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**TOOL FOR DRAFTING
Efforts Standards**

A common provision in many contracts requires that a party exert a specified level of efforts (the “*Efforts Standard*”) to achieve a desired result. The Efforts Standard is formulated in a variety of ways including: “best efforts,” “reasonable efforts,” “commercially reasonable efforts,” “reasonable best efforts” and “commercially reasonable best efforts.” The Efforts Standard is an important term in many different types of agreements, including acquisition agreements, financing agreements and leases. Despite the near universal usage of Efforts Standards and a “lore” among practitioners as to their meaning, New York Courts have not clearly defined what level of effort, if any, is required by any of the different formulations of the Efforts Standard.¹ Most practitioners and courts would probably agree that the Efforts Standard requires some level of good faith effort,² although

practitioners and courts would probably not all agree as to exactly what efforts were required by each of the different formulations. In fact, the obligation may be so vague that some New York courts have held “best efforts” clauses unenforceable without “objective criteria against which a party’s efforts can be measured.”³

As an aid to practitioners, the Corporation Law Committee of the New York City Bar Association has created this drafting template offering choices for “objective criteria,” so that the parties to a contract, and any court asked to interpret such a contract, would have a clearer understanding of the intent of the parties as to the level of effort expected, or any limitations on the efforts expected, in an Efforts Standard. The following template is intended to be a starting point for practitioners and offers some common choices that may be applicable.

The bracketed terms are meant to be filled in by one or more of the options listed below the sample provision and are not meant to be exhaustive. The options are meant for the practitioner to begin to think about the possible range of choices that may be available in a particular circumstance. Not all of the bracketed terms will be required in each usage of the standard.

¹ For an excellent discussion on the confusing case law on this issue, see Weiner and Roth, “*Meaning and Enforceability of ‘Best Efforts’ Provisions*” N.Y.L.J. Feb. 27, 2014 (citing *inter alia* Bloor v. Falstaff Brewing, 601 F.2d 609, 613 n.7 (2d Cir. 1979) (meaning of best efforts provisions are “far from clear”).

² See e.g. Pfizer v. PCS Health Systems, 234 A.D.2d 18 (1st Dept. 1996). See also, E. Allen Farnsworth, “*On Trying to Keep One’s Promises: The Duty of Best Efforts in Contract Law*,” 46 U. Pitt. L. Rev. 1 (1984). ,

³ Timberline Development v. Kronman, 263 A.D.2d 175, 178 (1st Dept. 2000); See also, Digital Broadcasting Corp. v. Ladenburg, Thalmann & Co., 63 A.D.3d 647 (1st Dept. 2009). But see, Maestro West Chelsea SPE and Kadima Tenth Avenue SPE v. Pradera Realty, 954 N.Y.S.2d 819 (Sup. Ct. N.Y. County 2012).

Required Efforts:

[_____] actions that a Person [_____] that is desirous of achieving a result
Action Standard *Person Type*

would use in similar circumstances to achieve such result [_____], in light of
Time Term

[_____], including an obligation to make out-of-pocket expenditures; provided
Measurement Standard

that in no event shall there be any obligation to take actions that could reasonably be expected to

[_____].
Prohibited Effects

A. Action Standard

[All]

[All reasonable]

[The reasonable]

B. Person Type

[of comparable size]

[in the same industry]

[in the same geographic area]

[that is similarly situated]

C. Time Term

[in a timely manner]

[within a reasonable time]

[as expeditiously as possible]

[no later than [the Outside Date] [specific calendar date or contractual event]]

D. Measurement Standard

[the value of the expected benefits to be realized by the counterparty from the achievement of such result]

[the magnitude of the expected detriment to be borne by the counterparty from the failure to achieve such result]

[the value of the expected benefits to be realized by the counterparty from the consummation of the overall transaction]

[the magnitude of the expected detriment to be borne by the counterparty from the failure to consummate the overall transaction]

E. Prohibited Effects

[have a [[material] adverse effect] on such Person or its business, properties, operations, or financial condition] [including [subjecting such Person to [legal action] [liability] [increased taxes or loss of tax benefits] [**insert any other specific items to be deemed adverse effects**]]]

[[materially] reduce the benefits to such Person of this Agreement and the Contemplated Transactions]

[require such Person to [make out-of-pocket expenditures [(other than *de minimis* amounts)]], expend more than \$[specify amount], [provide a guarantee], [provide a letter of credit] [**insert other specific exclusions**]]]