

Pre-Litigation Mediation Agreement

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Designation of Mediator. The undersigned have agreed to participate in a Pre-Litigation Mediation to be conducted by Jerome F. Rock, Esq. (the Mediator) for the purpose of compromising, settling or resolving disputed claims arising out of the matter herein referenced, and agree as follows:

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Mediation/Facilitation Proceedings. This is a voluntary mediation. The purpose of the mediation is to attempt to compromise, settle or resolve disputed claims between and or among the parties prior to initiation of any litigation proceedings by either party. The Mediator's role is to act as a Mediator party for the purpose of assisting the parties to resolve these claims. Prior, during or after the course of the mediation, the Mediator is authorized to conduct joint and separate communications and or meetings with the parties and or their counsel; and at the Mediator's discretion, to provide an evaluation of each party's case, if requested, and to make recommendations for settlement. The parties acknowledge that the Mediator is not acting as an attorney or advocate for any party and that any recommendations or statements by the Mediator do not constitute legal advice by the Mediator.

The parties acknowledge that they have been advised to seek and are relying on the advice of their own counsel in connection with any agreement with respect to pre-litigation matters, including tolling statutes of limitations, protective orders, and arrangements for litigation hold notices, including preservation of Electronically Stored Information (ESI).

Options to Customize Mediation Process. Mediation is intended to be flexible and can be customized to address specific requirements of the parties' dispute. The Mediator encourages counsel to consider and discuss these process options with the Mediator as early as possible so that process suggestions can be incorporated into the Mediation, with the objective of improving the likelihood of a satisfactory settlement. Some process variants include:

- a) Pre-Hearing conferences by the mediator with each party well in advance of the formal Hearing. See the Mediator's web site for the White Paper- PreMediation: the Gateway to Extraordinary Results;
- b) Informal document exchange and discovery, including customized materials such as spreadsheets, timelines, assumptions and formulas used for calculation of claims, set offs and counter claims, etc., all prepared and shared "For Mediation Purposes Only";
- c) Multi-stage hearings where the first session is intended as information exchange and clarification with technical or project staff in a moderated conference room setting, and the follow on session is reserved for senior staff and principals, using the foundation of the earlier session to negotiate a final settlement;
- d) Jointly retained experts to address technical issues; the costs shared and the findings intended "For Mediation Purposes Only";
- e) Strategic use of joint sessions for the Hearing. The Mediator is skilled at getting principals together in joint session to address their business disputes. Any anxiety about face to face meeting with the other side is discussed and often overcome during the Pre-Hearing conference;

- f) Consider incorporating issues or other disputes outside the strict boundaries of the present case;
- g) Consider Med-Arb in the event these Mediation Proceedings do not result in a complete resolution of the dispute and finality is a driving factor. If either party considers the Med-Arb process as a possible ADR strategy, the Mediator can provide a specific Med-Arb Agreement for consideration at the beginning of these proceedings that enumerate a number of opt-in and opt-out decision points that facilitate the administration of the Med-Arb process.

Further discussion on Process Options can be obtained from the Mediator's website, www.JeromerockLaw.com.



Confidential Nature of Mediation/Facilitation Proceedings. In order to encourage communications designed to facilitate settlement of disputed claims, the parties agree that all proceedings, including all pre-hearing activities in connection with the mediation/facilitation shall be subject to MCR 2.412 of the Michigan Court Rules and MRE 408 of the Michigan Rules of Evidence and FRE 408 as applicable as well as USDC EDM Local Rule 16. These rules provide that anything said, or any statement made or document prepared or submitted in the course of the mediation/facilitation, may not be used in any other court proceeding, including the continuation or trial of the present controversy. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or not discoverable as a result of its disclosure or use during the mediation/facilitation proceedings. Evidence that the parties have entered into a written settlement agreement during the course of the mediation /facilitation may be disclosed and is admissible to the extent necessary to enforce the settlement.



Confidential Communications. In connection with the mediation process, if either party has information that is considered too sensitive to present to the other side, you may agree to present this confidential information to the Mediator on a confidential "for mediator's/facilitator's eyes only" basis, until the time, if at all, that a party is prepare to disclose the information. The Mediator may be able to use this information to facilitate settlement, without disclosing the information.



