

## AGREEMENT TO MEDIATE

The undersigned have agreed to participate in a private mediation to be conducted by \_\_\_\_\_, as Mediator, for the purpose of achieving a negotiated resolution of the Disputes, as described in Section 1.

1. “Disputes” refers to those claims, counter-claims, defenses and issues which are the subject of or otherwise related to the action(s) pending between the Parties, as described in Section 2, which is (are) commonly referred to as:

Case Name: \_\_\_\_\_

Court: \_\_\_\_\_

Case No.: \_\_\_\_\_

2. “Parties” refers to the following:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

3. “Counsel for the Parties” refers to the following:

\_\_\_\_\_, representing \_\_\_\_\_.

\_\_\_\_\_, representing \_\_\_\_\_.

\_\_\_\_\_, representing \_\_\_\_\_.

4. “Mediation Date” refers to the date reserved for the mediation, which is **DATE**.

5. The terms of the Mediator’s compensation are:

Full Day (up to 10 hours) / \$5,000

Half Day (up to 5 hours) / \$2,500

\_\_\_\_\_ hours at \$500 per hour

- 5.1 No later than November 18, 2011, the Parties are required to fund an advance deposit of \$\_\_\_\_\_, shared equally between the Parties unless they agree otherwise.

- 5.2 The Mediation Date will not be reserved unless and until (a) the reservation deposit is fully funded, and (b) this agreement is executed and returned by all Parties and their respective counsel.
- 5.3 Payment of each party's share of the Mediator's Fee is the responsibility of Counsel for the Parties, who agree that they are responsible for payment in full of their respective client's share of the Mediator's Fee.
- 5.4 Any notice of cancellation of the mediation (for any reason) must be given to the Mediator in writing or by email. A cancellation fee of \$\_\_\_\_\_ shall be assessed if a notice of cancellation is received less than 21 days before the Mediation Date (e.g., prior to **DATE**).
- 5.5 The Mediator's services shall include attendance at the mediation, review of briefs and other written materials, participation in pre-mediation telephone conferences, and follow-up conferences.
- 5.6 Should the mediation extend beyond the time reserved or to another day, the Mediator shall be compensated at the rate of \$500.00 per hour. Counsel for the Parties will be billed for the additional time and payment shall be due within 10 days of the statement date.
6. In order to promote communication and candor between and among the Parties and their respective counsel, advisors, representatives and insurers, the undersigned agree that to the extent applicable the mediation confidentiality protections provided by Federal and/or California law, including but not limited to California Evidence Code Sections 703.5 and 1115-1128 and Federal Rules of Evidence 408 and 501, shall apply. Additionally, the undersigned agree as follows:
- 6.1 No written or oral communication made by any party, attorney, mediator or other participant in the course of or pursuant to the mediation which is the subject of this agreement, or any consultation related to that mediation, may be (a) disclosed or used for any purpose in any pending or future civil proceeding before a judicial, arbitration or administrative law tribunal, or (b) disclosed to, shared with or published in any form of media, including but not limited to social media/internet sites, unless the Parties, Counsel for the Parties and the Mediator so agree in writing.

- 6.2 No documents or writings prepared for the purpose of, in the course of, or pursuant to the mediation which is the subject of this agreement, or any consultation related to that mediation, may be (a) disclosed or used in discovery in any pending or future civil proceeding before a judicial, arbitration or administrative law tribunal, or (b) disclosed to, shared with or published in any form of media, including but not limited to social media/internet sites, unless the Parties, Counsel for the Parties and the Mediator so agree in writing.
- 6.3 Disclosure of information, documents or other writings during the mediation that otherwise are privileged or eligible for protection as confidential, proprietary or trade secret documents or information shall not lose their privileged or confidential character outside of the mediation.
- 6.4 Evidence that existed outside the mediation and was otherwise admissible or subject to discovery shall not become inadmissible or protected from discovery or disclosure solely by reason of its introduction or use in the mediation.
- 6.5 All offers and counter-offers of settlement made during the mediation, as well as all negotiations had in connection with the exchange of those offers and counter-offers, shall be considered part of the communications had and information exchanged during the mediation and shall be entitled to the confidentiality protections set forth in this Section 6.
- 6.6 The Parties and Counsel for the Parties acknowledge and agree that the Mediator may contact and communicate with them after the close of the aforementioned mediation session, and those discussions and communications shall be part of the mediation and entitled to the confidentiality protections set forth in this Section 6.
- 6.7 Notwithstanding the foregoing, the simple fact that the dispute was or was not settled during the mediation shall not be confidential. Additionally, nothing in this agreement shall preclude the Mediator from making such reports to the court or other tribunal as may be required.

6.8 The Parties and Counsel for the Parties acknowledge and agree that the Mediator has made no representations, promises or assurances to them concerning the enforceability of the confidentiality protections set forth in this agreement; that they understand that mediation confidentiality is a developing area of the law in which the scope, contours and limitations of protection vary from jurisdiction to jurisdiction; and that mediation confidentiality is currently the subject of dialogue and debate in many courts and legislative bodies. The Parties and Counsel for the Parties further acknowledge and agree that they, and not the Mediator, are responsible for identifying and dealing with any and all issues and concerns they might have regarding the confidentiality of any communication, information, offer or writing shared or exchanged during, pursuant to or in furtherance of the mediation covered by this agreement, including but not limited to entering into a separate agreement of confidentiality or obtaining a protective order from the court or other tribunal.

