduling Order”) to the Court prior to or at the Pretrial Scheduling Conference (as defined herein).

Stay of Requirement to Conduct Pretrial Conference

vii. The conference required by Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016, shall be stayed until the completion of mediation. Accordingly, the summons filed and served by the Trustee will not include a date for a pretrial conference. Upon the filing of the Mediator’s Report (as defined herein), with respect to each adversary proceeding that is not resolved through mediation or otherwise, the Trustee shall file with the

Court and serve on the Defendant a notice of pretrial scheduling conference (the “Pretrial Scheduling Conference”) to take place in the adversary proceeding at the next scheduled Omnibus Hearing; provided, however, that a minimum of fourteen (14) days notice of the Pretrial Scheduling Conference is required.

Stay of Discovery

viii. All formal discovery shall be stayed until after a Scheduling Order is entered and after the Scheduling Conference has occurred in accordance with these Proposed Procedures; provided, however, this stay of discovery shall in no way preclude the parties from informally exchanging documents and other information in an attempt to resolve an Avoidance Action in advance of, or during, the mediation process.

Settlement of Avoidance Actions

ix. The Trustee is authorized to compromise or settle the Avoidance Actions without court approval, as provided in section 4.10 of the Distribution Trust Agreement. In the event of a settlement, the Trustee shall file a Notice of Settlement with the Court within ten (10) days of the later of (i) the parties’ execution of the settlement agreement; or (ii) the date of payment of any amount due under the settlement agreement.

Mediation of Motions to Dismiss

x. If a Defendant files a motion under Federal Rule of Civil Procedure 12(b)(6) (made applicable by Bankruptcy Rule 7012) for failure to state a claim (a “Motion to Dismiss”), in response to the complaint, the issues raised in such Motion to Dismiss, together with the issues raised in the complaint, shall be immediately referred to mediation; provided, however, that if the parties mutually agree that mediation is unlikely to resolve the issues raised by any such Motion to Dismiss, that motion will not be referred to mediation and, instead, the parties will jointly request in a letter to the Court that the Court hear the motion on such schedule as the Court may determine.

xi. To the extent a party files a motion other than a motion under Federal Rule of Civil Procedure 12(b)(6), then the issues raised in that motion will not be referred to mediation and the Court will hear the matter on such schedule as either the local rules provide and/or the Court may determine, unless the parties otherwise agree to refer the issues raised in the motion to arbitration.

Mediation Procedures and Requirements

xii. To the extent an Avoidance Action has not been resolved and/or settled within thirty (30) days after an answer or motion to dismiss pursuant to Rule 12(b)(6) is filed, then said Avoidance Action (the “Remaining Avoidance Actions”) shall be referred to mandatory mediation. Within two weeks thereafter

(the “Mediation Deadline”), the Defendant and the Trustee shall jointly choose a mediator (the “Mediator”) from the list of mediators on Exhibit “B” (the “Mediator List”) and the Trustee shall file a “Notice of Mediator Selection” with the Court on or before the Mediation Deadline. If the parties are unable to agree on a mediator, the Court shall appoint one from the Mediator List.

xiii. The Mediator’s fees shall be split equally by the parties, and payment arrangements reasonably satisfactory to the Mediator must be completed on or prior to the commencement of the mediation.

xiv. Promptly after the filing of the Notice of Mediator Selection, the Trustee and Defendant’s counsel (or the Defendant, if appearing *pro se*) shall jointly contact the selected Mediator to discuss the mediation. The mediation will be scheduled within sixty (60) days of the filing of the Notice of Mediator Selection.

xv. The mediation shall take place in New York, New York and shall be held at the law offices of Trustee’s counsel, the Mediator’s office or at another location agreed upon by the parties.

xvi. Except as set forth herein, the mediation shall be conducted in accordance with General Order M-390 which is available on the Court’s website (<http://www.nysb.uscourts.gov/>).

xvii. The parties shall exchange position statements (“Position Statements”), which may not exceed ten (10) pages double-spaced in 12 point type (exclusive of exhibits and schedules), at least ten (10) days prior to the scheduled mediation. The Mediator may also require the parties to provide to the Mediator any relevant papers and exhibits as well as a settlement proposal.

