

MEDIATION AGREEMENT

Rev: 01 Dec 2004 JP McMahon

THIS MEDIATION AGREEMENT (this "Agreement") is among [Person A or Company A], a _____ corporation], whose address is _____ ("A"); and [Person B or Company B ("B"), a _____ corporation whose address is -----][C, D]. It is effective as of [date]. In this Agreement, the term "Party" or "Parties" refers to [A] and [B].

RECITALS

- A. The Parties are in a dispute about the ----- (the "Dispute"). A lawsuit about the Dispute is pending (Case No. -----) in the [United States] District Court for the District of ----- (the "Litigation").
- B. A and B both wish to try to resolve the Dispute by mediation if possible, and have determined to set forth their agreements regarding the mediation in this Agreement.

AGREEMENT

The Parties have agreed as follows:

1. The Mediation Process.

- 1.1. The Parties will participate in a mediation of the Dispute ("Mediation"). This Agreement contains the more formal terms of the Mediation. The Parties and the Mediator will decide the less formal terms of the Mediation process (for example, schedules, use of preparatory conference calls and document exchanges).
- 1.2. Other than paying the Mediator's fees and expenses as described in Section 4 below, each Party is responsible for its own costs and fees incurred in preparing for and participating in the Mediation.
- 1.3. The Mediation will be informal and flexible. The Mediator and the Parties will discuss how to best prepare for and use each Mediation session.
- 1.4. The Mediation is independent of, and separated from, the Litigation. No Party will serve subpoenas, summons, complaints, discovery requests or other process or court documents on any person, entity or its counsel at or near the site of the Mediation.

2. The Mediator's Role and Conduct.

- 2.1. Joseph P. McMahon, Jr., of Joseph P. McMahon, Jr. LLC ("Mediator") will serve under the ethical and professional guidance of the CPR and Georgetown University *Proposed Model Rule of Professional Conduct for the Lawyer as Third Party Neutral*.
- 2.2. The Mediator will work closely with the Parties to conduct the Mediation to:
 - 2.2.1. Clarify the Parties' choices and options,
 - 2.2.2. Keep the power of resolution with the Parties rather than the Mediator,

- 2.2.3. Improve communications and the exchange of information,
- 2.2.4. Develop and study options for resolution, and,
- 2.2.5. Prevent the errors in, and barriers to, dispute resolution.
- 2.3. The Mediator will treat the Parties fairly and impartially.
- 2.4. From time to time the Mediator may comment on general legal principles, draft summary memoranda or, on request of the Parties, make suggestions concerning the drafting documents including settlement agreements. In so doing, the Mediator will not serve as an attorney for any Party, nor will he seek to protect the legal rights of any Party. No attorney-client relationship will be created by his services. Each Party will seek the advice of their own independent legal counsel during and about the Mediation.
- 2.5. Except for willful or wanton misconduct, the Mediator is not liable for any act or omission in this Mediation.

3. Party Representatives.

- 3.1. In this Mediation, each Party will primarily act through a Party Representative.
- 3.2. [A] has appointed [Name of business or institutional representative] to serve as its party representative and [B] has appointed [Name of business or institutional representative] to serve as its party representative (collectively and individually the "Party Representative(s)"). Each Party Representative has the authority to participate in the Mediation for the Party whom he represents.
- 3.3. In addition to the Party Representatives identified above, each Party may be represented or accompanied by other persons in the Mediation (for example, business executives, general counsel, attorneys or consultants).

4. Mediator fees, fee estimate and retainer.

- 4.1. The Parties will compensate the Mediator at the rate of USD [Amount] per hour. The Mediator may charge for time spent preparing for, and serving in, this Mediation including study and travel time ("Fees") and for any necessary expenses (airline, mileage, lodging, room rental, copy costs, legal research fees) regarding the Mediation ("Expenses").
- 4.2. The Parties will equally share the Mediator's Fees and Expenses.
- 4.3. The Parties and the Mediator estimate the total Mediator Fees and Expenses (including fees for conference calls, review of documents submitted by the Parties, travel, conducting the mediation setting, and drafting any summary documents or memoranda) will be approximately USD _____.
- 4.4. By [date], each Party will send to the Mediator a check or other payment for [Amount] (such payments being collectively "Party Retainer"). The Mediator will hold the Party Retainer in his trust account primarily to secure payment of the Mediator's Fees and Expenses. As needed, the Mediator will periodically present statements to the Parties to show his Fees for service, and will withdraw from the trust account the amounts necessary to pay any such statements. If the retainer is inadequate to pay the statements for which it is to be used, the Parties will be billed for and must pay such shortage promptly. The Mediator will return any unused portion of the retainer to the Party or Parties on termination of the Mediation.

