

Mediation Agreement

For Case No. _____.

This Agreement is executed by the Federal Aviation Administration (“FAA”), through counsel, and _____ (“Respondent”) hereinafter collectively referred to as the “parties,” in connection with their joint efforts to resolve the above-referenced case using mediation.

1. Background Information

- 1.1. The FAA Office of Adjudication is independent of FAA organizations responsible for investigating and initiating enforcement actions. The Administrator of the FAA has granted the Office of Adjudication authority to encourage the use of alternative dispute resolution (“ADR”) techniques such as mediation for FAA civil penalty matters.
- 1.2. Respondent received a Notice of Proposed Civil Penalty in case number _____ (“the case”).

2. Agreement to Mediate

The parties agree to engage in mediation in a good faith effort to resolve this case. The parties understand that mediation is voluntary and may be terminated by any party or the mediator at any time. If the parties cannot settle the entire case via mediation, they shall resolve any unsettled portions via the applicable regulatory process.

3. Designation of Party Negotiators and Representatives

A party shall choose its own representatives for participation in the mediation proceedings. In addition to its legal counsel, each party shall be responsible for designating its principal negotiating representative. The principal negotiating representative shall have the authority to enter into a settlement agreement on behalf of his/her party.

4. Designation and Role of the Mediator

- 4.1 The parties agree that the Office of Adjudication’s _____ will serve as the mediator under this Agreement. The parties understand that the mediator has no authority to decide the case and will not act as a counsel, advocate, investigator, or representative for any parties. The parties acknowledge that this Agreement does not create an attorney-client relationship between the parties and the mediator and that no such relationship may be created or inferred during the mediation process. The parties further acknowledge that by the nature of his/her position with the Office of Adjudication, she/he frequently conducts mediations with both FAA and the Transportation Security Agency.

- 4.2.** The mediator shall have no financial or personal interest in the result of the mediation. Before accepting his or her appointment, a prospective mediator shall disclose to the parties any circumstance likely to create a conflict of interest or presumption of bias or prevent a prompt meeting with the parties. In such a case, at the request of any party, the Director of the Office of Adjudication (“the Director”) shall promptly designate a replacement mediator.
- 4.3.** If, during the mediation, the mediator becomes unwilling or unable to serve, the Director will appoint another mediator unless the parties agree otherwise.

5. Mediation Style

The mediator will strive to facilitate communication between the parties to promote the exchange of relevant information so that the parties can reach a well-informed decision regarding settlement of the case. The mediator does not have the authority to issue a binding decision in the case. If requested by the parties, the mediator may evaluate the strengths and weaknesses of positions, assess the value and cost of settlement alternatives, or assess the barriers to settlement (collectively referred to as “evaluation”) to facilitate the case resolution. The mediator has broad discretion in suggesting possible settlement options and terms. The mediator may provide legal information to all parties jointly or separately.

6. Procedures

The parties will engage in mediation at a time and location mutually agreeable to the parties and the mediator. **[ALT: State a time, date, and location]**

- 6.1** The mediation procedure will be informal, and the mediator has broad discretion to conduct the mediation to provide an efficient, effective, and impartial mediation process for the resolution of the case.
- 6.2** The mediator may request a party to produce and deliver to **[him/her]** further documentation, to the extent **[he/she]** determines such documentation has not already been provided and is reasonably needed for him to understand the issues presented and the respective positions of the parties.
- 6.3.** The mediation will start with a joint session followed by a series of sessions conducted by the mediator with the parties, both individually -- *i.e.*, in “caucus” -- and in a joint session, as the mediator deems appropriate for purposes of facilitating settlement discussions.
- 6.4** The parties agree that the adjudicative process for this case shall not commence until the procedures above are completed or terminated, as described in Section 8, *infra.*, of this Agreement.

- 6.5.** If a resolution is not achieved after a reasonable period as determined by the mediator, the mediator may advise the Director that resolution was not reached, and that the adjudication process should commence. However, the parties may agree to continue mediation efforts beyond that date. [ALT: State a date certain and that the mediator “will advise.”]
- 6.6.** No party shall be bound by anything said or done at the mediation unless a written settlement is reached and executed by all necessary parties. If a settlement is reached, the Agreement shall be reduced to writing and when signed and approved by the appropriate authorities for all parties, it shall be binding upon all parties to the Agreement.

Notwithstanding the procedures in 6.1 to 6.5 above, the mediator and the parties may interact at other times and by other means in the sound discretion of the mediator.