Exclusion of Mediator Testimony and Limitation of Liability. The Mediator shall not be subpoenaed or otherwise compelled to testify in any proceeding relating to the subject matter of the mediation and shall not be required to provide a declaration or finding as to any fact or issue relating to the mediation proceeding or the dispute which is the subject of the mediation proceedings. The Mediator, and any documents and information in his possession will not be subpoenaed in any proceeding and all parties will oppose any effort to have the Mediator or documents subpoenaed and will jointly and severally hold the Mediator harmless from costs associated with asserting this position. The Mediator shall not be liable to any party for any act or omission in connection with the mediation proceedings conducted pursuant to this Agreement.



Mediator's Services and Compensation. The parties will compensate the Mediator for the following services at the hourly billing rate of \$470.00, which will be shared equally by the parties:

1. **Mediator's Administrative & Pre-Hearing Services.** The Mediator's services include scheduling the mediation hearing, organizing and conducting the Mediation Pre-Hearing Conference, meetings or telephone calls with counsel, review of briefs and other written materials, and preparation for the mediation hearing, all of which will be billed on an hourly basis, and shared equally by the parties.

a. Pre-Hearing Conference. For complex matters, when the circumstances warrant and if practical, the Mediator prefers to meet with counsel and/or parties before the scheduled Mediation/Facilitation Hearing. This face to face meeting accomplishes several objectives:

i) The Mediator develops a sense of the party's position and can explore strategies and underlying needs or requirements that aid in conducting the Mediation Hearing (particularly important when there are ongoing or potential business relations, or when lack of trust underlies the dispute);

ii) The Mediator can explore the techniques that are likely to be beneficial in conducting the Mediation Hearing, such as preference of each party to caucus, plenary session, facilitative or evaluative styles of the Mediator. This meeting can also explore interest in hybrid approaches to Mediation, or open discussion on issues or remedies outside the scope of the current litigation;

iii) The Mediator uses a problem solving approach to Mediation, and the Pre-Hearing meeting serves to explore the competing interests of the parties without the time constraints that exist on the day of the Hearing;

iv) The Mediator develops an important rapport with the client to convey the message that the Mediator's role is to assist each party in arriving at the decision that best serves their interests. This session is an important first step in establishing a relationship of trust and confidence that the Mediator will be diligent in assisting the parties as they arrive at the proper resolution to the dispute.

The time the Mediator spends with each party during the Pre-Hearing Conference may vary, but the effort benefits both parties in their efforts to resolve the dispute, and therefore the Mediator's fee will be shared equally by the parties unless otherwise provided.

b. Agenda and Materials for Hearing. Based on the Mediator's conversations or meetings with the parties and his understanding of the issues, the Mediator may prepare an Agenda for the Hearing which will be distributed to all parties in advance. Depending on the complexity of the matter, the Mediator may prepare supplemental materials, such as time lines, or summary tables that will be used during the Hearing. The services are billed at the same hourly rate and will be shared equally by the parties.

2. Mediator's Hearing Services. The Mediator's Services for attendance and participation at the mediation hearing or conference will be compensated on an Hourly Fee basis, and actual costs or expenses incurred, if approved in advance by the parties. **Minimum compensation** for Mediator's Hearing Services shall be six hours for each day of hearing.

The Mediator will promptly submit an accounting for services to each attorney of record, which shall be payable upon receipt of the invoice.

3. Mediator's Post Hearing Services. At the request of all parties, the Mediator will provide additional services to further the settlement of the matter. Unless otherwise agreed, the fees will be shared equally by the parties.



Conflict of Interest; Disclosures; Waiver. The parties and their counsel acknowledge and agree that in the Mediator's capacity, he is not acting as an attorney or advocate for any party in connection with the mediation. The parties and their counsel will disclose to the Mediator, and the Mediator will disclose to each of them all matters that each reasonably believes requires disclosure pursuant to MCR 2.411(B)(4) or other applicable rules.



Counterpart Execution; Binding on Representatives. This Agreement may be executed in any number of counterparts which when taken together shall constitute one fully executed Agreement. This Agreement when so executed shall inure to the benefit of and be binding on the undersigned parties as well as their lawyers, respective representatives or other persons they have caused to be present during these mediation proceedings.

Mediator
Jerome F. Rock (P27317)

Date:

In the Pre-Litigation Matter:

Attorney for Party One

Date:

Principal Party One

Date:

Attorney for PartyTwo

Date:

Principal Party Two

Date: