

**AGREEMENT TO MEDIATE
VIA VIDEOCONFERENCING**

The undersigned have agreed to participate in a private mediation to be conducted by Rebecca Callahan, as Mediator, for the purpose of achieving a negotiated resolution of the Disputes, as described in Section 1. The parties have also agreed to convene and participate in the mediation using Zoom.us videoconferencing hosted by the Mediator.

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/Tribunal: _____
Case No.: _____

2. "Parties" refers to the following:

2.1 _____
2.2 _____
2.3 _____
2.4 _____

3. "Counsel for the Parties" refers to the following:

3.1 _____, representing
_____.
3.2 _____, representing
_____.
3.3 _____, representing
_____.
3.4 _____, representing
_____.

4. "Mediation Date" refers to the date reserved for the mediation, which is
_____.

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

- Full Day (up to 10 hours) / \$5,000, allocated evenly between / among the parties unless otherwise agreed, funded in advance of the start of the mediation.
- Half Day (up to 5 hours) / \$2,500, allocated evenly between / among the parties unless otherwise agreed, funded in advance of the start of the mediation.

5.1 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 telephone conferences.

5.2 Should the mediation extend beyond the time reserved, the Mediator shall be compensated at the rate of \$500.00 per hour or part thereof. Counsel for the Parties will be billed for the additional time and are responsible for payment of their respective client's portion of the Mediator's Fee.

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 the mediation confidentiality protections provided by California law, including but not limited to California Evidence Code Sections 703.5 and 1115-1128, shall apply. Additionally, the undersigned agree as follows:

6.1 Only the people who have executed this Agreement to Mediate may participate in the mediation. When videoconference is used, each participant must confirm that (a) he / she is alone in the room and cannot be overheard by others, or (b) he / she is in the room with only an identified person, and that that person has signed the Agreement to Mediate (e.g., a party representative and his / her / its counsel).

6.2 There is an absolute prohibition on recording the mediation or any portion thereof. The "record" feature in the Zoom meeting platform will be turned off by the host Mediator. Additionally, the undersigned will NOT audio or video record the mediation or any portion thereof by any means. In the event that a party hereto learns of an audio or video recording of the mediation or any portion thereof, that party will notify the other parties to this agreement of the existence of the recording, will take such measures as may be available to him / her / it to destroy the recording, and will not transmit the recording to any third party.

- 6.3 Only secure WiFi or Ethernet (hard wired) connections will be used. The parties will NOT use a public access WiFi connection, such as those available in public spaces and businesses because they are not secured and will put the parties' information at risk. Additionally, a strong internet connection is vital to the proper functioning of the online videoconferencing platform. A poor connection may result in a frozen screen and/or audio issues, which could significantly disrupt the mediation process.
- 6.4 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.
- 6.5 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.
- 6.6 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.
- 6.7 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.
- 6.8 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.

- 6.9 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.
- 6.10 Notwithstanding the foregoing, the simple fact that the dispute was or was not settled during the mediation shall not be confidential.
- 6.11 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 In advance of the mediation, the undersigned will have reviewed and familiarized themselves with the "Best Practices and Troubleshooting" protocols attached hereto as Exhibit 1.
- 8.2 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.
- 8.3 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.
- 8.4 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 to this agreement certify to the Mediator that all written disclosures and consents required under Section 1129 of the California Evidence Code, effective January 1, 2019, have been given and received.

Dated: _____

Rebecca Callahan, Mediator

[Signatures On Next Page]

PARTIES:

Dated: _____

By _____

Dated: _____

By _____

COUNSEL FOR THE PARTIES:

Dated: _____

By _____

Attorneys for

Dated: _____

By _____

Attorneys for

ADDITIONAL MEDIATION PARTICIPANTS:

Dated: _____

Dated: _____

Dated: _____

Dated: _____

Dated: _____

Dated: _____

Dated: _____

Dated: _____

EXHIBIT 1
BEST PRACTICES AND TROUBLESHOOTING
PROCEDURES FOR MEDIATION VIA VIDEOCONFERENCING

1. *Hearing Record and Recording:*

- 1.1** There will be no record of the mediation, and no part of the mediation will be recorded through Zoom or any other means.
- 1.2** No participant in the mediation shall record, via audio, video or screenshot, or permit any other person to record, via audio, video or screenshot, the mediation or any part of it. The parties and their respective counsel are responsible for ensuring that each additional attendee at the mediation for which that party or counsel is responsible is (a) made aware of this prohibition on recording, and (b) acknowledges and agrees to comply with this prohibition on recording.

