

**AGREEMENT TO PARTICIPATE IN
MEDIATION/ARBITRATION (MED/ARB)**

This Agreement is made as of _____ by and among the undersigned Participants and Philip E. Cutler (the "Neutral"). This Agreement may be executed in counterparts.

The Participants hereby agree to submit their dispute (defined broadly as the issues in dispute between them in _____ County Superior Court Cause No. _____) to a combined process of mediation and arbitration ("Med/Arb") to be conducted by the Neutral at times and places to be mutually agreed or as set forth below. The Med/Arb process consists of two separate and distinct phases, a Mediation Phase and an Arbitration Phase, which will be conducted in sequence at the mutually agreed times and places.

1. **Mediation Phase.** During the first phase of Med/Arb (the "Mediation Phase"), the Participants agree to meet and work in good faith with each other and with the Neutral, serving as Mediator, to arrive at a mutually satisfactory resolution of their dispute. The Participants and their attorneys have agreed that the Mediation Phase will take place in Seattle, Washington, at the offices of the Neutral (1191 Second Avenue, Suite 1650, Seattle), on _____ commencing at approximately _____. The Participants understand that mediation is entirely voluntary and that any party may terminate that party's participation at any time. During this phase, the Neutral, serving as Mediator, has no power to decide issues or make decisions for the Participants, nor is the Neutral acting as a representative, advocate, or attorney for any of the Participants; he is not, therefore, providing legal advice or counsel to or on behalf of any Participant. The Participants are advised and encouraged to obtain legal advice throughout the mediation process and before signing any settlement agreement.

During the Mediation Phase, the Neutral's role will be to assist in the negotiation of issues by facilitating the Participants' communication with one another. No guarantee of any outcome, general or specific, is made and none should be inferred from this Agreement.

2. **Caucuses.** During the Mediation Phase of the Med/Arb process, the Neutral, serving as Mediator, may from time to time hold sessions (known as "caucuses") with only one Participant (and the Participant's representatives). Such caucuses are intended to improve the Neutral's understanding of the Participant's position and to explore options. Information given to or obtained by the Neutral

during a caucus will at all times remain confidential unless the Participant agrees to allow the Neutral to share the information with other Participants.

3. **Arbitration Phase.** If the Participants, after reasonable and good faith efforts at resolution during the Mediation Phase of the Med/Arb Process, in their sole discretion determine and agree that they have reached impasse and that a mutually satisfactory resolution of their dispute cannot be found through mediation, they will so notify the Neutral, and the Med/Arb process will immediately enter the Arbitration Phase. It is contemplated, however, that even if the totality of the Participants' dispute is not resolved during the Mediation Phase, some issues may be resolved, leaving other issues for resolution during the Arbitration Phase. **[If needed:** The Participants and the Neutral agree to schedule a preliminary hearing during the week of _____ to discuss scheduling and other procedural matters pertinent to the Arbitration Phase.]

4. **Arbitration Hearing and Procedure.** The Participants and the Neutral have agreed that, should an Arbitration Phase be necessary, _____ are agreeable dates on which to hold the Arbitration Hearing. The location of the Arbitration Hearing will be at the offices of the Neutral or as determined by agreement of the Participants [; if the Participants are unable to agree on a location by _____, they shall so advise the Neutral, who shall thereafter decide, in his own discretion, on a location or locations for the Hearing].

During the Arbitration Phase, the Neutral, serving then as Arbitrator, will serve as the sole neutral arbitrator of the dispute. In that capacity, the Neutral will have all the powers and immunities of arbitrators under the Washington Uniform Arbitration Act, RCW Chapter 7.04A. The Neutral will conduct the remainder of the Med/Arb process according to the Washington Uniform Arbitration Act and the following general rules of procedure:

(a) The Participants and the Neutral, acting as sole arbitrator, will meet together at all times; the Neutral will not meet privately with any Participant, whether in caucus or otherwise, and will not discuss the case with any Participant except in the presence of the other Participants.

(b) Each Participant, and all representatives of each Participant will be sworn, will give testimony and present evidence in the presence of the Neutral and the other Participants, and will be subject to cross-examination by the other Participants, and examination by the Neutral, serving as Arbitrator.

(c) Each Participant will be entitled to present the testimony of other witnesses, who will also be sworn and will be subject to cross-examination by the other Participants, and examination by the Neutral, serving as Arbitrator; *provided*, that the Hearing will not be interrupted or postponed for the purpose of summoning such witnesses.

(d) In making decisions as Arbitrator in this matter, the Neutral will make a reasonable and good faith effort to only consider testimony and evidence properly presented during the Arbitration Phase of the Med/Arb process, and will not utilize or consider any confidential information disclosed to him in caucuses or private communications during the Mediation Phase. The Participants acknowledge and agree, however, that the Neutral may be subconsciously affected or influenced by information learned by him during the Mediation Phase.

Following the completion of the Arbitration Phase, including the presentation of testimony and other evidence, the Neutral, serving as Arbitrator, will take the matter under submission and will within thirty (30) days following the closing of the Hearing render a written Award which will be binding on the Participants, enforceable as provided for awards under the Washington Uniform Arbitration Act, RCW Chapter 7.04A. Closure of the Hearing shall be at the discretion of the Neutral, serving as Arbitrator.

