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6 **UNITED STATES BANKRUPTCY COURT**
7 **DISTRICT OF ARIZONA**
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PROCEDURES GOVERNING
ALTERNATIVE DISPUTE
RESOLUTION MATTERS IN
BANKRUPTCY CASES

GENERAL ORDER
NO. 92

1.0 **PURPOSE AND SCOPE.**

Litigation in bankruptcy cases frequently imposes significant economic and other burdens on parties and often delays resolution of disputes. Alternative Dispute Resolution ("ADR") procedures have the potential to reduce delay, cost, stress and other burdens often associated with bankruptcy and bankruptcy related litigation. Mediation, in particular, allows parties more active involvement in determining the resolution of their disputes. To provide a court-annexed ADR procedure, the Court hereby adopts this General Order creating an ADR Program for the District of Arizona (the "ADR Program").

It is the Court's intention that the ADR Program shall operate in such a way as to allow the participants to take advantage of and utilize a wide variety of ADR methods. These methods may include, but are not limited to, mediation, negotiation, early neutral evaluation, and settlement facilitation. The specific method or methods employed will be those that are appropriate and applicable as determined by the mediator and the parties, or as directed by the Court and will vary from matter to matter.

Nothing contained herein is intended to preclude other forms of ADR with the consent of the parties.

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2 **2.0 ASSIGNMENT OF MATTERS TO ADR.**

3 The Court may assign a matter for inclusion in the ADR Program *sua sponte*, upon written
4 stipulation of the parties to the matter, or on motion of a party to the matter or the U. S. Trustee. While
5 participation by the parties in the ADR Program is generally intended to be voluntary, the Court may
6 designate specific matters for inclusion in the ADR Program over the objection of one or more of the
7 parties. Upon motion of the mediator, a party to the ADR Program, or the United States Trustee, the
8 Court may order additional parties to participate in the ADR Program if the participation of the additional
9 parties would be necessary or helpful.

10 **3.0 TYPES OF MATTERS SUBJECT TO ADR.**

11 Unless otherwise ordered by the Court, all controversies arising in an adversary proceeding,
12 contested matter, or other dispute in a bankruptcy case are eligible for referral to the ADR Program.

13 **4.0 EFFECT OF ADR ON PENDING MATTERS.**

14 The assignment of a matter to the ADR Program does not relieve the parties to that matter from
15 complying with any other Court orders or applicable provisions of the United States Bankruptcy Code,
16 the Federal Rules of Bankruptcy Procedure, or the local bankruptcy rules of this Court. Unless otherwise
17 ordered by the Court, the assignment of a matter to the ADR Program does not delay or stay discovery,
18 pretrial, hearing dates, or trial schedules.

19 **5.0 THE MEDIATOR.**

20 **Panel of Mediators/ADR Program Administrator.**

21 **5.1**

22 The Clerk of the Court shall establish and maintain two lists of attorneys and panel trustees (the
23 "Panel") qualified under this Section 5.0 and approved by the Court to serve as mediators in the ADR
24 Program. The Chief Bankruptcy Judge shall appoint a judge of this Court, who is willing, to serve as the
25 ADR Program Administrator (the "ADR Program Administrator"). Aided by staff members of the Court,
26 the ADR Program Administrator shall receive applications for approval to the Panel, track and compile
27 reports on the ADR Program, and otherwise administer the ADR Program and handle such other
28 administrative duties as are necessary.

