

## **MEDIATION CONFIDENTIALITY AND RETAINER AGREEMENT**

This Mediation Confidentiality and Retainer Agreement (“Agreement”) is dated \_\_\_\_\_. The undersigned parties are engaged in a dispute which they hope to resolve in a voluntary and cooperative manner (“Dispute”). In an effort to resolve the Dispute, the parties desire to promote communication among themselves and wish to use the services of Greg David Derin (“Mediator”) to serve as a mediator to assist them. In consideration of these objectives and of the promises and agreements contained in this Agreement, and for other good and valuable consideration, the parties agree as follows:

1. **Role of the Mediator.** The Mediator shall function as a neutral facilitator and is given broad authority to conduct the process in any manner intended to achieve a fair and impartial hearing. The Mediator shall not, and does not, act as an attorney or advocate for any party. Participation in this process shall not be deemed to create, represent or imply the existence of any professional-client or fiduciary relationship between any party and the Mediator.

2. **Confidentiality and Privilege.** The parties are participating in the mediation process voluntarily and for the sole purpose of resolving the Dispute. Subject to certain limitations set forth in applicable statutory and case law, statements made during or in connection with the mediation are confidential, are intended to be privileged settlement communications, are made without prejudice to any party’s legal position, are not intended to be subject to discovery, and are intended by the parties to be not admissible in any subsequent proceedings. However, written and oral agreements reached by the parties in the course of the mediation may, under certain circumstances, be admissible in a subsequent proceeding.

This mediation is conducted pursuant to California Evidence Code §§703.5, 1115-1128, 1152 and/or Federal Rules of Evidence, Rule 408, and other sections or successor sections of the California Evidence Code and any Federal law counterparts, if applicable, governing among other things, the confidentiality of mediation proceedings. In addition, the parties and counsel agree not to disclose any conduct or statements made in connection with the mediation or any writings relating to the mediation to any other person or in the media. The mediator may not testify in any proceedings and the parties shall not seek to have the mediator testify or produce any records, reports, notes or other documents reviewed, received or prepared by him during the course of the mediation process.

Pre-conference and post-conference communications between the mediator and any party or counsel related to the mediation shall be confidential to the same extent as if they had occurred at the mediation session. The mediator may consult with others about this matter and may describe this matter for educational purposes as long as he does not disclose the parties’ names or any other information which would specifically identify the parties.

Since the parties are disclosing confidential information in reliance upon this agreement of confidentiality, any breach of this Agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any party to this Agreement may obtain an injunction to prevent disclosure of any such confidential information in violation of this Agreement.

3. **Release and Indemnity.** The parties hereby release the mediator from any and all claims arising out of their failure to reach agreement or their decision to enter into any agreement, or the terms of any agreement reached. The mediator makes no representation that the participants will reach an agreement on any of the issues, disputes or controversies discussed in the mediation. Any party who brings any claim, action or proceeding of any nature against the mediator or who seeks to have the mediator testify or produce records shall be responsible to indemnify the mediator for any costs, expenses, liabilities, losses or damages incurred, including but not limited to attorneys' fees and expenses incurred.

4. **Potential Conflicts of Interest.** The mediator is not aware of any actual or potential conflicts of interest which would affect his ability to be impartial. The parties acknowledge that the mediator may have served as a mediator or as counsel in connection with other disputes in which one or more of the counsel or parties was a participant. By signing this Agreement, the parties expressly waive any actual and potential conflicts which may exist.

5. **Admissibility of Agreement.** Notwithstanding the terms of Paragraph 2 above, this Agreement shall be admissible in any subsequent proceeding to prove the existence of the Agreement and/or to enforce its terms. It is the intention of the parties that any written settlement agreement prepared in the course of or pursuant to this mediation, and signed by the parties, be binding upon the parties and admissible as provided in California Evidence Code Section 1123 and enforceable by motion under Code of Civil Procedure §664.6 or by any other procedure permitted by law.

6. **Execution of Agreement.** This Agreement is signed before the commencement of the mediation by each of the persons whose signature appears below. This Agreement may be executed in counterparts which, taken together, shall constitute the whole of the Agreement as between the parties and the Mediator. A facsimile copy of this Agreement shall be treated as an originally signed document.

7. **Mediation Fees.** The initial fees of the Mediator shall be \_\_\_\_\_. All such fees shall be paid in equal shares by the parties. Outside counsel for the parties guarantee payment of their client's respective portion of such fees. The fee covers up to \_\_\_\_ ( ) hours of conference time, time spent convening the mediation and discussing procedure with parties and/or counsel, case administration fees, and one (1) hour of the mediator's time reviewing written briefs and supporting materials. Additional time spent in connection with a mediation will be billed at the rate of \$550 per hour, unless a full or half day is reserved for further discussion, which shall be billed at the Mediator's standard rate for such sessions as described on the Mediation Fee Schedule which each party has received. The mediation fee is due immediately upon the confirmation of reserved dates. If all fees are not received, the mediation session will not go forward. Fees for any additional time will be billed following the session and are due upon receipt of the invoice. Fees will not be refunded if a matter is cancelled or continued fourteen (14) or less days before the original date scheduled for the session, unless the mediator is able to schedule another conference for the date(s) being held. If the session is cancelled more than fourteen (14) days prior to the conference, deposited fees will be returned, less \$100 per party, which will be retained as an administrative cancellation fee.

8. **General Provisions.** This Agreement may only be amended by written agreement of the parties and the Mediator. The parties warrant and represent that their undersigned representatives

are authorized to execute this Agreement, and that any required corporate, partnership, joint venture or other resolutions or authorizations have been duly and properly obtained. Each party has received independent legal advice from attorneys of their own choice, with respect to the advisability of making the agreements provided for in this Agreement. Prior to executing this Agreement, each party's attorneys reviewed this document at length and made all desired changes. The interpretation and validity of this Agreement, and any and all claims arising under or in connection with this Agreement, shall be resolved by reference to the laws of the State of California applicable to contracts created and entered into in the State of California. The parties submit to the jurisdiction of the federal and state courts sitting in California in connection with any dispute arising in connection with this Agreement.

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Greg David Derin, Mediator

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