5. **Waiver of Conflicts.** The Participants recognize and understand that the Neutral, in acting as Arbitrator during the Arbitration Phase of the Med/Arb process, will make a significant change in his role; that, in the role of Mediator, he will have no power or authority to make decisions for the Participants, whereas in the role of Arbitrator he will make binding decisions and rulings against one or more of the Participants which may significantly affect their rights and obligations. Accordingly, the Participants hereby stipulate and agree that the Neutral may and will serve as the sole Arbitrator of this dispute during the Arbitration Phase of the Med/Arb process, and they specifically waive any claim of conflict of interest or appearance of fairness which arises or may arise from his service first as Mediator and subsequently as Arbitrator during this process; *provided* that at any time prior to the commencement of the Arbitration Hearing, any Participant may withdraw from that Participant's agreement that the Neutral may serve as Arbitrator. Any such withdrawal shall not affect any Participant's obligation for fees of the Neutral for time devoted to this matter prior to the Neutral's receipt of the Participant's notice of withdrawal.

6. **Confidentiality.** All written and oral communications, negotiations, draft resolutions, unsigned mediated agreements, and settlement discussions in connection with the Mediation Phase of the Med/Arb process are and will remain confidential, pursuant to the Washington Uniform Mediation Act, RCW Chapter 7.07. Without the consent of all Participants, anything said or any document prepared during the Mediation Phase is not admissible in evidence, is not subject to discovery, and shall not be compelled in any civil action, administrative adjudication, or other noncriminal proceeding in which testimony can be compelled; and the Participants agree not to call the Neutral (or any member of his staff) to testify regarding their dispute nor seek to obtain his notes or other materials, if any, concerning the mediation. Notwithstanding the foregoing, any executed settlement agreement may be offered in evidence should any Participant not fully perform, or allege that any other Participant has not fully performed, the settlement.

7. **Compensation.** Participants agree to pay the Neutral's fee for services rendered in the amount of US\$375.00 per hour. Fees are charged for:

- (a) the Neutral's time in preparing for and conducting any phase of the Med/Arb process with the Participants, in caucuses, and in meetings with any of the Participants;
- (b) if the matter enters the Arbitration Phase: the Neutral's time in preparing for the Arbitration Phase, including scheduling conferences or conference calls, or other preliminary hearings, with the Participants and their attorneys; the Neutral's time in conducting the Hearing; and the Neutral's time preparing and delivering a written ruling following the completion of the Arbitration Phase of the Med/Arb process;
- (c) significant time spent by the Neutral administering the Med/Arb Process, defined as greater than one (1) hour in total;
- (d) although the Participants and the Neutral have agreed that all proceedings contemplated by this Agreement will take occur in the City of Seattle, Washington, if the Participants and the Neutral later agree that either the Mediation Conference or the Arbitration Hearing may be held outside of the City of Seattle, time spent by the Neutral traveling to the location of the Conference or Hearing.

Fees are based on time actually expended by the Neutral and are calculated to the next one-tenth of an hour. Fees shall be shared equally among the Participants

unless a different arrangement is made by mutual agreement of the Participants and communicated to the Neutral prior to the first Med/ Arb session.

Participants agree to deposit, no later than _____, the sum of US\$_____ (US\$_____ per side) for the Med/ Arb processes contemplated by this Agreement. Each Participant's deposit will be deposited in the IOLTA Trust Account maintained by Cutler Nylander & Hayton PS, the law firm with which the Neutral is associated. Following the conclusion of the Med/ Arb processes, each side will be billed for any deficiency or refunded any overpayment. If any side fails to timely make its required deposit, the Neutral may, in his discretion, suspend the Med/ Arb process pending receipt of payment.

A late fee equal to one percent (1%) per month will be charged on any amount due under this Agreement which remains unpaid for more than thirty (30) days.

7. Other Provisions.

- (a) This Agreement is subject to and shall be construed in accordance with the laws of the state of Washington, except those regarding choice of laws.
- (b) Any dispute arising under this Agreement shall be submitted to binding arbitration in the City of Seattle, Washington, in a forum and in accordance with rules to be mutually agreed among counsel for the parties and the parties to this Agreement hereby waive their right to a trial by jury. If the parties cannot agree within thirty (30) days after any party to this Agreement has given notice to the other parties of a dispute under this Agreement, the forum, rules, or other procedural matters on which the parties have not been able to agree shall be submitted to the Chief Civil Judge of the King County Superior Court, who shall decide the same.
- (c) Neither the Neutral nor his law firm, Cutler Nylander & Hayton, P.S., nor any person employed by or affiliated with his firm, shall be liable to any Participant for any act or omission in connection with either the mediation or the arbitration conducted by the Neutral pursuant to this Agreement.
- (d) The Participants will not commence any action or proceeding, in arbitration or otherwise, against the Neutral, his law firm, or any

person employed by or affiliated with his firm, concerning the Neutral's service as mediator or arbitrator pursuant to this Agreement.

- (e) The Participants will not subpoena the Neutral, his law firm, or any person employed by or affiliated with his firm, to testify in any action or proceeding arising out of or connected in any way with the mediation or arbitration conducted pursuant to this Agreement, or the Neutral's service as mediator or arbitrator.
- (f) The Neutral is not a necessary party in any judicial or arbitration proceedings relating to the dispute between the Participants or to the mediation or arbitration conducted pursuant to this Agreement, including without limitation any dispute arising under a settlement agreement entered into by the Participants.
- (g) Each Participant acknowledges and agrees that, prior to executing this Agreement, he or she has had an adequate opportunity to review it, consult with his or her attorney concerning this Agreement and the advantages and disadvantages of using the Med/Arb process to resolve disputes generally, and the dispute between the Participants specifically, and enters into this Agreement freely and voluntarily with the intent to be bound by its terms.

IN WITNESS WHEREOF, the Neutral, the Participants and their representatives have executed this Agreement as of the date set forth above.

[Signature Blocks for Each Participant, by Side, Attorneys for each Participant, and the Neutral]