1 **5.2 Application and Certification of Mediators.**

2 **Application and Qualification Requirements.**

3 **5.2.1**

4 Each attorney or panel trustee applying for approval to the Panel must submit to the ADR
5 Program Administrator the Application Form attached hereto as Form A. Except as otherwise
6 determined by the Court, to be approved as a mediator in the ADR Program, each applicant must meet
7 the following criteria:

- 8 (1) if the applicant is an attorney, be a member in good standing of the bar
9 of any state or the District of Columbia, with at least five (5) years of
10 practice; or
11 (2) if the applicant is an attorney, be a member in good standing of the bar
12 of the Federal District Court of Arizona, with at least five (5) years of
13 practice; or
14 (3) if the applicant is a panel trustee, be an active panel trustee in good
15 standing with the Office of the United States Trustee with at least five
16 years service as a panel trustee, or if retired, have been a panel trustee
17 in good standing with the Office of the United States Trustee with at least
18 five years of service as a panel trustee;
19 (4) not have been suspended, or have had a professional license or bond
20 revoked, or have pending any proceeding to suspend or revoke such
21 license or bond;
22 (5) not have resigned from a professional organization or panel while an
23 investigation into allegations of misconduct which would warrant
24 suspension, disbarment or professional license or bond revocation was
25 pending;
26 (6) not have been convicted of a felony;
27 (7) have completed appropriate mediation training, or have sufficient
28 experience, in the mediation process;
 (8) be determined by the Court to be competent to perform the duties of a
 mediator; and

1 (9) be willing to serve as mediator in at least one matter during each quarter
2 of each year, subject only to unavailability due to conflicts, personal or
3 professional commitments, or other matters which would make such
4 service inappropriate.

5 **5.2.2 Term.**

6 Mediators shall serve as members of the Panel for a term of three (3) years
7 unless the mediator is advised otherwise by the Court or submits a written request to
8 withdraw from the Panel to the ADR Program Administrator. Reappointment will occur
9 at the Court's discretion, and an application for reappointment shall not be required. A
10 mediator assigned to act as a mediator in a matter before expiration of his or her term
11 shall continue said service until the mediation is concluded regardless of term expiration.

12 **5.2.3 Court Certification.**

13 The Court, in its sole discretion, shall grant or deny an application submitted pursuant to
14 subsection 5.2.1 of this General Order. If the Court grants the application, the applicant's name shall be
15 added to the Panel, subject to removal pursuant to Section 5.4 of this General Order.

16 **5.2.4 Reaffirmation of Qualifications.**

17 Each applicant approved for designation to the Panel shall reaffirm annually the continued
18 existence and accuracy of the qualifications, statements, and representations made in the application.
19 Failure to comply with this section shall be grounds for removal under Section 5.4.

20 **5.3 Mediator's Oath.**

21 Before serving as a mediator, each person designated to the Panel as a mediator shall take the
22 following oath or affirmation:

23 "I, _____, do solemnly swear (or affirm) that I will faithfully
24 and impartially discharge and perform all the duties incumbent upon me as a
25 Mediator in the ADR Program of the United States Bankruptcy Court for the
26 District of Arizona without respect to persons and will do so equally with respect
27 to the poor and to the rich. So help me God."
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2 **5.4 Removal from Panel.**

3 A person shall be removed from the Panel either at the person's request or by Court order. If
4 removed by Court order, the person shall not be returned to the Panel absent a Court order obtained on
5 motion to the ADR Program Administrator, supported by an affidavit sufficiently explaining the
6 circumstances of such removal and the reasons justifying the return of the person to the Panel.

7 **6.0 APPOINTMENT OF MEDIATOR**

8 **6.1 Selection and Appointment of a Mediator.**

9
10 **6.1.1 Selection by Parties.**

11 Unless otherwise ordered by the Court, within seven (7) calendar days following the receipt of
12 notice of assignment of a matter to the ADR Program, the parties to the matter shall select a mediator and
13 an alternate mediator, and shall present the Court with a proposed order of appointment. If such selection
14 is not from the Panel, the parties shall submit with the proposed order of appointment a stipulation by the
15 parties that the proposed mediator is not on the Panel but is otherwise qualified under subsection 5.2.1
16 of this General Order to mediate the matter. If the Court, in its sole discretion, approves the parties'
17 selection, immediately after entry of the order of appointment, the Court shall notify the parties, the
18 mediator, and the alternate mediator of the appointment.