5. Confidentiality of the Mediation.

- 5.1. The Mediation is confidential. The Parties and the Mediator will not disclose to third parties confidential information about the Mediation unless compelled to do so by court order.
- 5.2. The information that is confidential and privileged as settlement communications includes, but is not limited to, all statements, communications, offers, conduct, findings or conclusions, written submittals, exhibits, demonstrative aids, documents, notes or papers made in preparation for or during and about the subject matter of the mediation. Information is confidential whether provided by the Mediator, the Parties, their agents, employees, experts, consultants and attorneys (all of the foregoing information are referred to in this Agreement as "Confidential Information").
- 5.3. The Parties will treat all Confidential Information as compromise and settlement negotiations under the Federal Rules of Evidence, the Colorado and other state rules of evidence about settlement, compromise and mediation confidentiality.
- 5.4. No Party will assert that actions taken or statements made pursuant to this Agreement or in the Mediation are the basis for the waiver of attorney-client or work product privilege, or the waiver of confidentiality of business information.
- 5.5. At the conclusion of the Mediation and upon the written request of a Party that provided documents or other material to the other Party(ies), the Party recipient will return the same to the originating Party without retaining any copies.
- 5.6. The Mediator will not be a witness, consultant or expert in any pending or future investigation, action or proceeding relating to the subject matter of the Mediation, including any investigation, action or proceeding that involves persons or entities that are not a Party to the Mediation (collectively "Subsequent Proceeding").
- 5.7. No Party will seek discovery of or testimony from the Mediator, nor will they seek Confidential Information in the Mediator's possession. All Parties will oppose any effort to have the Mediator and documents in the Mediator's possession subpoenaed or produced in a Subsequent Proceeding. A Party who receives any such subpoena or document request will promptly notify the other Party(ies).
- 5.8. No Party will seek to discover or obtain Confidential Information from another Party in any legal proceeding. All Parties will oppose any effort to have the Confidential Information disclosed in any Subsequent Proceeding. A Party who receives any such subpoena or document request will promptly notify the other Party(ies).
- 5.9. Confidential Information will not be admissible in any arbitration, litigation or other proceeding for any purpose, including impeachment. However, a Party may disclose Confidential Information in court pleadings and proceedings insofar as necessary to enforce the terms of a settlement agreement, but such disclosure of Confidential Information will be in the most limited degree necessary to enforce the settlement agreement.
- 5.10. Any information that is otherwise discoverable or admissible will not be rendered immune from discovery, or inadmissible as evidence, merely because of its use in the Mediation. Additionally, this Section 5 does not bar the disclosure of any communication that reveals the intent to commit a felony or inflict bodily harm, or any communication that is required to be made public by statute. This Section 5 does not prevent the Mediator from disclosing

the fact that he is or has served as a mediator in this matter. In any teaching or training activities in which the Mediator discusses this mediation, the discussion will be general and will not include details or Confidential Information.

6. **Agreements in Mediation.** No agreement of any kind reached in the mediation, whether partial or comprehensive, will be final and binding on the Parties until it has been included in a written settlement agreement reviewed by the Parties' counsel and signed by all Parties.
7. **Termination of the Mediation.** The Mediation is voluntary and nonbinding. Therefore, a Party may withdraw from the Mediation at any time, and without cause, before the execution of a written settlement agreement. A Party may terminate the Mediation by notifying the other Party[ies] and the Mediator by the most expeditious means available. That Party will provide prompt written confirming notice of the termination. The Mediator may declare the Mediation terminated if the Parties are in deadlock, and it appears that additional mediation efforts are not likely to move the Parties beyond deadlock.
8. **Survival.** On termination of the Mediation as described in Section 7 above, a Party has no further obligation to participate in the Mediation or incur additional Mediation costs. However, the remaining covenants and agreements made by the Parties in this Agreement shall survive the termination of the Mediation.
9. **No Admission, Waiver or Use of Performance.** Each Party understands, acknowledges and agrees that the negotiation, execution and performance of this Agreement (collectively "Performance") shall not constitute, or be construed as: (a) an admission of any liability or wrongdoing on the part of any Party; or (b) a waiver by any Party of any claims or defenses it may have. Therefore, no Party's Performance will be used or presented in any way in any pending or subsequent legal proceeding.
10. **Binding Effect.**
 - 10.1. This Agreement shall be binding on and shall inure to the benefit of the Parties, and the Parties' respective successors and assigns. However, no Party may assign its rights or delegate its duties under this Agreement without the prior written consent of the other Party(ies).
 - 10.2. Prior written consent is not required where assignment is: to an affiliate; made with the sale of substantially all of such Party's assets; or, a merger or consolidation of such Party with or into another corporation.
 - 10.3. Where assignment is permitted, an assignee shall agree to be bound by the applicable terms of this Agreement.
 - 10.4. Any purported assignment in violation of this Section shall be void.
11. **Amendment and Waiver.** Although the Parties and Mediator are free to flexibly modify the Mediation process to meet the needs of the Mediation, the Parties also agree that no modification,

Joseph P. McMahon, Jr., Mediator

Date: