

MEDIATION AGREEMENT

THIS MEDIATION AGREEMENT (“Agreement”) is made and entered into this _____ day of _____, 2012, by and between _____, a _____, (“_____”), and _____, a _____, (“_____”) (each and collectively “Party” and “Parties”).

WHEREAS, a dispute has arisen between the Parties regarding _____ (“Dispute”) [that is the subject of litigation in the _____ Court of _____ (“Court”), in the cause styled _____ (“Litigation”)]; and

WHEREAS, the Parties wish to resolve the Dispute, if possible, without continued time and expense and for that purpose desire to submit the Dispute to non-binding mediation with the assistance of a neutral party acting as a mediator;

NOW, THEREFORE, in consideration of the premises and the mutual promises set forth below, the Parties hereby agree as follows:

1. **Submission to Mediation.** The Parties shall attempt in good faith to resolve the Dispute to their mutual satisfaction through non-binding mediation as provided in this Agreement (“Mediation”).

a. *Nature of Mediation.* The Mediation shall be a structured but informal problem-solving process in which a neutral, impartial third person shall serve as a mediator to assist the Parties in reaching an agreement to resolve the Dispute in one or more mediation sessions. The Parties understand that mediation is an agreement-reaching process in which the mediator will assist the Parties to reach agreement in a collaborative, consensual, and informed manner. The mediator will facilitate negotiations between the Parties, but shall not impose his views of what any settlement agreement should be, other than as provided in the “Mediator Impasse Proposal” subsection below.

b. *Good Faith.* The mediation process is voluntary and non-binding. While participating in mediation, each Party agrees to make a good faith attempt to settle the Dispute through mediation, to cooperate with the mediator, and to be open, candid, and complete in its efforts to resolve the dispute.

c. *Disclosure of Material Information.* No Party shall fail to disclose to any other Party or the Mediator information or documentation materially relevant to a reasonably intelligent person’s ability to understand the facts of the Dispute or to evaluate the merits of a settlement proposal.

2. **Mediator.** The Parties hereby appoint and retain Daniel R. Cofran, Esq. as the mediator for their negotiations (“Mediator”). The Parties further understand and agree as follows:

a. *Mediator as Facilitator.* The Mediator has no power to decide disputed issues for the Parties. The Parties understand that the Mediator’s objective is to facilitate the Parties themselves reaching their best agreement.

b. *Mediator Impartiality.* The Parties understand that the Mediator must remain impartial throughout and after the mediation process. The Mediator will not champion the interests of any Party over another in the Mediation nor in any court or other proceeding. The Mediator is to be impartial as to each Party and neutral as to the results of the Mediation.

c. *Mediator Not a Party's Legal Counsel.* The Mediator is an attorney, but will in the Mediation not serve as any Party's nor all Parties' legal counsel. The Mediator will not provide legal advice or legal representation for any Party. The Parties understand that the Mediator has an obligation to work on behalf of all Parties and that he cannot and will not render individual legal advice to any Party.

d. *Conflicts of Interest.* Each Party will answer the Mediator's inquiries about any relationships that any Party or an affiliate of any Party may have with the Mediator to determine if the Mediator has any conflicts of interest with any Party to the Mediation. The Mediator will disclose any such conflicts of interest as well as all prior contacts with the Parties and their legal counsel prior to beginning the Mediation.

e. *Independent Legal Representation.* The Parties understand that mediation is not a substitute for independent legal advice. The Parties are encouraged to be represented by legal counsel in the Mediation and, if not, they are strongly advised to obtain independent legal review of any formal settlement agreement before signing such an agreement. The Mediator may require one or both Parties to have any agreement reviewed by legal counsel to ensure that the Party is or Parties are reaching a reasonably informed agreement.