xviii. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties’ presentations and with the full authority to implement any additional procedures which are reasonable and practical under the circumstances.

xix. The length of time necessary to effectively complete the mediation will be within the Mediator’s discretion. The Mediator may also adjourn a mediation that has been commenced if the Mediator determines that an adjournment is in the best interests of the parties.

xx. The parties shall participate in the mediation in good faith and with a view toward reaching a consensual resolution. The mediation(s) shall be attended by a representative of the Defendant with full settlement authority and, if a Defendant is represented, their counsel, as well as counsel for the Trustee (who must have settlement authority from the Trustee).

xxi. Unless otherwise consented to in writing by the parties, no Mediator shall mediate an Avoidance Action in which the Mediator or the Mediator’s law firm currently represents a party with respect to any Avoidance Actions.

xxii. All proceedings and writings incident to the mediation will be considered privileged and confidential, and shall not be reported or admitted in evidence for any reason whatsoever. Nothing stated or exchanged during a mediation shall operate as an admission of liability, wrongdoing or responsibility.

xxiii. The mediation shall be conducted so as to be completed within one hundred and twenty (120) days after the date the Notice of Mediator Selection is filed, which deadline may be extended by the mutual consent of the parties and the Mediator.

xxiv. If a party (a) fails to submit the required position statement or other submissions as provided in these Proposed Procedures or as may be agreed to by the Mediator or ordered by the Court, or (b) fails to attend the mediation, then the non-defaulting party may file a motion for default judgment or a motion to dismiss the adversary proceeding, as applicable.

xxv. Within ten (10) days after the conclusion of each mediation, the Mediator shall file a report (the “Mediator’s Report”) in the Remaining Avoidance Action, which shall be limited to stating only (i) whether the Remaining Avoidance Action settled or did not settle; (ii) the date or dates the mediation took place; and (iii) the names of the parties and/or counsel who attended.

Avoidance Actions Omnibus Hearings

xxvi. The Court will schedule regular Omnibus Hearing dates in the bankruptcy case, on which dates any post-mediation Pretrial Scheduling Conference will take place. Any pretrial motions filed by the parties in the Avoidance Actions must be set for hearing on one of the Omnibus Hearing dates unless otherwise ordered by the Court.

Motions Affecting all Avoidance Actions

xxvii. Any motions filed by the Trustee that affect all of the Avoidance Actions shall be filed in the bankruptcy case and not in each separately docketed Avoidance Action; provided, however, that each Defendant shall receive notice of the filing of the same.

27. The Trustee believes that the Proposed Procedures will provide for an efficient and cost effective means of resolving the Avoidance Actions as formal discovery, seeking broad categories of documents and information, will operate to delay and increase the cost involved in prosecuting and defending the Avoidance Actions; whereas, the temporary stay of formal discovery provided for in the Proposed Procedures will enable the parties to resolve the

Avoidance Actions through the informal exchange of information and documentation before the parties are required to incur the substantial costs of formal discovery and litigation.

28. In addition, after the mediation process, including the submission of Position Statements and participation in the mediation sessions, the parties will have a clear understanding of the factual and legal issues in dispute which will hopefully enable them to narrowly tailor their discovery needs.

29. The Proposed Procedures are consistent with the Bankruptcy Rules, the Local Rules and General Order M-390 and are designed to further the goals of judicial economy and efficiency.

NO PRIOR REQUEST

30. No other or prior motion for the relief sought herein has been made to this Court or any other court.

WHEREFORE, Executive Sounding Board Associates Inc. believes the Proposed Procedures are integral to the ability to resolve the Avoidance Actions in a cost-effective, efficient manner that will further speed distributions to creditors and, ultimately, the closing of the Debtors' chapter 11 cases. In light of the foregoing, Executive Sounding Board Associates Inc. submits that the Proposed Procedures are warranted and approval thereof is well within the authority granted to the Court under the applicable Bankruptcy Rules and sections of the Bankruptcy Code and respectfully requests that this Court enter the Proposed Procedures Order, attached hereto as Exhibit A, (i) approving the Proposed Procedures and (ii) granting such other and further relief as the Court deems just and proper.

