

# AGREEMENT TO MEDIATE

Case: \_\_\_\_\_ Number: \_\_\_\_\_

We, the undersigned participants (“Participants”), agree to the terms and conditions of this Agreement to Mediate (“Agreement”):

**1. Appointment of Mediator.** The Participants consent to the appointment of the Institute *for* Conflict Management, Inc., (“ICM”), through Sam Imperati, JD, as mediator, and acknowledge they have been fully informed as to the mediator’s role. The mediator shall act as an advocate for resolution and shall use good-faith efforts to assist the Participants in reaching an acceptable settlement.

**2. Mediation.** Mediation means a process in which a mediator impartially assists and facilitates two or more parties to a controversy in reaching a mutually acceptable resolution of the controversy and includes all contacts between a mediator (and his/her agents or principals) and any Participant, party, or agent/principal of a party, until such time as a resolution is agreed to by the parties or the mediation process is terminated. The mediator does not have the authority to decide any issue. The mediator’s goal is to promote settlement, partial agreement, or understanding among Participants. The Participants are responsible for negotiating a mutually acceptable resolution.

### 3. Confidentiality of the Mediation Process.

**A)** Subject to the exceptions noted herein, “**confidential**” or “**confidentiality**” means that all “**mediation communications**” during the “**mediation process**” (including pre- and post-mediation session communications) are: 1) confidential, 2) not subject to disclosure, 3) non-discoverable, and 4) inadmissible for any purpose in any proceeding. The “mediation process” commences with the first contact between a party or their representative/agent and a mediator. The terms “confidential” or “confidentiality,” also incorporate all statutory provisions (e.g. FRE/OEC Rule 408(ORS 40.190, federal mediation statutes/rule and regulations); along with all exceptions to public record/freedom of information (*See* ORS 192.410 to 192.505); and public meeting laws (*See* ORS 192.610 to 192.690)) (“**mediation laws**”). Taken together, all “mediation communications,” subject only to any exceptions agreed to in writing by the Participants, are “confidential,” or subject to “confidentiality.” Nothing in this Agreement or ORS 36.220 to 36.238 affects any “confidentiality” created by other law.

**B)** This Agreement is “confidential,” unless otherwise agreed in writing.

**C)** The mediator may hold a private meeting or “caucus” with any Participant and these “mediation communications” are “confidential,” subject to the exceptions noted in this Agreement. The mediator, with the oral or written permission of a Participant, may communicate “confidential” “mediation communications” to any other Participant(s).

**D) Exceptions to Confidentiality, Non-Discoverability & Inadmissibility. *See* “THE RULES OF MEDIATION,” RULE 4 (C).**

**4. Public Body/State Agency Confidentiality Disclosure. X Does NOT APPLY     DOES APPLY.**  
(*See* Rule 5).

**5. Participation of Legal Counsel.** The mediator acts as a neutral exclusively and does not represent any Participant or otherwise practice law during the mediation process. While the mediator is an attorney, s/he will not act as a lawyer for any party against another party in the matter of the mediation or in any related proceeding. The mediator will maintain impartiality toward all Participants. As a result, the mediator's statements should not be construed as legal advice, nor should the Participants rely upon them as such, even if the mediator is an attorney. It is up to the Participants themselves to negotiate their own agreement. There is no attorney-client relationship between the Participants and the mediator. *Each Participant is encouraged to seek independent advice at all stages of the process from an attorney or other appropriate professional(s) and those persons may participate in the “mediation process.” This includes each participant seeking independent legal advice before signing any document, including this Agreement.*

**6. Mediator Work Product and Confidentiality Privilege.** The mediator's “work product” is “confidential” and includes without limitation, all “mediation communications,” the case file and its contents, billing information, calendar, and any notes or other information made in the course of or in connection with the “mediation process.” In addition to the parties, the mediator has a non-exclusive, independent privilege of “confidentiality.”

**7. Mediator Participation in Subsequent Adjudicatory Proceedings.** The mediator is not a necessary party to any subsequent adjudicatory proceeding arising out of or relating to the “mediation process.” The Participants will not subpoena or otherwise require the mediator to testify or produce anything. Should any other person subpoena the mediator, the mediator’s work product, or both, the Participants agree to indemnify, defend and hold harmless the mediator.

