

DATED: ..... 2016

## MEDIATION AGREEMENT

.....

.....

**(the Parties)**

**Paul E. Caporale**

**(the Mediator)**

# MEDIATION AGREEMENT

Date: .....2016

Parties: .....& .....

(the Parties)

Mediator: Paul E. Caporale

(the Mediator)

## Recitals:

- A. A dispute, as briefly set out in Schedule 1, has arisen between the Parties (the Dispute).
- B. The Parties have requested the Mediator, and the Mediator has agreed, on the terms and conditions of this agreement to assist the Parties in their attempts to resolve the Dispute.

## AGREEMENT:

### The Mediation

- 1. **The Mediation** shall comprise all steps taken to attempt to resolve the Dispute by mediation whether prior or subsequent to the execution of this agreement.

### Appointment and functions of the Mediator

- 2. The Parties appoint the Mediator, and the Mediator accepts the appointment, to mediate the Dispute in accordance with the terms of this agreement.
- 3. The Mediator will assist the Parties to identify the issues between them and to explore options for and, if possible to achieve, the expeditious resolution of the Dispute by agreement between them.
- 4. The Mediator will not advise a Party, nor make decisions for nor impose a solution on the Parties.
- 5. The Mediator will not, unless the Parties agree in writing to the contrary, obtain from any independent person advice or an opinion as to any aspect of the Dispute. Any such advice or opinion shall be obtained only from such person or persons as may be agreed by the Parties.
- 6. The Mediator confirms that the Mediator has no interest in the Dispute, nor has the Mediator had any prior dealings with any of the Parties in relation to the Dispute.

7. If in the course of the Mediation the Mediator becomes aware of any circumstances that might reasonably be considered to affect the Mediator's capacity to act impartially, the Mediator will, to the extent that the Mediator may properly do so, immediately inform the Parties of those circumstances. The Parties will then confer and the Mediator will continue to participate in the Mediation if the Parties so agree.
8. If, after consultation with the Parties, the Mediator forms the view that the Mediator will be unable to assist the Parties to achieve resolution of any of the Dispute the Mediator may terminate the appointment as Mediator by giving written notice to the Parties of that termination.

#### **Co-operation, Costs and Mediator's Fees**

9. The Parties agree to participate in the Mediation and have or will arrange and be responsible for the cost of rooms for the Mediation.
10. Each Party will comply with reasonable requests made by the Mediator to promote the efficient and expeditious resolution of the Dispute.
11. Each party will meet its own costs of and in connection with the Mediation.
12. Irrespective of the outcome of the Mediation, the Parties will pay the Mediator's fees and disbursements as specified in Schedule 2, in the proportions there stated.

#### **Authority & Representation**

13. Each party must be represented at the Mediation conference by a person or persons having or able during the course of the mediation to obtain authority to settle the Dispute.
14. Any persons other than the Parties (including legally qualified persons) attending the Mediation to assist and advise a Party in the Mediation shall sign an acknowledgement and undertaking as to confidentiality as specified in Schedule 3.

#### **Conduct of the Mediation**

15. The Mediation, including all preliminary steps, shall be conducted in such manner as the Mediator considers appropriate having due regard to the view of each Party as to the manner in which the Mediation should be conducted, and the mediator may give directions as to:
  - (i) the holding of preliminary conferences;
  - (ii) the exchange of written outlines of the views of the Parties on the issues raised by the Dispute;
  - (iii) the exchange of experts' reports, the meeting of experts and the preparation of a joint experts' report;
  - (iv) service on the Mediator of any such reports and outlines.

#### **Communication between the Mediator and a Party**

16. The Mediator may communicate with a Party or the Parties orally or in writing.

17. The Mediator may as frequently as the Mediator deems appropriate meet with the Parties together or separately.
18. Information, whether oral or written, disclosed in confidence by a Party to the Mediator need not be disclosed by that Party, and may not be disclosed by the Mediator to any other Party unless the Party by whom that information was disclosed consents to such disclosure.

### **Confidentiality**

19. The Parties and the Mediator will not unless required by law to do so, disclose to any person not present at the Mediation, nor use, any confidential information furnished during the Mediation unless such disclosure is to obtain professional advice or is to a person within that Party's legitimate field of intimacy, and the person to whom the disclosure is made is advised that the confidential information is confidential.
20. The Mediator agrees:
  - 20.1 to keep confidential all information furnished by a Party to the Mediator on a confidential basis;
  - 20.2 save with the consent of the Party who furnished such information not to disclose the information to any other Party.