2. *Technical Aspects:*

- 2.1 *Invitations to Access Hearing:*** The Mediator or Case Manager will invite attendees via email to join the Zoom videoconference or conference call for the mediation. To protect the security of the mediation, access to the mediation will be password-protected and limited to authorized attendees only. Mediation attendees may not forward or share the mediation link or password. In order to facilitate e-mail invitations for the mediation, the parties' counsel shall provide to the Mediator and Case Manager a list of each attendee's name, e-mail address, and cell phone number (where they will be reachable on the day(s) they are expected to attend the mediation).

2.2 *Advance Testing of System:*

- 2.2.1** At least one week before the mediation, counsel and the Mediator should test the videoconferencing system to ensure that all counsel and the Mediator can connect and that their video and audio systems work (and noting camera settings, lighting, delays/time lags, clarity, volume, feedback, and other sound disruptions).

2.2.2 Each party will be responsible for testing the videoconferencing system with their respective counsel and attendees.

2.2.3 The video conference shall be of sufficient quality so as to allow for clear video and audio transmission of all participants.

2.2.4 Each participant should test their equipment to determine their best audio connection – whether by phone, through their computer speakers/microphone, and with or without a headset. *Note: For participants using telephone equipment only, a landline is best. Otherwise, the participant needs to plan on using their cell phone in a place where there is good reception.*

2.3 ***Back-Up Conference Call Line:*** The parties’ counsel, Mediator and/or the Case Manager shall reserve an optional dial-in conference call number in case one or more participants has poor quality computer audio (after trying the audio connection through the computer – with and without a headset – and by phone). The dial-in information for the conference call line will be circulated via email during the mediation if necessary.

2.4 ***Hearing Participants:***

2.4.1 In advance of the mediation, counsel for each party shall inform the Mediator and all other counsel of the names of all persons who will attend, participate in or will be able to hear any communications in the mediation using Zoom or the conference call line dedicated to the mediation, including any technicians assisting the parties or their counsel. The parties agree that no persons will attend, participate or be allowed to listen in on the mediation who have not been identified in accordance with this paragraph, without the prior consent of all parties and the Mediator.

2.4.2 If the Mediator plans to have a technician present to assist during the mediation, she will so advise the parties’ counsel of the technician’s name and affiliation before the start of the mediation.

2.4.3 Each attendee of the mediation shall disclose at the start of each session all people in the room with the attendee. Should an individual join the attendee after the session has begun, that individual should be identified to counsel and the Mediator at the earliest opportunity.

2.4.4 During the mediation, the participants shall always be in view of the camera. If two or more people are attending the mediation together in a room, they shall **(a)** use a single camera, which shall be placed to provide a view of a reasonable part of the room in which they are sitting, or **(b)** use their respective individual computers and advise that they are in the same room.

2.4.5 At the Mediator's request, unknown participants shall identify themselves by showing a piece of identification to the camera or by responding to the Mediator's questions regarding their identity.

2.5 ***Ensuring Good Audio/Video:*** Mediation participants shall make best efforts to ensure that there will be clear video and audio transmission during the Hearing.

2.5.1 A hard-wired internet connection (Ethernet) is generally preferable to a wireless connection (WiFi). *Note: A poor connection may result in a frozen screen and/or audio issues that neither Zoom, the Mediator, the Case Manager or any technical assistant will be able to correct or cure, and thus may disrupt or delay the proceedings such that additional hearing time and related expenses will be necessitated.*

2.5.2 The use of a public access WiFi connection, such as those available in public spaces and businesses, is strictly prohibited. They are not secure and thus pose the risk of loss of privacy and / or confidentiality with respect to the Hearing and the information disseminated during the course of the proceedings.

2.5.3 Make sure all computing devices are adequately charged and that power cables or back-up batteries are available as may be necessary before the start of the mediation.

- 2.5.4** Use the computer microphone, with or without a headset, for audio transmission or use a phone to dial into audio portion of the platform (or if necessary, use the back-up conference call number if the computer and platform audio are of poor quality).
- 2.5.5** Eliminate any background noise by creating an interruption free zone before the start of the mediation. To the extent that a participant is not working in a private office environment where he / she can close the door, he / she is encouraged to take all reasonable steps to let family, friends and co-workers know of his / her unavailability during the hours of the mediation, and making arrangements for child care, dog sitting, etc.
- 2.5.6** Position the computer and camera so that the camera does not face a window, and turn off bright overhead lights. For lighting, consider using a desk lamp positioned behind the computer.
- 2.5.7** It is preferable that mediation participants access Zoom using a desktop computer or laptop, rather than a smartphone, iPad or tablet.

2.6 *Respectful Online Communication:*

- 2.6.1** For each person participating in the mediation in the same room, there shall be sufficient microphones to allow for the amplification of each participant's voice.
- 2.6.2** Each participant in the mediation should have access to a computer or other device with email – ideally separate from the computer being used for the mediation - and a printer to which the device can print documents if needed during the course of the mediation. For example, a memorandum of understanding for review and signing at the conclusion of the mediation.

2.6.3 It is recommended that mediation participants who are not actively participating for some or all aspects of the mediation maintain their audio on mute to limit potential interruptions – this is applicable to both telephone and video conferencing. The Mediator will have the ability to mute and unmute any participant during the course of the mediation in order to minimize disruptions.

2.6.4 Only one person can speak at a time because the microphone will only pick up one speaker at a time. It will not pick-up cross-talk or interruptions. The following are some suggested guidelines to make sure that everyone can speak and be heard:

3. Documents:

3.1 Before the mediation, counsel should provide the Mediator with a clean, unannotated hard copy set of documents mentioned in the party’s mediation statement or which the counsel thinks may be referred to during the course of the mediation. In order to facilitate the Mediator’s use of the screen sharing feature in Zoom, counsel are encouraged to provide the Mediator with a jump drive containing PDFs of the documents their client has referred to in its mediation statement or may want to refer to during the course of the mediation. *Note: It is all right for the mediation documents to be highlighted with respect to areas that may be the subject of discussion.*

4. Hearing Logistics:

4.1 Upon joining the mediation, participants will be admitted to a virtual Waiting Room. The Mediator will admit all participants to the mediation at the same time. To avoid delay and difficulty reconnecting, mediation attendees should not disconnect from the Zoom platform during any recess. However, lines may be muted during this time, and the Arbitrator may move participants to **(a)** “break-out rooms” (where the parties in that room can still engage) and/or **(b)** a virtual “waiting room” (where engagement between or among any of the parties in that room is not possible).

- 4.2** The parties should expect that the mediation will start in a joint session where all parties, counsel and other attendees are in attendance. The first order of business will be to identify all participants and make sure that only authorized persons are in attendance at the videoconference.
- 4.3** The Mediator will enable virtual break-out rooms for the participants to facilitate private conversations between case participants as may be appropriate (e.g., to allow members of a party's legal team to confer with each other, outside of the presence of the other side, and to allow the Mediator to speak privately with the different party groups).
- 4.4** The Mediator will disable the private "chat" function in the Zoom platform.

5. *Technical Failure:*

- 5.1** Despite all best efforts, at times technology may not operate properly. Should one participant's videoconferencing connection fail, the Mediator and/or Case Manager will ask the counsel remaining on the videoconference to **(a)** mute their audio, and **(b)** turn off their video to avoid concerns regarding potential ex parte communications. Once the Mediator sees that the dropped participant has rejoined the videoconference, the Mediator and/or Case Manager will advise counsel to unmute their audio and turn on their video.
- 5.2** If a participant is disconnected from the mediation or experiences some other technical failure, and the connection cannot be re-established within a 5-minute interval:
 - 5.2.1** The disconnected participant shall e-mail all mediation attendees, by replying all to the Zoom platform invitation circulated by the Mediator or Case Manager. The participants may also use telephone communication to indicate if any party, attorney, or other attendee has been dropped from the mediation due to a connection problem or other technical issue. Unless agreed otherwise, the Mediator is the designated person and number to contact in the event that parties, counsel, or other attendees are disconnected using the cell phone number that will be provided to everyone at the start of the mediation.

5.2.2 The parties may agree to pause the proceedings as needed to resolve any reconnections or technical issues.

5.2.3 The Mediator may take steps to “pause” the mediation, which may include moving participants into a virtual waiting room or one or more separate break-out rooms, while efforts are made to resolve any reconnections or technical issues.

5.3 If the videoconferencing system fails to work such that the mediation cannot take place as scheduled, the Mediator may suggest that the mediation be rescheduled for another day and time.