7. The Mediator's role is limited to facilitating negotiations between (among) the Parties and Counsel for the Parties. In this regard, the undersigned acknowledge and agree as follows:

7.1 The Mediator is an impartial intermediary, whose role is to assist the Parties in reaching a negotiated resolution of some or all of the Disputes. The Mediator cannot impose a settlement or make any decision or determination that is binding on the Parties.

7.2 The Mediator's role is limited to that of a settlement facilitator. The Mediator does not act as an attorney or advocate for or give legal, tax or other professional advice to the participants. In this regard, the Parties and Counsel for the Parties agree that the Mediator has not undertaken to represent or provide legal advice or legal opinions to any party and that no attorney-client or fiduciary relationship exists between any of the Parties and/or Counsel for the Parties, on the one hand, and the Mediator, on the other.

- 7.3 The Mediator is not competent to testify concerning anything communicated, exchanged, said, or done in the course of the mediation. The Parties and Counsel for the Parties agree that they shall not seek to compel the Mediator's testimony in any pending or future civil proceeding before a judicial, arbitration or administrative law tribunal. The Mediator agrees that she will not testify voluntarily on behalf of any party concerning the Disputes or anything communicated, exchanged, said or done in the course of the mediation covered by this agreement in any such proceeding.
- 7.4 The notes, working papers, file and electronic information created or maintained by the Mediator ("Mediator Papers") belong solely to the Mediator. In this regard, the Parties and Counsel for the Parties agree that they have no right, title or interest in the Mediator Papers and, further, have no right to review, inspect or copy the Mediator Papers. The Parties and Counsel for the Parties agree that they will not subpoena or otherwise seek to compel production of the Mediator Papers in any pending or future civil proceeding before a judicial, arbitration or administrative law tribunal. The Mediator agrees that she will not voluntarily produce the Mediator Papers to any party for review, inspection or copying.
8. The following general provisions shall apply to this agreement:
- 8.1 Notwithstanding the confidentiality provisions set forth in Section 6, this agreement shall not render inadmissible a written settlement agreement, term sheet or memorandum of understanding entered into as a result of the mediation in an action or proceeding to enforce the settlement.
- 8.2. Notwithstanding the confidentiality provisions set forth in Section 6, this agreement shall be admissible in any action or proceeding to enforce any term of provision of this agreement and/or to prove the existence of this agreement.
- 8.3 This document constitutes the entire agreement between the Mediator and the undersigned regarding the mediation which is the subject of this agreement.
- 8.4. This agreement may not be modified orally. Any modification or amendment must be in writing and signed by all Parties and Counsel for the Parties. No obligation or undertaking shall be implied that is not set forth expressly in this agreement.

- 8.5. The internal law, and not the law pertaining to choice of laws, of the State of California, shall govern this agreement and the engagement contemplated hereby. The laws of the State of California hereto shall govern all questions with respect to the construction or interpretation of this letter agreement and / or the rights and obligations of the parties.
- 8.6 This agreement may be executed in any number of counterparts, each of which shall be deemed an original and all of which, when taken together, shall constitute one and the same agreement and shall be binding and effective as to all parties hereto. In this regard, facsimile and scanned (PDF) signatures shall be treated as original signatures.
- 8.7 The undersigned acknowledge and agree that the Mediator has made no promises, guarantees or representations to the Parties or Counsel for the Parties that they will be able to achieve a negotiated resolution of their disputes through mediation, and hereby agree to release the Mediator from any and all claims arising out of (a) their failure to reach agreement, or (b) their decision to enter into any agreement at the mediation.
- 8.8 Should any action be filed to enforce or interpret this agreement in which the Mediator is named as a party, the undersigned acknowledge and agree that such action shall be filed in the Orange County Superior Court and hereby consent to venue in the County of Orange, State of California.
- 8.9 The Parties and Counsel for the Parties have disclosed to the Mediator, and the Mediator has disclosed to each of them, all matters that each reasonably believes requires disclosure. By signing this agreement, the Parties and Counsel for the Parties expressly waive the conflicts and potential conflicts heretofore disclosed above and acknowledge that they have had the opportunity to make full inquiry of the Mediator concerning her background and any potential or actual conflicts of interest.
- 8.10 The Parties and Counsel for the Parties agree that no conflict of interest has been or will be deemed to exist in any matter in which the Mediator has represented in the past or may represent in the future interests that may be adverse to them, and that the Mediator shall not be disqualified in any such matters by virtue of having served as Mediator in this matter.

Dated: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_, Mediator

**PARTIES:**

Dated: \_\_\_\_\_

\_\_\_\_\_

Dated: \_\_\_\_\_

\_\_\_\_\_

Dated: \_\_\_\_\_

[ENTITY]

By \_\_\_\_\_

Its: \_\_\_\_\_

Dated: \_\_\_\_\_

[ENTITY]

By \_\_\_\_\_

Its: \_\_\_\_\_

**COUNSEL FOR THE PARTIES:**

Dated: \_\_\_\_\_

By \_\_\_\_\_

\_\_\_\_\_  
Attorneys for \_\_\_\_\_

Dated: \_\_\_\_\_

By \_\_\_\_\_

\_\_\_\_\_  
Attorneys for \_\_\_\_\_

Dated: \_\_\_\_\_

By \_\_\_\_\_

Attorneys for \_\_\_\_\_

**NON-PARTY MEDIATION PARTICIPANTS:**

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_

Dated: \_\_\_\_\_