

## **MEDIATION PROCEDURES**

### **1. AGREEMENT TO MEDIATE**

The Mediation Procedures herein (the "Procedure") shall be adopted by agreement of the parties, and any mediation conducted by the undersigned mediator shall be subject to the terms and provisions herein.

The parties and their respective attorneys hereby contract to use David B. White as mediator of this dispute (the "Mediator").

The Mediator's rate of compensation is \$475.00 per hour for preparation time and \$2,400.00 per half day (less than four hours) and \$4,800.00 per day (for greater than four hours). Such compensation, and any other costs of the process, will be shared equally by the parties unless they otherwise agree. Each party's attorney and such attorney's law firm shall be equally responsible with his or her client for payment of that party's share of the mediator's fees. If a party withdraws from the multiparty mediation but the procedure continues, the withdrawing party will not be responsible for any costs incurred after it has notified the Mediator and the other parties of its withdrawal.

Before appointment, the Mediator will assure the parties of his availability to conduct the proceeding expeditiously. The mediation conference will be scheduled by mutual consent. A Mediation Agreement will be executed by the parties and the Mediator.

### **2. RULES OF PROCEEDING**

The following ground rules will apply, subject to any changes on which the parties and the Mediator agree:

- (a) The process is non-binding.
- (b) The mediation conference will be conducted at the office of Burns White LLC, Burns White Center, 48 26<sup>th</sup> Street, Pittsburgh, PA 15222.
- (c) Any party may withdraw at any time during the mediation process, before execution of a written settlement agreement, by notice to the Mediator and the other party or parties.
- (d) The Mediator shall be neutral and impartial.
- (e) The Mediator shall control the procedural aspects of the mediation. The parties will cooperate fully with the Mediator.
  - i. The Mediator is free to meet and communicate separately with each party by separate caucus.
  - ii. The Mediator will decide when to hold joint meetings with the parties and when to hold separate meetings. There will be no

stenographic record of any conference. Formal rules of evidence or procedure will not apply.

- (f) Each party will be represented at each mediation conference by a person authorized to negotiate a resolution of the dispute, unless excused by the Mediator as to a particular conference. Each party may be represented by more than one person, e.g. a business executive and an attorney.
- (g) The Mediator will not transmit information received in confidence from any party to any other party or any third party unless authorized to do so by the party transmitting the information, or unless ordered to do so by a court of competent jurisdiction.
- (h) Unless all parties and the Mediator otherwise agree in writing, the mediator and any persons assisting the Mediator will be disqualified as a witness, consultant or expert in any pending or future investigation, action or proceeding substantially relating to the subject matter of the mediation.
- (i) If the dispute goes into arbitration, the Mediator shall not serve as an arbitrator, unless the parties and the Mediator otherwise agree in writing.
- (j) Neither Burns White LLC, the attorneys and employees thereof, nor the Mediator shall be liable for any act or omission in connection with the mediation.
- (k) The Mediator may withdraw at any time by written notice to the parties (i) for serious personal reasons, (ii) if the Mediator believes that a party is not acting in good faith, or (iii) if the Mediator concludes that further mediation efforts would not be useful. If the Mediator withdraws pursuant to (i) or (ii), he need not state the reason for withdrawal.
- (l) If the matter is filed in the U.S. District Court for the Western District of Pennsylvania, the parties agree to the procedure outlined in the Local Rules set forth under the chapter "Alternative Dispute Resolution Policies and Procedures."

### **3. SUBMISSION OF POSITION STATEMENTS**

At least three (3) business days before the mediation conference, unless otherwise agreed, each party will submit to the Mediator a written statement summarizing the background and present status of the dispute, including any settlement efforts that have occurred, and such other material and information as the Mediator requests or the party deems helpful to familiarize the Mediator with the dispute. The parties may agree to submit jointly certain records and other materials. The Mediator may request any party to provide clarification and additional information.

Except as the parties otherwise agree, the Mediator shall keep confidential any written materials or information that are submitted to him, The parties and the representatives are not entitled to receive or review any materials or information submitted to the Mediator by another

party or representative without the agreement of the latter. At the conclusion of the mediation process, upon request of a party, the Mediator will return to that party all written materials and information which that party had provided to the Mediator without retaining copies thereof. Absent such a request, the Mediator is authorized to destroy all materials provided to him by the parties.

The parties and/or their counsel shall have the right to make opening statements at the commencement of the mediation process, but no party will be required to make such an opening statement.

#### **4. NEGOTIATIONS**

The Mediator may facilitate settlement in any manner the Mediator believes is appropriate. The Mediator will help the parties focus on their underlying interests and concerns, explore resolution alternatives and develop settlement options. The Mediator will decide when to hold joint meetings, and when to confer separately with each party.

The parties are expected to initiate and convey to the Mediator proposals for settlement. Each party shall be prepared to provide a rationale for any settlement terms proposed.

If the Mediator believes he is qualified to do so, at the request of any party the Mediator may give the parties an evaluation of the likely outcome of the case if it were tried to final judgment. Thereupon, the Mediator may suggest further discussions to explore whether the Mediator's evaluation or proposal may lead to a resolution.

Efforts to reach a settlement will continue until (a) a written settlement is reached, or (b) the Mediator concludes and informs the parties that further efforts would not be useful, or (c) one of the parties or the Mediator withdraws from the process. However, if there are more than two parties, the remaining parties may elect to continue following the withdrawal of a party.

#### **5. SETTLEMENT**

If a settlement is reached, a preliminary memorandum of understanding may be prepared and signed or initiated by the parties and their counsel before the parties separate. This will be at the option of the parties. Thereafter, the parties shall determine who will promptly draft a written settlement document incorporating the agreed settlement terms. This draft will be circulated, amended as necessary, and formally executed. If litigation is pending, the settlement may provide that the parties will seek dismissal of the case.

#### **6. FAILURE TO AGREE**

If a resolution is not reached, the Mediator may discuss with the parties the possibility of their agreeing on advisory or binding arbitration, "last offer" arbitration or another form of ADR. If the parties agree in principle, the Mediator may offer to assist them in structuring a procedure designed to result in a prompt, economical, dispute resolution process.

## 7. **CONFIDENTIALITY**

Unless agreed among all the parties or required to do so by law, the parties and the Mediator shall not disclose to any person who is not associated with participants in the process, including any judicial officer, any party's premediation position statements or materials, the negotiation positions of the parties to the mediation, or any matters discussed in caucus to which confidentiality has been requested. The outcome of the mediation, including the terms of settlement, shall be deemed confidential. Additionally, if litigation is pending, the participants may advise the court of the schedule and overall status of the mediation for purposes of litigation management. Any written settlement agreement from the mediation may be disclosed for purposes of enforcement.

Under this procedure, the entire process is a compromise negotiation subject to 42 Pa.C.S.A. §5949, a copy of which is attached hereto, and Fed. R. Evid. 408, together with any applicable statute(s) protecting the confidentiality of mediation. Any settlement offers, subsequent offers, promises, conduct and statements are privileged for any applicable purpose, including impeachment, in subsequent litigation between the parties. However, evidence that is otherwise admissible or discoverable shall not be rendered inadmissible or non-discoverable as a result of its presentation or use during the mediation.

The Mediator and any document and information in the Mediator's possession shall not be subpoenaed in any such investigation, action or proceeding, and all parties will oppose any effort to have the Mediator or documents subpoenaed. The Mediator will promptly advise the parties of any attempt to compel him to divulge information received in mediation.