19 **6.1.2 Selection/Appointment by Court.**

20 If the parties cannot agree upon a mediator within ten (10) calendar days following the receipt
21 of notice of assignment of a matter to the ADR Program, the parties shall notify the Court; thereupon, the
22 Court shall appoint a mediator and an alternate mediator from the Panel, and shall notify in writing the
23 parties, the mediator, and the alternate mediator of such appointment.

24 **6.2 Inability of Mediator to Serve.**

25 If the mediator is unable to serve, the mediator shall file and serve on all parties to the matter, and
26 on the alternate mediator, within seven (7) calendar days after receipt of notice of appointment, a notice
27 of inability to accept the appointment. The alternate mediator then shall become the mediator, if the
28 alternate mediator does not file and serve on all parties to the mediation a notice of inability to accept the

1 appointment within seven (7) calendar days after receipt of the original mediator's notice of inability to
2 accept the appointment. If neither the mediator nor the alternate mediator can serve, the Court shall
3 appoint another mediator and alternate mediator from the Panel.

4 **6.3 Disqualification of Mediator.**

5 **6.3.1 Disqualifying Events.**

6
7 Any person selected as a mediator may be disqualified for bias or prejudice in the same manner
8 that a judge may be disqualified under 28 U.S.C. § 455. Any person selected as a mediator shall be
9 disqualified in any matter where 28 U.S.C. § 455 would require disqualification if that person were a
10 judge.

11 **6.3.2 Inquiry by Mediator; Disclosure.**

12 Promptly after receiving notice of appointment, the mediator shall make inquiry sufficient to
13 determine whether there is a basis for disqualification under subsection 6.3.1 of this General Order. The
14 inquiry shall include, but shall not be limited to, a search for conflicts of interest in the manner prescribed
15 by the applicable rules of professional conduct for attorney mediators, and by the applicable rules
16 pertaining to the mediator's profession for non-attorney mediators. Within seven (7) calendar days after
17 receiving notice of appointment, the mediator shall file with the Court and serve on the parties to the
18 mediation either (a) a statement that there is no basis for disqualification under subsection 6.3.1 and that
19 the mediator has no actual or potential conflict of interest or (b) a notice of withdrawal.

20 **6.3.3 Objection Based on Conflict of Interest.**

21 A party to the mediation who believes that the assigned mediator and/or the alternate mediator
22 has a conflict of interest, promptly shall bring the issue to the attention of the mediator and/or the alternate
23 mediator, as applicable, and to the other parties to the mediation. If the mediator does not voluntarily
24 withdraw, the issue shall be brought to the Court's attention by the mediator or any of the parties to the
25 mediation. Any pleading shall be filed with the Court, and copies of the pleading shall be mailed to all of
26 the parties to the mediation, their counsel of record, if any, the mediator, the alternative mediator, and the
27 ADR Program Administrator. The Court shall take such action as the Court deems necessary or
28 appropriate to resolve the alleged conflict of interest and to avoid the appearance of impropriety.

1 **6.4 Mediator's Liability.**

2 There shall be no liability on the part of, and no cause of action shall arise against, any person who
3 is appointed as a mediator pursuant to this General Order on account of any act or omission in the course
4 and scope of such person's duties as a mediator.

5
6 **7.0 COMPENSATION.**

7 **7.1 Compensated Mediation.**

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9 Mediators who meet the requirements of paragraph 5.2.1 shall be paid fees and expenses on such
10 terms as the mediator and the parties to the mediation may agree or as the Court otherwise may direct.
11 The parties to the mediation shall share equally all ADR fees and expenses unless the parties to the
12 mediation agree otherwise. The Court may, in the interest of justice, determine a different allocation or
13 a different fee structure . ADR fees and expenses are subject to prior Court approval if the bankruptcy
14 estate is to be charged with any portion. Notwithstanding the foregoing, the mediator’s fee, whether
15 agreed to by the parties or fixed by the Court, may not be contingent or otherwise based on the result or
16 outcome of the ADR process. The Court shall maintain a list of all mediators who are qualified to be
17 compensated mediators.