3. **Participants**

a. *Decision Making Authority.* Each Party must have present at each mediation session at least one representative authorized to negotiate a settlement of the Dispute; provided, however, that final approval of any negotiated settlement by a representative not present at a mediation session shall be allowed if such person can be and is contacted by telephone for such purpose during the mediation session.

b. *Party Representatives.* _____ has appointed _____ to serve as its Party representative for the mediation session(s). _____ has appointed _____ to serve as its Party representative for the mediation session(s).

c. *Additional Persons.* In addition to these Party representatives, each Party may be represented or accompanied by other persons employed or engaged by a Party, *e.g.*, officers, employees, general counsel, and consulting professionals, *e.g.*, accountants, engineers, architects, and financial advisors.

4. **Written Submissions Preceding Mediation.** If the Dispute is in litigation, the Parties shall submit to the Mediator at least two days before the first mediation session copies of (a) the petition or complaint, answer, counterclaim, cross-claim or similar pleading setting forth a claim in the Litigation and (b) any pending motions dispositive of the issues in the Dispute, including the motion, supporting and opposing legal memoranda, and statements of facts. In addition, the Parties may, but shall not be required to, submit a written statement summarizing its position in the Dispute, not to exceed two single-spaced, typewritten pages at least two days before the first mediation session.

5. **Mediator Consultations with Parties During Sessions.** The Mediator may conduct sessions with all Parties present as well as separate “caucuses” with each Party and its respective legal counsel during a mediation session. If attorneys and Party representatives are participating in a mediation session, the Mediator, after consultation with the Party representatives and attorneys, may conduct sessions with just the Party representatives, just the attorneys, or both Party representatives and their respective attorneys present.

6. **Additional Procedures.** Additional rules and procedures for the Mediation may be negotiated and agreed upon by the Mediator and the Parties at any time during the mediation process.

7. **Confidentiality**

a. *Confidential Information.* All mediation communications, discussions, documents, and materials made or provided for mediation purposes including but not limited to all statements, communications, offers, conduct, findings or conclusions, written submittals, exhibits, demonstrative aids, documents, notes or papers made in preparation for or during and about the subject matter of the Dispute or the Mediation, draft settlement agreements, unexecuted settlement agreements, and executed settlement agreements (“Confidential Information”) shall be strictly confidential; provided, however, an executed settlement agreement shall be admissible in any proceeding to enforce the terms of such a settlement agreement but only in the most limited degree as may be reasonably necessary to enforce the settlement agreement.

b. *Sources of Confidential Information.* Information is Confidential Information whether provided by the Mediator, any Party, or any Party’s agents, employees, experts, consultants, or attorneys.

c. *Impasse Confidential.* In the event of impasse and the inability to reach agreement for settlement of the Dispute, the reasons for the impasse and inability to reach agreement shall be Confidential Information.

d. *Private Caucuses Confidential.* In the event the Mediator has private caucus meetings and discussions with any Party as provided in the “Mediator Consultations with Parties During Sessions” section of this Agreement, all such meetings and discussions shall be confidential between the Mediator and the caucusing Party, unless the Parties agree otherwise.

e. *Settlement Communications.* The Parties will treat all Confidential Information as compromise and settlement negotiations under the Federal Rules of Evidence; evidence statutes of any state; common law of any state’ or other statute, rule, regulation regarding settlement, compromise, and mediation confidentiality.

f. *No Waiver of Privileges.* No Party will assert that actions taken or statements made in the Mediation are the basis for the waiver of the attorney-client privilege, any work product protection from disclosure, or the confidentiality of business information.

g. *Return of Documents.* At the conclusion of the Mediation and upon the written request of a Party that provided documents or other material to the other Party, the recipient Party promptly will return the same to the originating Party without retaining any copies.

h. *No Subpoena of Mediator.* No Party shall subpoena, otherwise compel, or request the Mediator to be a witness, consultant, or expert in any pending or future investigation, action, or proceeding relating to the Dispute. In the event the Mediator is subpoenaed or

otherwise compelled to be a witness in a court or other proceeding by a third party regarding or related to the Dispute, the Mediator shall provide prompt notice of the same to all Parties in order to give them adequate time to evaluate and protect the confidentiality of Confidential Information.

i. *Court-Ordered Mediator Testimony.* Notwithstanding the foregoing, a Party or the Mediator may without violating this Agreement disclose Confidential Information, whether in discovery or in a court proceeding, if ordered to do so by a court. Neither a Party nor the Mediator shall be required under this Agreement to risk being held in contempt of court in such event, or seek appellate review, whether by mandamus or otherwise, of a court order to disclose Confidential Information.

j. *Mediator as Teacher or Trainer.* The Mediator shall not be prohibited from disclosing the fact that he is or has served as a mediator in this matter. In any teaching or training activities in which the Mediator discusses the Mediation, the discussion will be general and will not include the names of the Parties, factual details, or Confidential Information.

k. *Exceptions.* Confidential Information does not include any communication or document that is required to be made public by statute including but not limited to:

i. Information that is reasonably necessary to allow for investigation of or action for ethical violations against the Mediator or for the defense of the Mediator conducting the Mediation in an action against the Mediator by a Party;

ii. Information the Mediator is required to report under K.S.A. Sec. 38-2223, as may be amended from time to time, or applicable statute of any other state or federal law, regarding harm to a child as a result of physical, mental, or emotional abuse or neglect or sexual abuse;

iii. Information reasonably necessary to stop the commission of an ongoing crime or fraud or prevent the commission of a crime or fraud in the future for which there is an expressed intent to commit such crime or fraud;

iv. Information that the Mediator is required to report or communicate under the specific provisions of any statute or order to comply with orders of the Court; and

v. A report to the Court of threats of physical violence made by a Party during the Mediation against a Party, a Party's dependent or family member, the Mediator, or an officer or employee of the Court with the apparent intention of carrying out such a threat;

all as provided in K.S.A. Secs. 60-452a, 5-512, as 38-2223, as amended from time to time, or applicable statute of any other state or federal law.

8. Mediator Compensation.

a. *Hourly Fee.* The Parties shall pay the Mediator a fee \$250 (Two Hundred Fifty Dollars) per hour for time spent with the Parties and for time reasonably necessary to study documents, research issues, correspond, make telephone calls, and do such other things as may be reasonably necessary to prepare for and facilitate the Parties reaching full agreement.

b. *Expense Reimbursements.* The Mediator shall also be reimbursed for all out-of-pocket expenses incurred as a part of the mediation process, e.g., postage, photocopying, overnight courier, and long distance telephone. In the event of travel outside the Kansas City metropolitan area the Mediator shall be reimbursed for his actual, documented expenses, e.g., air fare, hotel, meals, cab, and car rental. In the event travel outside the Kansas City metropolitan area is by car, the Mediator shall be reimbursed at the rate then approved by the Internal Revenue Service for employee mileage reimbursements (50 cents per mile in 2010).

c. *When Payment Due.* Payment of the preceding fee and expenses shall be made within 10 (ten) days of receipt of the Mediator's invoice for the same.

d. *Joint and Several Liability.* Each Party shall be jointly and severally responsible to the Mediator for payment of the full amount of the Mediator's fee and expenses. Between or among themselves, responsibility for the such fee and expenses shall be split between or among the Parties as follows:

_____	_____ %
_____	_____ %

9. Conclusion or Termination of Mediation.

a. *Conclusion or Termination.* Efforts to reach a settlement during a mediation session will continue until (i) a settlement is reached; (ii) one of the Parties withdraws from the mediation process as provided in the immediately following subsection; or (iii) if the Mediator concludes that the Mediation will lead to an unreasonable result, the Mediator feels that an impasse has been reached, or the Mediator determines that he can no long effectively perform his facilitative role.

b. Subject to the obligation always to act in good faith, any Party may withdraw from or suspend the mediation process at any time. If the Mediation is court-ordered, consent by the Court for a Party to withdraw may be required. The Parties, not the Mediator, shall be responsible for determining if Court approval is required.

c. *Mediator Impasse Proposal.* If the Parties should reach an impasse and be unable to develop mutually acceptable settlement terms, the Mediator may, before terminating the mediation session, submit to the Parties a final settlement proposal which he considers equitable to all Parties. The Parties will carefully consider any such proposal and at the request of the Mediator will discuss the proposal with the Mediator.