7. Confidentiality and Inadmissible Settlement Discussions

- 7.1.** The Administrative Dispute Resolution Act of 1996 (codified at 5 USC § 571, *et. seq.*) governs the confidentiality of the mediation process established by this Agreement. 14 CFR § 17.39. The principles of Federal Rule of Evidence Rule 408 are applied when considering the admissibility of dispute resolution communications. *Id.*
- 7.2** The term “dispute resolution communications,” means any oral or written communication prepared for this mediation, and includes any memoranda, notes, or work product of the neutral, parties, or nonparty participants. 5 USC § 571(5). Neither this Agreement nor any resulting settlement agreement is a dispute resolution communication. *Id.*
- 7.3** The mediator and the parties may not voluntarily disclose dispute resolution communications that are confidential under 5 USC § 574. That code section places more significant limitations on neutrals than on parties, but exceptions apply. Such exceptions include, but are not limited to:
- 7.3.1** Parties may not disclose dispute resolution communications generated by the mediator but may disclose dispute resolution communications provided or available to all parties to the mediation. 5 USC § 574(b)(7). This means that caucus discussions generally give a party and its representatives the greatest degree of confidentiality.
- 7.3.2.** The parties authorize the mediator to disclose to other parties or to nonparties any dispute resolution communication or communications made in confidence that in the judgment of the mediator must be disclosed to prevent or investigate actual or possible fraud, waste, abuse, criminal activity,

protective order violations, security compromises, or imminent physical harm. See 5 USC § 574(a)(1) and (a)(3).

- 7.4 There shall be no transcription or similar record of the mediation. All notes taken by participants shall be considered dispute resolution communications subject to the terms of this Agreement.
- 7.5. The exclusive remedy for disclosures contrary to this Agreement is the exclusion of the disclosed communication from the administrative record for adjudication of the case. See 5 USC § 574(c). Violations of other non-disclosure obligations found in statutes, regulations, executive orders, contract terms, or other binding authorities are governed by those other authorities.
- 7.6. The parties agree on behalf of themselves and their attorneys that none of them shall call upon or subpoena the mediator in any legal or administrative proceeding of any kind to testify or produce any notes, files, or documents in any way created in connection with the mediation process. In no event will the mediator voluntarily testify on behalf of either party or third person.
- 7.7. The disclosure of any report, document, or information in the context of settlement discussions or otherwise in furtherance of settlement during the mediation process shall not constitute a waiver of any applicable privilege. Both parties to this agreement reserve the right to contest the assertion of any privilege by the other party to the Agreement but will not argue that the disclosing party, by virtue of the disclosures it makes pursuant to this Agreement, has waived any applicable privilege.
- 7.8. Evidence otherwise admissible or discoverable shall not be rendered inadmissible or undiscoverable because of its use in the mediation process. 5 USC § 574(f).
- 7.9 The mediation proceedings are subject to any protective order issued in the case.
- 7.10. If a settlement is reached and subject to any protective order or other legal restrictions, any information created or exchanged in settlement discussions or during the mediation process may be used within the parties' respective organizations to explain and document the settlement. 5 USC § 574(g).
- 7.11. Neither this Agreement nor any resulting settlement agreement will be confidential.

8. Termination of Mediation and Resort to Adjudication Process

8.1. All mediation efforts shall terminate whenever one of the following occurs:

- 8.1.1. The execution of a settlement agreement by the parties;

- 8.1.2. The mediator makes a written declaration to the parties and to the Director that further efforts at mediation are no longer worthwhile; or,
- 8.1.3. A party makes a written declaration to the mediator and the Director that the mediation proceedings are terminated.

9. Interpretation of this Agreement

Any disputes, claims, or other actions arising under or relating to this Agreement or the mediation will be determined by the Office of Adjudication. The mediator shall interpret and apply the terms of this Mediation Agreement and insofar as such terms duties, responsibilities, and conduct of the mediation procedure. All other terms shall be interpreted and applied by the Director.

10. Status Reports to the Director

During the pendency of this matter before the mediator, the Director may review the progress of mediation status with the mediator but shall not be privy to dispute resolution communications governed by section 7 above.

FEDERAL AVIATION _____
ADMINISTRATION

By _____
NAME: _____
 [TITLE]
Date: _____

By _____
NAME: _____
 [TITLE]
Date: _____

OFFICE OF ADJUDICATION

By _____
Name: _____
Date: _____