DATED: March 11, 2011

DUANE MORRIS LLP

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*Conflicts Counsel for Movant, Executive
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for the Oldco M Distribution Trust*

Exhibit A

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re: : Chapter 11
: :
OLDCO M CORPORATION, : Case No. 09-13412 (MG)
(f/k/a Metaldyne Corporation), *et al.*, : :
: :
: Jointly Administered
: :
EXECUTIVE SOUNDING BOARD :
ASSOCIATES INC., as Trustee for the :
Oldco M Distribution Trust, :
: :
Movant, :
: :
vs. : Adversary Proc. Nos.
: [See Attached Exhibit A]
: :
[SEE ATTACHED EXHIBIT A], :
: :
Defendant. :
: :

**ORDER ESTABLISHING PROCEDURES
GOVERNING ADVERSARY PROCEEDINGS BROUGHT PURSUANT
TO SECTIONS 547 AND 550 OF THE BANKRUPTCY CODE**

Upon the motion (the “Motion”)¹ dated March 11, 2011 of Executive Sounding Board Associates Inc. (the “Trustee” or “Movant”), the liquidating trustee of the Oldco M Distribution Trust (the “Trust”), by and through its attorneys, for an Order pursuant to sections 105(a), 547 and 550 of the Bankruptcy Code, Rules 7016 and 7026 of the Bankruptcy Rules, and General Order M-390 of the United States Bankruptcy Court for the Southern District of New York, establishing procedures governing the Avoidance Actions; and this Court having jurisdiction to consider and determine the Motion as a core proceeding in accordance with 28 U.S.C. §§ 157 and 1334 and the Plan; and due notice of the Motion having been provided no further notice

¹ Capitalized terms not otherwise defined herein shall have the same meaning ascribed to them in the Motion.

being required; and it appearing that the relief requested by the Motion is necessary and in the best interests of the parties; and sufficient cause appearing therefor, it is hereby:

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

ORDERED, that the procedures governing all parties to the Avoidance Actions, attached hereto as Exhibit "1" and incorporated herein by reference (the "Avoidance Action Procedures") are hereby approved and shall govern the Adversary Proceedings, effective as of the date of this Order.

ORDERED, that the Bankruptcy Code, the Bankruptcy Rules and the Local Bankruptcy Rules shall apply to the Adversary Proceedings, except to the extent that they conflict with the Avoidance Action Procedures.

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

ORDERED, that the requirement under Local Bankruptcy Rule 9013-1 to file a memorandum of law in connection with the Motion is hereby waived.

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

Dated: _____, 2011

The Honorable Martin Glenn
United States Bankruptcy Judge

Exhibit 1

AVOIDANCE ACTION PROCEDURES

Extension of Time to Serve Avoidance Actions Pursuant to Bankruptcy Rule 7004

i. The time period pursuant to Federal Rule of Civil Procedure 4(m), made applicable to the Avoidance Actions by Bankruptcy Rule 7004, by which the Trustee must serve the summons and complaint on each Defendant shall be extended for an additional one hundred and twenty (120) days, without prejudice to the Trustee to seek further extensions of time for cause shown. It is anticipated, however, that the Trustee will serve the summons and complaints as promptly as practicable after issuance of the summons.

Stipulation to Extend Time for Defendants to Respond to the Complaint, Mediation before Response

ii. For any Defendant that received more than \$50,000.00 in transfers during the 90 days before the Petition Date, without further order of the Court, the parties may stipulate to up to three (3) separate extensions of time for a Defendant to respond to the Complaint (the “Response Due Date”), with each extension to be of no more than thirty (30) days each. The stipulation must be in writing to be binding on the Trustee.

iii. For any Defendant that received less than \$50,000.00 in transfers during the 90 days before the Petition Date, without further order of the Court, the parties may stipulate to up to five (5) separate extensions of time for a Defendant to respond to the Complaint (the “Response Due Date”), with each extension to be of no more than thirty (30) days each. The stipulation must be in writing to be binding on the Trustee.

iv. If the parties jointly agree in writing (which writing shall be filed in the adversary proceeding) to enter mediation prior to the Response Due Date, the Response Due Date shall be deferred while the mediation is pending. If the mediation does not resolve the Avoidance Action, the Response Due Date shall be extended for an additional thirty (30) days following the completion of mediation and the filing of the mediator’s report.

v. Except as set forth in paragraphs b and c (above), further extensions of the Response Due Date shall not be granted except upon a motion or by stipulation of the parties, approved by Order of this Court.