10. Settlement Agreement. If a settlement is reached, the Parties, or the Mediator as an intermediary, and not as legal counsel for either or both Parties, and only if requested by the Parties if they are not represented by legal counsel, will prepare a written settlement agreement incorporating all settlement terms. Unless otherwise agreed, the agreement shall be executed by all Parties at the conclusion of the mediation session and not left until another day. However, unless otherwise agreed, such an agreement may be done as an enforceable "short form" agreement, subject to preparation of a more formal version of the agreement prepared by legal counsel.

11. Miscellaneous

a. *Survival.* On conclusion or termination of the Mediation as described in the “Conclusion or Termination of Mediation” section of this Agreement, a Party has no further obligation to participate in the Mediation or incur additional Mediation costs. However, the remaining obligations of the Parties in this Agreement or obligations under any settlement agreement shall survive the termination of the Mediation.

b. *No Admission or Waiver.* Each Party understands, acknowledges, and agrees that the negotiation, execution, and performance of obligations under this Agreement shall not constitute or be construed as (a) an admission of any liability or wrongdoing on the part of any Party; or (b) a waiver by any Party of any claims or defenses it may have. No Party’s performance of its obligations under this Agreement will be used or presented in any way in any pending or subsequent legal proceeding other than to defend against a claim that it has not performed its obligations under this Agreement.

c. *Binding Effect.* This Agreement shall be binding on and shall inure to the benefit of the Parties and their respective successors and assigns, or respective heirs, executors, and administrators. No Party may assign its rights or delegate its duties under this Agreement without the prior written consent of the other Party(ies). Prior written consent is not required where assignment is (i) to an affiliate, (ii) made with the sale of substantially all of a Party’s assets, or (iii) is part of a merger or consolidation of such Party with or into another limited liability company, corporation, or other business entity. Where assignment is permitted, the assignee shall be bound by the terms of this Agreement. Any purported assignment in violation of this section shall be void.

d. *Amendment and Waiver.* Although the Parties and Mediator are free to flexibly modify the mediation procedural terms of this Agreement to meet the needs of the Mediation, no modification, amendment, waiver, or alteration of the substantive terms of this Agreement shall be effective unless in writing and executed by all Parties.

e. *Interpretation and Construction.* In the event any provision of this Agreement requires interpretation or construction, this Agreement will be interpreted or construed without any presumption that the provisions of this Agreement are to be strictly construed against any Party.

f. *Effect of Agreement on Third Parties.* This Agreement does not create any rights for the benefit of any person who is not a Party. There are no third party beneficiaries for or under this Agreement.

g. *Severability.* If any provision in this Agreement is held to be invalid or unenforceable, such holding shall not be deemed to render this Agreement invalid or unenforceable. Rather, the provisions of this Agreement are severable. However, this provision shall not preclude a court from refusing to sever any provision if severance would be inequitable to one or more of the Parties.

h. *Governing Law.* The Parties agree that this Agreement will be construed and enforced in accordance with the law of the state of _____, exclusive of its conflict of law rules.

i. *Execution in Counterparts.* All Parties do not need to sign the same signature page for this Agreement to be effective. This Agreement may be executed with multiple signature pages which are accepted by all Parties as a single signed agreement. Counterpart signature pages may be exchanged by facsimile, and shall be deemed delivered when received by the other Party(ies). Executed originals must be provided to the other Party(ies) within five business days thereafter.

IN WITNESS WHEREOF, the Parties have executed this Mediation Agreement effective the day and year first above stated.

Signatures on Following Pages

(FIRST PARTY'S NAME)

By _____
(Please Use Dark Blue Ink)

Printed Name: _____

Position: _____

Date: _____

(SECOND PARTY'S NAME)

By _____
(Please Use Dark Blue Ink)

Printed Name: _____

Position: _____

Date: _____

Joinder and Consent

The undersigned Daniel R. Cofran, Mediator, hereby joins and consents to the Mediator duties and obligations set forth in the above and foregoing Mediation Agreement.

Please Use Dark Blue Ink)

Date: _____