18 **7.2 Uncompensated Mediation.**

19 The Court shall maintain a list of mediators who have agreed to serve as mediators without
20 compensation in those cases where one or more of the parties can not afford to pay for mediation. Any
21 attorney or panel trustee willing to serve as an uncompensated mediator shall file the Application Form
22 pursuant to paragraph 5.2.1 above and state that they are willing to serve as an uncompensated mediator.
23 To be approved as a uncompensated mediator, it is not required that the applicant have completed
24 mediation training (See subparagraph 7 of paragraph 5.2.1 above.)

25 **8.0 THE MEDIATION.**

26 **8.1 Initial Telephonic Conference.**

27 Promptly, but no later than ten (10) days of receipt of notification of appointment, the mediator
28 shall conduct a telephone conference with counsel of record for the parties (or the parties, where

1 appearing *pro se*) to discuss (1) fixing a convenient date and place for the ADR Conference; (2) the
2 procedures that will be followed during the ADR Conference; (3) who shall attend the ADR Conference
3 on behalf of each party; (4) what material or exhibits should be provided to the mediator before the ADR
4 Conference; and (5) any issues or matters that it would be especially helpful to have the parties address
in the Submission materials.

5 **8.2 Time and Place of ADR Conference.**

6
7 After consulting with all counsel and *pro se* parties, the mediator shall schedule a convenient time
8 and neutral place for the ADR Conference, and promptly give all counsel and *pro se* parties at least 15
9 calendar days advance written notice of the time and place of the ADR Conference. The mediator shall
10 schedule the ADR Conference to begin as soon as practicable after entry of the order of appointment.

11 **8.3 Submission Materials.**

12
13 Not less than seven (7) calendar days before the ADR Conference, each party shall submit
14 directly to the mediator, and shall serve on all counsel and *pro se* parties, an ADR statement (the
15 "Submission"). The Submission shall not be filed with the Court and the Court shall not have access to
16 the submission of any portion thereof. The Submission may include any information that the parties would
consider useful, but must:

- 17 (1) Identify the person(s), in addition to counsel of record, who will attend
18 the ADR Conference as representative of the party with decision making
19 authority;
20 (2) Describe briefly the nature and scope of the substance of the dispute;
21 (3) Address whether there are legal or factual issues whose early resolution
22 might reduce appreciably the nature and scope of the dispute or
23 significantly contribute to settlement;
24 (4) Identify the discovery that could contribute most to equipping the parties
25 for meaningful settlement discussions;
26 (5) Set forth the history of past settlement discussions, including disclosure
27 of prior and any presently outstanding offers, counteroffers, and
28 demands;

- 1 Make an estimate of the cost and time to be expended for further
2 (6) discovery, pretrial motions, expert witnesses, and trial;
3 Indicate presently scheduled court dates for further status conferences,
4 (7) pretrial conferences, trial, or otherwise; and
5 Attach copies of the document(s) from which the dispute has arisen or
6 (8) other relevant documents or information whose availability would
7 materially advance the purposes of the Mediation Conference.

8
9 **8.3 Attendance at ADR Conference.**

10 **8.4.1 Persons Required to Attend.**

11 The following persons must attend the ADR Conference:

- 12
13 (1) Each party who is a natural person;
14
15 (2) If a party is not a natural person, a representative who is not the party's
16 attorney of record and who has full authority to negotiate and settle the
17 matter on behalf of the party;
18 If the party is a governmental or quasi governmental entity that requires
19 (3) settlement approval by an elected official or legislative body, a
20 representative who has authority to recommend a settlement to the
21 elected official or legislative body;
22 The attorney who has primary responsibility for each party's case. The
23 (4) attorney shall come prepared to discuss all liability issues, all damage
24 issues, and the position of the party relating to settlement, in detail and
25 in good faith; and
26 Other interested parties such as insurers or indemnitors, or one or more
27 (5) of their representatives, whose presence is necessary for a full resolution
28 of the matter assigned to the ADR program.