### **Privilege**

21. Subject to Clause 24, in any arbitral or judicial proceedings the following will at all times be kept confidential and will be privileged, and the Parties and the Mediator will not disclose nor rely upon them nor issue nor cause to be issued any subpoena to give evidence or to produce documents concerning them:
  - 21.1 any settlement proposal;
  - 21.2 the willingness of a Party to consider any such proposal;
  - 21.3 any statement, admission or concession made by a Party;
  - 21.4 any statement or document made by the Mediator.

### **Termination**

22. A Party may at any time terminate the Mediation by giving written notice terminating the Mediation to each other Party and to the Mediator.
23. In the absence of notice by a Party terminating the Mediation the Mediation will be terminated only upon execution of a written settlement agreement in respect of the Dispute. Such settlement agreement shall be drawn up and executed at the earliest possible time after the terms of settlement have been agreed on.

### **Enforcement**

24. Any Party will be at liberty:
  - 24.1 to enforce the terms of a settlement agreement;
  - 24.2 in any enforcement proceedings to adduce evidence of and incidental to the settlement agreement including evidence from the Mediator and any other person engaged in the Mediation.
25. The Mediator will not accept appointment as an arbitrator nor act as an advocate in, nor provide advice to a Party to, any arbitral or judicial proceeding relating to the Dispute or any of them.
26. The Parties will not do anything to cause the Mediator to breach Clause 25.

### **Exclusion of Liability and Indemnity**

27. The Mediator will not be liable to a Party for any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement unless the act or omission is fraudulent.
28. Each party indemnifies the Mediator against all claims by that Party or anyone claiming under or through that Party, arising out of or in any way referable to any act or omission by the Mediator in the performance or purported performance of the Mediator's obligations under this agreement, unless the act or omission is fraudulent.
29. No statements or comments, whether written or oral, made or used by the Parties or their representatives or the Mediator within the mediation shall be relied upon to found or maintain any action for defamation, libel, slander or any related complaint, and this document may be pleaded as a bar to any such action.

### **Legislative Provisions**

30. The terms of this agreement are subject to the provisions of any legislation that may be applicable to or govern the mediation, and in the event of any inconsistency the provisions of the legislation will prevail.

## Schedule 1

The dispute concerns .....

## Schedule 2

### Mediator's Fees and Expenses (plus applicable GST)

- |    |   |         |
|----|---|---------|
| 1. | For all preparation including reading submitted materials | \$..... |
| 2. | For the mediation   | \$..... |
| 3. | Accommodation, meals and travel expenses                  | \$..... |
| 4. | Long distance calls, couriers, etc (if applicable)        | \$..... |
| 5. | Allocation of costs:                                      |         |
|    | Party 1: .....  | 50%     |
|    | Party 2: .....  | 50%     |

### Schedule 3

#### ACKNOWLEDGEMENT and UNDERTAKING

..... & .....

(The Parties)

and

Paul E. Caporale

(The Mediator)

Have entered into a Mediation Agreement dated .....2016 in accordance with which the Mediator will conduct a mediation:

1. The undersigned acknowledge by their signatures that they attend the mediation on the basis of their agreement to the terms of clause 2 and 3 below.
2. Each of the undersigned undertakes to the Parties and the Mediator:
  - 2.1 to keep confidential to themselves and any persons to whom by reason of the terms of their employment or any contract of insurance they may properly communicate it, all information disclosed during the Mediation including the preliminary steps (**confidential information**);
  - 2.2 not to act contrary to the undertaking in sub-paragraph 2.1 unless compelled by law to do so or with the consent of the Party who disclosed the confidential information;
  - 2.3 not to use confidential information for a purpose other than the Mediation.
3. Each of the undersigned undertakes to the Parties and the Mediator that the following will be privileged and will not be disclosed in or relied upon or be the subject of any subpoena to give evidence or to produce documents in any arbitral or judicial proceedings between the Parties to the Mediation:
  - 3.1 any settlement proposal;
  - 3.2 the willingness of a Party to consider any such proposal;
  - 3.3 any admission or concession made by a Party;
  - 3.4 any statement or document made by the Mediator.

## Execution page

**Signed by Paul E. Caporale**

In the presence of:

\_\_\_\_\_  
Signature of Mediator

\_\_\_\_\_  
Signature of witness

Name in block letters:

**Signed by .....**

In the presence of:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature of witness

Name in block letters:

**Signed by .....**

in the presence of:

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Signature of witness

Name in block letters: