

# AGREEMENT TO MEDIATE

## 1. Non-Binding Mediation

The undersigned parties are involved in a civil litigation matter which is commonly referred to as \_\_\_\_\_ v. \_\_\_\_\_, pending before the \_\_\_\_\_ (Court / Private Provider) as Case No. \_\_\_\_\_ (the "Dispute"). The parties have agreed to participate in a private mediation in an effort to achieve a negotiated resolution of the Dispute and hereby engage Rebecca Callahan, of Callahan Dispute Resolution, as Mediator pursuant to the terms and conditions of this Agreement to Mediate.

## 2. Parties and Counsel

The parties and counsel to the mediation are as follows:

Plaintiff

Counsel for Plaintiff

Defendant

Counsel for Defendant

## 3. Mediator Fee and Reservation Deposit

The undersigned have reserved \_\_\_\_\_ **hours** of Mediator's time for a private mediation to be conducted on \_\_\_\_\_.

The parties have agreed to pay the Mediator for her services at the rate of **\$400 per hour** and have agreed to share responsibility for payment of the Mediator's fee as follows:

\_\_\_\_\_% \_\_\_\_\_ and counsel  
\_\_\_\_\_% \_\_\_\_\_ and counsel  
\_\_\_\_\_% \_\_\_\_\_ and counsel  
\_\_\_\_\_% \_\_\_\_\_ and counsel

The undersigned law firms are jointly and severally liable for payment of their respective client's portion of the Mediator's Fee.

The parties have been requested and have agreed to fund a reservation deposit of \$\_\_\_\_\_ (\$\_\_\_\_\_ each) and to do so no later than \_\_\_\_\_.

The parties acknowledge and agree that 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 counsel.

Any notice of cancellation of the mediation must be given to the Mediator in writing or by email. There is no administrative set-up fee, but an administrative fee of \$500 will be charged for cancellation notices and rescheduling requests received less than 21 days before the scheduled hearing / session date. There is no refund for cancellation notices and rescheduling requests received less than 14 days before the scheduled hearing / session

date. The parties acknowledge and agree that their reservation deposits shall become nonrefundable after \_\_\_\_\_.

Should the mediation session last beyond the time reserved, the parties hereto acknowledge and agree that they will be billed for the additional time and that payment shall be due within ten (10) days of the statement date.

**All checks should be made payable to Rebecca Callahan APLC, dba Callahan Dispute Resolution / Tax ID No. Tax ID No. 33-0566247.**

#### **4. Mediation Confidentiality**

In order to promote communication between and among the parties and their respective counsel, advisors, and insurers, the undersigned agree that the provisions of California Evidence Code Sections 703.5, 1115 through 1128 and 1152, and all comparable Federal Rules of Evidence, shall apply to this mediation. The parties further agree that:

- All written and oral communications made by any party, attorney, neutral or other participant in the course of, or pursuant to, the mediation or consultation about the mediation shall be held in strictest confidence and may not be used for any purpose in any pending or future proceeding unless all parties, including the Mediator, so agree.
- All statements made and all writings prepared or exchanged during the mediation process are done so in connection with settlement negotiations, and are inadmissible and non-discoverable for any purpose in any proceedings outside the mediation, including but not limited to proceedings conducted before a judicial, arbitration or administrative law tribunal.
- All statements made and materials prepared during the mediation process shall be considered a settlement negotiation for the purpose of all state and federal rules protecting disclosures made during such conferences from later discovery or use in evidence.
- The parties acknowledge and agree that the Mediator is not competent to testify in any civil proceeding concerning anything communicated, exchanged, said, done or occurring in the course of the mediation, and that the notes, working papers and file maintained by the mediator belong solely to the Mediator and are strictly confidential. In this regard, the parties acknowledge and agree that they have no right, title or interest in the notes, working papers or files maintained by the Mediator and that they do not have any right to review, inspect or copy such documents. The parties agree that they will not subpoena or otherwise require the mediator to testify or produce her notes, working papers or files in any proceeding.
- If during the course of the mediation the parties disclose sensitive, private, confidential and / or proprietary information, they hereby agree that all such information was exchanged in reliance on this agreement of confidentiality with the expectation, intent and understanding that it shall be considered a settlement negotiation for the purpose of all state and federal rules.

- Disclosure of information during the course of the mediation that otherwise is privileged shall not alter its privileged character.
- Disclosure of information or writings during the course of mediation that otherwise is not privileged shall not alter its character as discoverable or admissible evidence.
- Notwithstanding the foregoing agreement of confidentiality, the parties acknowledge and agree that this agreement may be disclosed and shall be admissible evidence in any proceeding to prove the existence of the agreement and / or to enforce all or any part of the agreement as provided in California Evidence Code Section 1123.