**8. Mediator Fee.** The mediator’s fee shall be \$\_\_\_/hour and shall be paid equally by all parties. A deposit of \$\_\_\_ is due from each party by no later than 15 days before the mediation.

**9. Waiver of Liability.** Services are being provided under ORS 36.100 to 36.245. Thus, notwithstanding Section 10 (A) below, neither the mediator nor his/her representatives, agents, principals, employees, successors, and assigns shall be civilly liable to any Participant for any act or omission arising out, in the course of, in connection with, or related to the “mediation process,” this Agreement, or its breach, unless the act or omission was made or done in bad faith, with malicious intent, or in a manner exhibiting a willful, wanton disregard of the rights, safety or property of another; in which case the claim(s) shall lie in tort, not contract, and shall be limited to the extent and limits of the mediator's malpractice insurance. ”

**10. Enforcement, Interpretation, Severability, Fees, Costs, Governing Law and Jurisdiction**

**A)** Any signatory breaching this Agreement shall be liable for all damages, liabilities, fees, costs and expenses arising out of or related to that breach, and shall indemnify defend, and hold harmless the non-breaching signatory(s). Fees shall include attorneys’ fees, whether or not legal action is instituted, which are incurred as a result of such breach, including at trial and on appeal. The signatories consent to the jurisdiction and venue of the Courts of the State of Oregon, Multnomah County. Oregon law, including its choice of law, applies in all matters relevant to this Agreement, except as noted herein. Any signatory’s failure to enforce at any time, or for any period of time, the provisions of this Agreement will not be interpreted to be a waiver of such provision(s) or of the right of such signatory(s) to enforce each and every such provision of this agreement, in whole or in part.

**B)** The Participants are disclosing sensitive information in reliance upon this Agreement. For that reason, any breach of this Agreement would cause irreparable injury for which monetary damages would be inadequate. Consequently, any Participant may obtain an injunction to prevent disclosure, in addition to all other relief provided by law.

**C)** The term “mediator” includes ICM and Sam Imperati, along with principals, agents and employees of the mediator. The mediator shall have the sole authority with full discretion to interpret and apply this Agreement. This agreement supersedes “mediation laws” where they are inconsistent except where the “mediation laws” provide more “confidentiality.” Any interpretation of this Agreement or the “mediation laws” shall be read in the light most favorable to providing “confidentiality.” Where the “mediation laws” provide for “confidentiality” and this Agreement is silent, then this Agreement shall in no way be read to limit “confidentiality.” In the event that any of the provisions of this Agreement are held by a court or other tribunal of competent jurisdiction to be unenforceable or illegal, the remaining portions of this Agreement will remain in full force and effect. In such event, the Participants, will negotiate in good faith and if they cannot agree, the mediator shall provide, a substitute enforceable provision(s) which most nearly effectuates the Participants’ intent to have and maintain “confidentiality.”

**11. Binding Agreement.** This Agreement is binding on the representatives, agents, principals, employees, successors and assigns of each signatory. The signatories may, by written agreement of all signatories, waive or modify this Agreement.

**12. “THE RULES OF MEDIATION”** (“Rules”) that follow are expressly adopted and incorporated by reference into this Agreement.

**13. Entire Agreement.** This Agreement constitutes the entire agreement between the signatories and supercedes and cancels any and all prior representations, negotiations and agreements in connection with any of the matters contained herein.

**I HAVE READ, UNDERSTAND AND AGREE TO ABIDE BY THE TERMS OF THIS AGREEMENT.**

*(If you have any questions, do not sign this agreement until they have been answered to your full satisfaction. You are encouraged to seek independent legal advice BEFORE signing. All participants must agree, even those appearing telephonically.)*

**SIGNATORIES:**

_____	_____	_____	_____
PARTY	DATE	ATTORNEY	DATE
_____	_____	_____	_____
PARTY	DATE	ATTORNEY	DATE
_____	_____	_____	_____
		MEDIATOR	DATE
_____	_____	_____	_____
PARTY	DATE	ATTORNEY	DATE
_____	_____	_____	_____
PARTY	DATE	ATTORNEY	DATE

## THE RULES OF MEDIATION

**Rule 1. Participant Authority.** Each Participant represents that they have complete authority to fully resolve all issues in dispute. All persons **necessary** to the decision to settle or not settle shall be physically present unless otherwise agreed.

