

Sample Agreement¹

The Managed Dispute Resolution (MDR) Agreement:

1. Scope and Purpose of Agreement

The undersigned parties, hereinafter the “parties,” enter into this Managed Dispute Resolution Agreement (the “MDR Agreement”) to set forth the agreed protocol for the conduct of their settlement negotiations to resolve the disputed issues set forth in the attachment in an efficient, effective, and reasonably affordable manner. In making this agreement, the said parties acknowledge that they have been independently advised regarding the provisions of the agreement and the consequences of engaging in this process, and that with full knowledge and understanding of such matters, they have voluntarily entered into this protocol agreement.

2. Designation of MDR Manager

The said parties stipulate and agree that _____ will serve as the Manager of this Managed Dispute Resolution process and that before making this designation the said parties and their respective counsel have made an independent investigation of the qualifications, experience, and neutrality of said manager and are entirely satisfied that said individual is fully qualified to serve in such capacity.

3. Conduct of the MDR Process

The MDR Manager will manage the MDR Process as a neutral and unbiased moderator and facilitative coach and in that dual capacity will assist the parties and their counsel in developing a procedural format and agreed timetable for the conduct of half or full day meetings for the purpose of:

1. exchanging relevant documents and information;
2. making objective evaluations of their respective positions;
3. engaging in good faith settlement negotiations; and
4. submitting any unresolved issues to arbitration for a final determination.

At the conclusion of such meetings, unless otherwise agreed, the MDR Manager will assist the parties and their counsel in developing the terms of a Final Settlement Agreement and, if appropriate, a Consent Decree as hereinbelow provided.

4. Good Faith Commitments

The parties agree to make a good faith effort to reach an expeditious and mutually acceptable resolution of all issues in dispute, and in this regard, the parties agree to work cooperatively with one another and the MDR Manager in developing a written statement of the principal issues in dispute. If the parties are unable to reach a mutually acceptable settlement of all such issues, they agree to submit such unresolved issues to a jointly selected arbitrator, as hereinafter provided, for a final and binding determination.

¹ This sample draft of a Managed Dispute Resolution Agreement is being made available to the public by Resolution Forum, Inc., a non-profit §501(c)(3) dispute resolution organization, solely for the purpose of providing experienced lawyers and their clients a basic reference point regarding the managed dispute resolution process and a general idea regarding the types of provisions that could be incorporated in such agreements.

5. Disclosures and Exchange of Documents

For the purposes of this agreement, the parties agree to disclose all information (whether oral or written) and to exchange all documents, whether or not specifically requested by the other party, which are reasonably relevant to one or more of the issues in dispute. After their initial exchange of information and documents, the parties agree to continue to disclose and to exchange relevant information and documents as and when the same may become available or brought to their knowledge. In the event the parties disagree about the relevancy of certain information or documents, the parties agree to make a good faith effort to resolve the dispute with the assistance of the MDR Manager. If the parties are unable to resolve the dispute through such good faith negotiations, the issue in dispute shall be submitted to the court in which the dispute is pending, or if the parties so agree, to an arbitrator as hereinafter provided for a final determination.

6. Production of Electronic Documents (Optional Provision)

Bearing in mind the high cost and burdens associated with compliance with traditional requests for disclosure of electronic information, the parties agree to address e-discovery issues as early as possible in their exchange of documents and information and to voluntarily produce all such documents and information when sought pursuant to reasonably specific and economically feasible requests. In this regard, a party in the possession or control of electronic materials transmitted to or from a wide range of users or customers, as well as back-up tapes or fragmented or deleted files, need not produce such electronic data unless the requesting party demonstrates an extraordinary need for the same or establishes a reasonable likelihood that such files were deliberately destroyed or altered by a party in anticipation of litigation or arbitration and outside of that party's document-retention policies operated in good faith.

7. Joint Retention of Experts

If the MDR Manager determines that the settlement process will likely be expedited through the retention of a neutral third-party such as a mediator, communication coach, financial advisor, or other impartial third-party expert, the parties, after conference with the MDR Manager regarding the need for and affordability of such neutral expert, agree to jointly retain the services of a mutually acceptable person (or persons) to serve in such capacity. Unless otherwise agreed, the costs of such services will be borne equally by the parties.