## 5. Mediator Role

The Mediator is an impartial, neutral intermediary, whose role is to assist the participants in reaching a settlement by negotiation between or amongst themselves. The Mediator cannot impose a settlement but will assist the participants towards achieving a negotiated resolution to the extent that they are interested in pursuing such an outcome.

## 6. Mediation Format

Mediation is based upon three core principles: voluntary participation, party choice and confidentiality. The mediation format is designed to give parties to a dispute an opportunity to discuss their differences and consider settlement options in a private environment and without prejudice to their claims and defenses in pending or threatened litigation. The parties are free to design the mediation process they would like to use, but the format typically includes some or all of the following:

- **Joint / Convening Session:** The parties, counsel and the mediator meet together for introductions, an opening statement by the Mediator, and brief statements by the parties and / or their counsel.
- **Private Sessions:** During the course of the mediation, the parties and / or counsel may meet in private sessions with the Mediator to discuss the dispute from a variety of perspectives, to evaluate settlement options, to discuss matters of concern, to develop offers and counter-offers, to communicate and discuss offers and counter-offer, etc. These discussions and any information exchanged during these discussions will not be revealed to the other parties or counsel without permission.
- **Joint / Negotiating Sessions:** During the course of the mediation, the parties and / or counsel may return to joint session to clarify points that have been agreed upon, to prioritize issues to be discussed, to exchange information, to evaluate or compare settlement options that have been put on the table, to discuss matters of concern, etc.
- **Closing Session:** At the end of the mediation, if the parties have reach agreement on a negotiated resolution of all or part of the dispute, they will have the option of reducing the agreement to a term

sheet or full written settlement agreement. If the parties do not reach agreement during the mediation, the mediation may be closed in joint session for the purpose of discussing the progress made and whether it makes sense to recess the mediation to another day.

- **Termination of the Mediation:** The mediation session shall be terminated by the occurrence of any of the following:
  - (1) The resolution of the dispute by agreement between some or all of the parties;
  - (2) The desire by any party to stop the mediation; or
  - (3) The recommendation by the Mediator that, in her opinion, further efforts at mediation would not result in resolution of the dispute and might do more harm than good.

## **7. No Legal Advice or Legal Opinions**

The parties acknowledge and agree that 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 their counsel acknowledge and agree that neither Callahan Dispute Resolution nor the Mediator has undertaken to represent or provide legal advice or legal opinions to any party and that no professional-client or fiduciary relationship exists between any of the participants, on the one hand, and the Mediator, on the other.

## **8. Mediator's File**

The parties acknowledge and agree that the Mediator is not competent to testify in any civil proceeding concerning anything communicated, exchanged, said, done or occurring in the course of the mediation, and that the notes, working papers and file maintained by the Mediator belong solely to the Mediator and are strictly confidential. In this regard, the parties acknowledge and agree that they have no right, title or interest in the notes, working papers or files maintained by the Mediator and that they do not have any right to review, inspect or copy such documents. The parties agree that they will not subpoena or otherwise require the Mediator to testify or produce her notes, working papers or files in any proceeding. In this regard, the parties acknowledge that the Mediator has advised them that all materials given to her in connection with the mediation, as well as her notes and working papers, shall be destroyed upon closing of her file in this matter.

## **9. Entire Agreement**

By the signatures set forth below, each participant certifies either directly or through counsel that he / she / it has read this entire agreement and agrees with all matters stated herein. This document constitutes the entire agreement between the Mediator and the undersigned regarding the Mediator's engagement in the above-referenced matter. This agreement may not be modified orally. Any modification or amendment must be (a) in writing, and (b) signed by all parties. No obligation or undertaking that is not set forth expressly in this agreement shall be implied.

**10. No Guaranty**

The participants acknowledge and agree that the Mediator has made no promises, guarantees or representations to the parties or their counsel 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 concerning the above-referenced matter.

**11. Disclosures**

The Mediator is unaware of any actual or potential conflicts of interest that would amount to grounds for disqualification in accordance with California Code of Civil Procedure Section 170.1 (applicable to judges and by reference to mediators) except for the following, which have been disclosed to participants.

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To the extent any actual or potential conflicts of interest exist, the Mediator does not believe they will affect his/her capacity to be impartial.

By signing this agreement, the participants expressly waive the conflicts and potential conflicts 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.

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

CALLAHAN DISPUTE RESOLUTION

By \_\_\_\_\_  
Rebecca Callahan, Mediator

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

COUNSEL

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

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

COUNSEL

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

**PARTIES:**

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