1 **8.4.2 Excuse.**

2 A person required to attend the ADR Conference is excused from appearing if all parties and the
3 mediator agree that the person need not attend the ADR Conference. The Court for cause may excuse
4 a person's attendance at the ADR Conference. Any party or attorney who is excused by the mediator
5 from appearing in person at the ADR Conference may be required by the mediator to participate
6 telephonically. Telephonic participation at the ADR Conference should be the exception rather than the
7 rule and shall only be permitted upon good cause shown. This decision is within the mediator's sole
8 discretion.

9 **8.4.3 Failure to Attend.**

10 Willful failure to attend any ADR Conference, and any other material violation of this General
11 Order, shall be reported to the Court by the mediator and may result in the imposition of sanctions by the
12 Court or other appropriate relief. Any such report of the mediator shall comply with the confidentiality
13 requirements of Section 9.1 of this General Order. The Court will take whatever action(s) it deems
14 necessary and appropriate under the circumstances to resolve the issue of such willful failure to attend the
15 ADR Conference and/or other violations of this General Order.

16 **8.5 ADR Conference Procedures.**

17 The mediator may establish appropriate procedures for the ADR Conference. The ADR
18 Conference shall proceed informally. The Rules of Evidence shall not apply. There shall be no formal
19 examination or cross-examination of witnesses.

20 **9.0 CONFIDENTIALITY OF ADR PROCEEDINGS.**

21 **Protection of Information Disclosed at ADR.**

22 **9.1**

23 Unless otherwise agreed by the parties, the mediator and the participants in the ADR process are
24 prohibited from divulging, outside of the ADR proceeding, any oral or written information disclosed by
25 the parties or by witnesses in the course of the ADR Conference including the Submission materials or
26 any portion thereof. No person may rely on or introduce as evidence in any arbitral, judicial, or other
27 proceedings, evidence pertaining to any aspect of the ADR proceeding, including but not limited to: (a)
28 views expressed or suggestions made by a party with respect to a possible settlement of the dispute; (b)
the fact that another party had or had not indicated willingness to accept a proposal for settlement made

1 by the mediator; (c) proposals made or views expressed by the mediator; (d) statements or admissions
2 made by a party in the course of the ADR proceeding; and (e) documents prepared for the purpose of,
3 in the course of, or pursuant to the ADR proceeding or this General Order. In addition, without limiting
4 the foregoing, and notwithstanding section 8.5, Rule 408, Fed. R. Evid. and any applicable federal or
5 state statute, rule, common law, or judicial precedent relating to the privileged nature of settlement
6 discussions, mediation, or other ADR procedure shall apply. Information otherwise discoverable or
admissible in evidence, however, does not become exempt from discovery, or inadmissible in evidence,
merely by being used by a party in a ADR Conference.

7
8 **9.2 Discovery from Mediator.**

9 The mediator shall not be compelled to disclose to the Court or to any person outside the ADR
10 Conference any of the records, reports, summaries, notes, communications, testimony, or other
11 documents received or made by a mediator while serving in such capacity. The mediator shall not testify
12 or be compelled to testify in regard to the ADR proceeding in connection with any arbitral, judicial, or
13 other proceeding. The mediator shall not be a necessary party in any proceeding relating to the ADR
14 proceeding. Nothing contained in this subsection shall prevent the mediator from reporting the status, but
not the substance, of the ADR proceeding to the Court in writing, from filing a final report as required by
Section 10.1, or from complying with any of the other obligations set forth in Section 11.0.

15
16 **9.3 Protection of Proprietary Information.**

17 The parties, the mediator, and all ADR participants shall protect proprietary information obtained
18 during the ADR Conference.

19
20 **9.4 Preservation of Privileges.**

21 The disclosure by a party of privileged information to the mediator or at the ADR Conference
22 does not waive or otherwise adversely affect the privileged nature of the information.

23
24 **10.0 RECOMMENDATIONS BY MEDIATOR.**

25 The mediator is not required to prepare written comments or recommendations to the parties.
26 Mediators may present a written settlement recommendation memorandum to the attorneys or *pro se*
27 litigants, but not to the Court.