Stay of Requirement to Conduct Rule 26(f) Conference

vi. The conference required by Federal Rule of Civil Procedure 26(f), made applicable herein pursuant to Bankruptcy Rule 7026 (mandatory meeting before scheduling conference/discovery plan), shall be stayed until the completion of mediation and, if the matter is not resolved at the mediation, then after the Defendant’s response is filed. Following the filing of the Mediator’s Report (as defined herein) and assuming the Avoidance Action was not resolved during the

mediation, the parties shall conduct a Rule 26(f) conference and submit a discovery scheduling order (the “Scheduling Order”) to the Court prior to or at the Pretrial Scheduling Conference (as defined herein).

Stay of Requirement to Conduct Pretrial Conference

vii. The conference required by Federal Rule of Civil Procedure 16, made applicable herein pursuant to Bankruptcy Rule 7016, shall be stayed until the completion of mediation. Accordingly, the summons filed and served by the Trustee will not include a date for a pretrial conference. Upon the filing of the Mediator’s Report (as defined herein), with respect to each adversary proceeding that is not resolved through mediation or otherwise, the Trustee shall file with the Court and serve on the Defendant a notice of pretrial scheduling conference (the “Pretrial Scheduling Conference”) to take place in the adversary proceeding at the next scheduled Omnibus Hearing; provided, however, that a minimum of fourteen (14) days notice of the Pretrial Scheduling Conference is required.

Stay of Discovery

viii. All formal discovery shall be stayed until after a Scheduling Order is entered and after the Scheduling Conference has occurred in accordance with these Proposed Procedures; provided, however, this stay of discovery shall in no way preclude the parties from informally exchanging documents and other information in an attempt to resolve an Avoidance Action in advance of, or during, the mediation process.

Settlement of Avoidance Actions

ix. The Trustee is authorized to compromise or settle the Avoidance Actions without court approval, as provided in section 4.10 of the Distribution Trust Agreement. In the event of a settlement, the Trustee shall file a Notice of Settlement with the Court within ten (10) days of the later of (i) the parties’ execution of the settlement agreement; or (ii) the date of payment of any amount due under the settlement agreement.

Mediation of Motions to Dismiss

x. If a Defendant files a motion under Federal Rule of Civil Procedure 12(b)(6) (made applicable by Bankruptcy Rule 7012) for failure to state a claim (a “Motion to Dismiss”), in response to the complaint, the issues raised in such Motion to Dismiss, together with the issues raised in the complaint, shall be immediately referred to mediation; provided, however, that if the parties mutually agree that mediation is unlikely to resolve the issues raised by any such Motion to Dismiss, that motion will not be referred to mediation and, instead, the parties will jointly request in a letter to the Court that the Court hear the motion on such schedule as the Court may determine.

xi. To the extent a party files a motion other than a motion under Federal Rule of Civil Procedure 12(b)(6), then the issues raised in that motion will not be referred to mediation and the Court will hear the matter on such schedule as either the local rules provide and/or the Court may determine, unless the parties otherwise agree to refer the issues raised in the motion to arbitration.

Mediation Procedures and Requirements

xii. To the extent an Avoidance Action has not been resolved and/or settled within thirty (30) days after an answer or motion to dismiss pursuant to Rule 12(b)(6) is filed, then said Avoidance Action (the “Remaining Avoidance Actions”) shall be referred to mandatory mediation. Within two weeks thereafter (the “Mediation Deadline”), the Defendant and the Trustee shall jointly choose a mediator (the “Mediator”) from the list of mediators on Exhibit “B” (the “Mediator List”) and the Trustee shall file a “Notice of Mediator Selection” with the Court on or before the Mediation Deadline. If the parties are unable to agree on a mediator, the Court shall appoint one from the Mediator List.

xiii. The Mediator’s fees shall be split equally by the parties, and payment arrangements reasonably satisfactory to the Mediator must be completed on or prior to the commencement of the mediation.