**Rule 2. Ground Rules & Commitment to Participate.** While no party agrees in advance to settle their case in mediation, all Participants commit to participating fully in the “mediation process.” All Participants also agree to abide by the following:

- |  |                                       |                        |
|--|---------------------------------------|------------------------|
| A) Participate Fully                     | C) One Speaker at a Time              | E) Explore All Options |
| B) Comment Constructively & Specifically | D) Attack the Problem, Not the Person | F) Keep an Open Mind   |

**Rule 3. Mediation Model.** Except where inconsistent with this Agreement, the mediator adheres to the Core Standards of Mediation Practice (available at: <http://www.mediate.com/oma/pg61.cfm>) promulgated by the Oregon Mediation Association.

### Rule 4. Confidentiality.

A) Subject to the exception noted herein, “mediation communications” are all “mediation process” communications (including pre- and post-mediation session communications) that are made in the course of or in connection with the “mediation process” to a mediator, a mediation program, or a Participant in, or any other person present at, a mediation session(s); and all memoranda, work products, documents and other materials, including any draft mediation (settlement) agreement(s), that are prepared for or submitted in the course of or in connection with the “mediation process,” or by a mediator, a mediation program or a Participant in, or any other person present at mediation session(s). A mediation session is part of the “mediation process” and shall be terminated: a) by declaration of the mediator, or b) by declaration of one party to the mediator and other party(ies) that he/she/it no longer wishes to participate for any reason, except when required by law or court order. The mediator shall determine, in his/her sole discretion, when a mediation session and the “mediation process” commences and is terminated. Notwithstanding any provision of law, “any subsequent adjudicatory proceeding” (*See* ORS 36.222(7)) means any phase, including but not limited to the discovery phase, of any international, federal, state, legislative, judicial or administrative proceeding(s), regardless of when instituted or occurring. No privileges are waived by participating in the “mediation process.”

**B) Exceptions to Confidentiality, Non-Disclosure & Inadmissibility.** They are as follows:

i) The terms of any mediation settlement agreement are not “confidential” unless the parties agree that all or parts of the terms are “confidential.” However, interim and tentative agreements that precede any mediation settlement agreement are are “confidential” unless the parties otherwise agree in writing.

ii) Statements, memoranda, work products, documents, and other materials otherwise subject to discovery **that were not prepared specifically for use in a mediation** are not “confidential.” Any document that, before its use in a mediation, was a **public record**, as defined in ORS 192.410, remains subject to disclosure to the extent provided by ORS 192.410 to 192.505.

iii) In an action for damages or other **relief between a party to a mediation and a mediator, (including any matter involving a bar association or any insurance carrier for ICM or the mediator)** or in any **proceeding to enforce, modify or set aside a mediation agreement**, “confidential” “mediation communications” and “confidential” mediation (settlement) agreements may be disclosed to the extent necessary to prosecute or defend the matter.

iv) A party may disclose “confidential” “mediation communications” or agreements in any subsequent adjudicative proceeding, if all parties to the mediation agree in writing to the disclosure.

v) A person may disclose “mediation communications,” “confidential” or not, related to **elder abuse** or **child abuse** to the extent that person is required to report. The mediator or a party may disclose “mediation communications,” “confidential” or not, to prevent a party from committing a **crime** that is likely to result in death or substantial bodily injury to a specific person; or when required to report **professional misconduct** subject to professional disciplinary rules, unless it is determined that ORS Chapter 36 or other provisions of law precludes such disclosures.

vi) A party to a mediation may disclose “confidential” “mediation communications” to a person if the party’s **communication with that person is privileged** under ORS Chapter 40 or other provision of law. A party may disclose “confidential” “mediation communications” to **any other person** for the purpose of obtaining advice concerning the subject matter of the mediation, if all parties to the mediation agree. In this case, those persons are:

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vii) In any mediation of **a case that has been filed in court**, the court may: require the parties or the mediator to report to the court the disposition of the mediation at the conclusion of the mediation proceeding; disclose records reflecting which matters have been referred for mediation; and/or disclose the disposition of the matter as reported to the court.