1
2 **11.0 POST ADR PROCEDURES.**

3 **11.1 Preparation of Orders.**

4
5 If a settlement is reached at an ADR Conference, the party designated by the mediator shall
6 submit a fully executed stipulation and proposed order to the Court within twenty (20) calendar days after
7 the conclusion of the ADR Conference. If the party designated by the mediator fails to prepare the
8 stipulation and order proposed, the Court may impose appropriate sanctions or other appropriate relief.

9 **11.2 Mediator's Certificate of Completion.**

10 Promptly after the conclusion of the ADR Conference, the mediator shall file with the Court, and
11 serve on the parties and the ADR Program Administrator, a certificate in the form provided by the Court
12 showing compliance or noncompliance with the Mediation Conference requirements of this General Order
13 and whether or not a settlement has been reached. Regardless of the outcome of the ADR Conference,
14 the mediator shall not provide the Court with any details of the substance of the ADR Conference.

15 **11.3 Mediator's Report.**

16 In order to assist the ADR Program Administrator in compiling useful data to evaluate the ADR
17 Program, and to aid the Court in assessing the efforts of the members of the Panel, the mediator shall
18 provide the ADR Program Administrator with an estimate of the number of hours spent in the ADR
19 Conference and other statistical and evaluative information on a form provided by the Court. The
20 mediator shall provide this report whether or not the ADR Conference results in settlement.

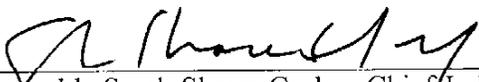
21 **12.0 WITHDRAWAL FROM ADR.**

22 Any matter assigned to ADR pursuant to this General Order may be withdrawn from ADR by
23 the Court at any time upon determination that the matter is not suitable for ADR or by the written consent
24 of all parties to the ADR.
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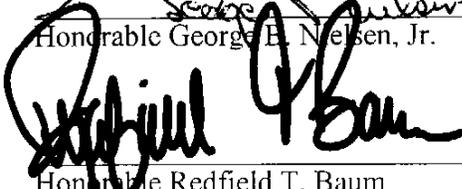
1 **13.0 TERMINATION OF ADR.**

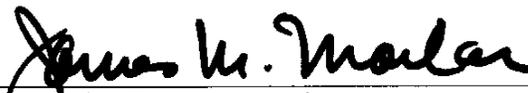
2 Upon the filing of a mediator's certificate pursuant to Section 11.2 or the entry of an order
3 withdrawing a matter from ADR pursuant to Section 12.0, the ADR will be deemed terminated, and the
4 mediator excused and relieved from further responsibilities in the matter without further Court order. If the
5 ADR Conference does not result in a resolution of all of the disputes in the assigned matter, the matter shall
6 proceed to trial or hearing on all remaining issues pursuant to the Court's scheduling orders.

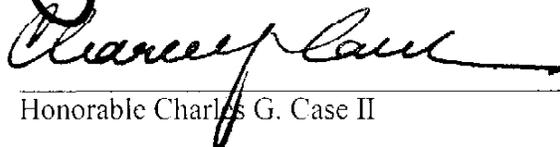
7 Dated: April 30, 2004

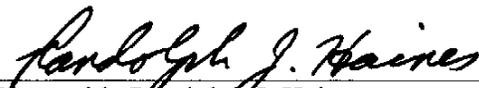
9 
10 Honorable Sarah Sharer Curley, Chief Judge

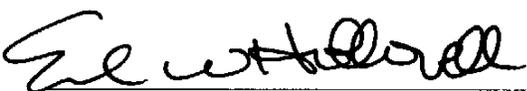
11 
12 Honorable George E. Nielsen, Jr.

13 
14 Honorable Redfield T. Baum

15 
16 Honorable James M. Marlar

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18 Honorable Charles G. Case II

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20 Honorable Randolph J. Haines

21 
22 Honorable Eileen W. Hollowell