

**AGREEMENT TO MEDIATE, TO PAY MEDIATION FEES AND CONFIDENTIALITY  
ACKNOWLEDGMENT**

**Malcolm Sher's Tax ID # 68-040-2961**

**Re: Mediation of Smith v. Jones**

This agreement, which may be executed in counterpart, is made this \_\_\_\_\_ day of \_\_\_\_\_, 2021, between the undersigned parties, attorneys and insurers, if any, (collectively "parties,") and Malcolm Sher, hereinafter referred to as "Mediator".

1. **Appointment and Role of Mediator.** The parties hereby agree to submit their dispute to mediation conducted by Malcolm Sher, whose role is limited to assisting them by facilitating negotiations, with the intent of reaching an acceptable resolution of their dispute. The Mediator has no power to decide issues or make decisions for the parties. The Mediator is, and throughout the mediation will remain impartial to its outcome, not favoring the interests of any party over that of any other party. The Mediator is not acting as a representative or advocate for any of the parties and therefore is not providing legal advice or counsel for any party. The parties, including self-represented parties, are advised and encouraged to obtain legal advice throughout the mediation process and before signing any settlement agreement. The Mediator makes no guarantee of a specific outcome, and payment of mediator fees is not contingent on a settlement being reached.

2. **The Mediation Process.** Because mediation is a process, not an event, the mediation starts at the time the Mediator is first contacted by the parties and/or their attorneys. The mediation will be deemed to have concluded if there has been no communication between the Mediator and the parties for a period of ten calendar days. Notwithstanding the provisions of Evidence Code § 1125(a)(5), communications between the Mediator and the parties shall remain confidential, as set forth below.

Prior to the mediation session itself, the Mediator may hold one or more private telephone or video conferences with one or more parties and their attorneys. Mediator time spent in these conferences is considered part of the mediation process, for which the Mediator will charge, and are confidential as between the mediator and those parties. At the mediation session, itself, which may be conducted in person, by telephone or through a video-conferencing platform, the Mediator may hold joint sessions as well as private sessions/caucuses with only one party. Such caucuses are designed to improve the Mediator's understanding of the dispute and to explore settlement options. Information gained by the Mediator during a private caucus may be disclosed to another party if the Mediator deems it in the best interests of contributing to a resolution of the dispute, *unless* the Mediator is specifically instructed not to share the information with other parties.

3. **Confidentiality.** No evidence of anything said or any admission made, and no writing, as defined by Evidence Code § 250, created for the purposes of, or in the course of, or

pursuant to, a mediation or a mediation consultation is admissible or subject to discovery, and disclosure of the evidence shall not be compelled in any arbitration, administrative adjudication, civil action, or other non-criminal proceeding in which, pursuant to law, testimony can be compelled to be given. However, evidence otherwise admissible or subject to discovery outside of a mediation or mediation consultation shall not be or become inadmissible or protected from disclosure solely by its introduction or use in a mediation or mediation consultation. Evidence Code § 1120 (a). Whether the mediation session is in-person or via Zoom or other videoconferencing platform, only parties, attorneys and insurers may be present, and all participants in the mediation or pre-mediation meetings agree not to record any of the mediation process.

4. **Settlement Agreement.** The terms of any settlement agreement will be confidential, unless required to be divulged to a court in proceedings designed to enforce its terms pursuant to Code of Civil Procedure § 664.6. Otherwise, with certain limited exceptions, all communications, negotiations, or settlement discussions by and between the parties in the course of mediation, or a mediation consultation shall remain confidential. (Evidence Code §§703.5, 1115 – 1126 and 1152).

5. **Mediator Immunity.** The Mediator is protected by quasi-judicial immunity and shall not be competent to testify, in any subsequent civil proceeding, as to any statement, conduct, decision, or ruling, occurring at or in connection with a prior mediation, except as to a statement or conduct that could give rise to civil or criminal contempt, constitute a crime, be the subject of an investigation by the State Bar or Commission on Judicial Performance, or give rise to disqualification procedures under CCP §170.1(a)(1) or (c); Evidence Code §703.5 and 1121. The Mediator’s notes, mediation briefs and materials submitted to the Mediator by the parties and/or attorneys shall be destroyed by the Mediator following the conclusion of the mediation.

6. **Mediator Fees.** The charge for this mediation will be at the rate of \$500 per hour. Time will be charged for preparation, review of briefs and other documents, pre-mediation session telephone calls or video conferences with the parties and/or counsel, which are considered as mediation time, site visits, and time in the mediation session itself. There is a four-hour minimum charge for the mediation session, itself. A total of two hours of Mediator time will be at no charge. **The Mediator must receive \$6,000 (\$3,000 each side) as a deposit toward mediator fees no later than [insert date].** This is only a deposit toward mediator fees. Unused fees will be promptly refunded. If the Mediator spends more time, a final invoice reflecting the additional time will be sent following the mediation session and will be paid within ten days of invoicing. Parties, including principals of parties, attorneys and insurers, if any, are jointly and severally responsible for payment of mediator fees. Any lawsuit to collect mediator fees will be venued in Contra Costa County. If the mediation is cancelled within seven (7) days of the scheduled session date, and the session is not re-scheduled, the canceling party(ies) will be charged for four hours of the Mediator’s time.

Parties’ Signatures

Attorneys’ Signatures

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