viii) A mediator may disclose “confidential” “mediation communications,” the disposition of matters referred for mediation, and the terms of mediation settlement agreements to another person for **use in research, training or educational purposes**, only if: (a) The communications are used or disclosed in a manner that does not identify individual mediations or Participants; or (b) The communications that identify individual mediations or parties is allowed by a written agreement with, or written waiver of “confidentiality,” by all of the parties.

ix) In addition, the Participants agree that the following “mediation communications” shall not be “confidential”:

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**(The parties to a mediation must agree in writing that all or parts of the “mediation communications” are not confidential, otherwise, they are “confidential.”)**

**Rule 5. Public Body Disclosure and Confidentiality Rules Generally. X Do NOT Apply \_\_\_ DO Apply (Rules Attached if Applicable.)**

*(A state agency or other public body is a party to a mediation if it participates in a mediation and has a direct interest in the controversy that is the subject of the mediation. It is not a party by virtue of its conducting a mediation, making a mediation available, or acting as an information resource.)*

Any public body, as defined in ORS 36.110(11), or state agency, as defined in ORS 36.110(12), that is a Participant in this mediation must provide the mediator and all other Participants, before substantive communications, with copies of the applicable mediation laws that differ from any provision of this Agreement. Additionally, before substantive communications, the public body or state agency shall promptly provide each Participant with a disclosure noting its role(s) in the mediation and whether the mediator is an employee, contractor, or has any financial relationship with the public body or state agency.

**Rule 6. Agreements.**

- A) If the parties reach an agreement, the mediator may prepare a Memorandum of Essential Terms and Conditions (“Memorandum,”) (parties elect whether final, binding and enforceable or not), which may then be incorporated into a formal document or documents. ICM and the mediator recommend that each participant seek independent legal advice before signing any document, including this Agreement to Mediate. *The terms of any mediation settlement agreement are not “confidential” unless the parties agree that all or parts of the terms are “confidential.”* The mediator will authenticate the Memorandum and the signatures, but will not otherwise testify or be compelled to produce, testify or give any other evidence.
- B) Participants agree to promptly complete and sign formal documents. If they don’t complete and sign formal documents or can’t agree on the form of such documents, where such documents are required by the terms of the settlement, disputes will be resolved by informal, final, binding and non-appealable arbitration by an arbitrator mutually selected by the parties or selected by the mediator if they cannot agree. The arbitrator can provide any additional language and terms to effectuate the settlement. Inability to reach agreement on the final document will not invalidate any settlement if the parties state in the Memorandum that it is final, binding and enforceable.
- C) If the arbitrator was the mediator, that person shall be empowered to provide any additional language and terms necessary or appropriate to effectuate the settlement based upon (a) all relevant information (confidential or otherwise) provided during the mediation, and (b) all other relevant information submitted to the Arbitrator by the parties. The format of the arbitration proceeding shall be within the sole discretion of the Arbitrator. The Arbitrator’s fees shall be charged at his/her rate, and shall be divided equally between the parties and paid in advance. The Arbitrator shall not be held liable in an action or proceeding for damages alleged to have resulted from any act or omission in the performance of their roles as arbitrator, and shall have all other immunities and protections provided under Oregon law.

**Rule 7. Time, Place and Conduct at Mediation.** No subpoenas, summons, complaints, citations, petitions, writs, warrants or other process may be served at, near or during any mediation session upon any Participant.

**Rule 8. Privacy and No Stenographic Record.** Mediation sessions are private. The parties and their legal representatives who have signed this Agreement may attend mediation sessions. Other persons may attend only with the permission of the Participants and the consent of the mediator. Additionally, they must sign this Agreement. There shall be no recording by any means of the “mediation process.” However, the Participants are allowed to take personal notes during the mediation session(s).

**Rule 9. File Retention.** The mediator will hold the original of this “Agreement,” and any “Memorandum,” with copies to each party. The mediator may, at its sole discretion, destroy all information in its possession, including the “Memorandum,” and this “Agreement,” once the formal documents are signed or after three (3) months have passed since the termination of the “mediation process,” regardless of whether or not a settlement is achieved or an arbitration award issued.

**Rule 10. Addendum Attached and Incorporated. \_\_\_ YES X NO.** The addendum controls where inconsistent with ICM’s form Agreement to Mediate.