xiv. Promptly after the filing of the Notice of Mediator Selection, the Trustee and Defendant’s counsel (or the Defendant, if appearing *pro se*) shall jointly contact the selected Mediator to discuss the mediation. The mediation will be scheduled within sixty (60) days of the filing of the Notice of Mediator Selection.

xv. The mediation shall take place in New York, New York and shall be held at the law offices of Trustee’s counsel, the Mediator’s office or at another location agreed upon by the parties.

xvi. Except as set forth herein, the mediation shall be conducted in accordance with General Order M-390 which is available on the Court’s website (<http://www.nysb.uscourts.gov/>).

xvii. The parties shall exchange position statements (“Position Statements”), which may not exceed ten (10) pages double-spaced in 12 point type (exclusive of exhibits and schedules), at least ten (10) days prior to the scheduled mediation. The Mediator may also require the parties to provide to the Mediator any relevant papers and exhibits as well as a settlement proposal.

xviii. The Mediator will preside over the mediation with full authority to determine the nature and order of the parties’ presentations and with the full authority to implement any additional procedures which are reasonable and practical under the circumstances.

xix. The length of time necessary to effectively complete the mediation will be within the Mediator’s discretion. The Mediator may also adjourn a mediation that

has been commenced if the Mediator determines that an adjournment is in the best interests of the parties.

xx. The parties shall participate in the mediation in good faith and with a view toward reaching a consensual resolution. The mediation(s) shall be attended by a representative of the Defendant with full settlement authority and, if a Defendant is represented, their counsel, as well as counsel for the Trustee (who must have settlement authority from the Trustee).

xxi. Unless otherwise consented to in writing by the parties, no Mediator shall mediate an Avoidance Action in which the Mediator or the Mediator's law firm currently represents a party with respect to any Avoidance Actions.

xxii. All proceedings and writings incident to the mediation will be considered privileged and confidential, and shall not be reported or admitted in evidence for any reason whatsoever. Nothing stated or exchanged during a mediation shall operate as an admission of liability, wrongdoing or responsibility.

xxiii. The mediation shall be conducted so as to be completed within one hundred and twenty (120) days after the date the Notice of Mediator Selection is filed, which deadline may be extended by the mutual consent of the parties and the Mediator.

xxiv. If a party (a) fails to submit the required position statement or other submissions as provided in these Proposed Procedures or as may be agreed to by the Mediator or ordered by the Court, or (b) fails to attend the mediation, then the non-defaulting party may file a motion for default judgment or a motion to dismiss the adversary proceeding, as applicable.

xxv. Within ten (10) days after the conclusion of each mediation, the Mediator shall file a report (the "Mediator's Report") in the Remaining Avoidance Action, which shall be limited to stating only (i) whether the Remaining Avoidance Action settled or did not settle; (ii) the date or dates the mediation took place; and (iii) the names of the parties and/or counsel who attended.

Avoidance Actions Omnibus Hearings

xxvi. The Court will schedule regular Omnibus Hearing dates in the bankruptcy case, on which dates any post-mediation Pretrial Scheduling Conference will take place. Any pretrial motions filed by the parties in the Avoidance Actions must be set for hearing on one of the Omnibus Hearing dates unless otherwise ordered by the Court.

Motions Affecting all Avoidance Actions

xxvii. Any motions filed by the Trustee that affect all of the Avoidance Actions shall be filed in the bankruptcy case and not in each separately docketed

Avoidance Action; provided, however, that each Defendant shall receive notice of the filing of the same.

Exhibit B

LIST OF MEDIATORS

1. Leslie Berkoff
2. Ted Berkowitz
3. Melanie Cyganowski
4. Andy Eckstein
5. Jonathan Flaxer
6. Neil Forrest
7. James Garrity, Jr.
8. Mickee Hennessy
9. Ira Herman
10. Lori Lapin Jones
11. David Kittay
12. Tracey Klestadt
13. Ken Lewis
14. Alan Marder
15. Alan Nisselson
16. Peter Pantaleo
17. Michael Richman
18. Sean C. Southard
19. Arthur Steinberg
20. Jay Teitelbaum