8. Waiver of Adversarial Remedies

The said parties, respectively, expressly waive their right to seek judicial or administrative remedies, including the right to a trial by jury in civil litigation or other adversarial proceedings. Either party, however, may seek judicial or administrative remedies for the enforcement of the terms of this agreement or to enforce any final award issued by the arbitrator under the provisions of this agreement.

9. Confidentiality of Process

This process constitutes a forum for the compromise and settlement of all issues in dispute within the meaning and scope of applicable federal and state rules of evidence governing the admission of evidence of compromise and settlement. Any and all communications of the parties, their representatives, advisors, and counsel, and of the MDR Manager and other neutral entities retained by said parties or their counsel for any purpose hereunder, including statements, offers,

views, and opinions, whether written or oral, shall be considered to be privileged and confidential communications protected by the Texas Alternative Dispute Resolution Procedures Act (Tex.Prac. & Rem. Code Ann. § 154.073 Vernon's 1990). Accordingly, such communications shall not be discoverable or admissible for any purpose, including impeachment, in any subsequent trial or other proceedings involving the said parties. Without waiving confidentiality, as hereinabove provided, the parties may agree to make an electronic or computer-assisted transcription of their settlement negotiations for the purpose of their own analysis and use in further settlement communications.

10. Final Settlement Agreement

If the parties reach a compromise and settlement with respect to all or a portion of the issues in dispute between them, the terms of the settlement, including any award made by an arbitrator as hereinafter provided, shall be incorporated in a final written agreement, and if appropriate, in a consent decree, which shall together be considered a compromise and settlement contract under the provisions of Tex.Civ. Prac. & Rem. Code §154.071.

11. Arbitration of Unresolved Issues (Optional Provision)

All issues not resolved by the parties' settlement negotiations will be submitted for final and binding determination by a neutral and impartial arbitrator jointly selected and retained by the parties. The MDR Manager will assist the parties in the selection procedure and in developing the procedural format and agreed timetable for the conduct of the arbitration process. If the parties are unable to agree upon an individual to be so selected, the MDR Manager will make such selection on behalf of both parties, and if both parties agree in writing, the MDR Manager may but will not be obligated to serve in such capacity. The decision and award of the arbitrator on the unresolved issues in dispute will be due within thirty (30) days after the submission of such issues to the arbitrator, and such decision and award will be incorporated in the parties written settlement agreement and will be enforceable as an agreed arbitration award under the provisions of the Texas General Arbitration Statute. Unless otherwise specified herein or agreed to in writing by the parties, any arbitration conducted under the provisions hereof will be governed by the then applicable rules of the American Arbitration Association.

12. Arbitrator's Decision and Award (Optional Provision)

In the event the parties submit unresolved issues to an arbitrator, as hereinabove provided, the arbitrator's decision and award may be enforced as a final judgment and award in any court of competent jurisdiction or as a valid supporting document in a letter of credit issued by any bank or financial institution.

13. Sharing of Expenses and Costs

The undersigned parties will be responsible for the payment of any and all costs and expenses incurred by the parties in connection with the initiation and conduct of this managed process, including but not limited to the cost and expense of the retention of the MDR Manager and, if needed, the cost of an arbitrator or other third-party neutral, and said costs and expenses will be shared equally by said parties unless otherwise agreed in writing by said parties.

14. Immunity of MDR Manager and Arbitrator

It is agreed that the MDR Manager and any other impartial third-party, including the arbitrator, who has been selected by the parties to determine any unresolved issues in the matter, will have the same immunity as a judge sitting in a court of law and that he/she will be held harmless and indemnified against any and all claims relating to or arising out of this process. It is also agreed that the said MDR Manager and any impartial third-party selected by the parties as hereinabove provided will never be subpoenaed or called as a witness by either party in any proceeding relating to or arising out of the conduct of this process.

Signed this ____ day of _____.

Party:

Counsel:

Party:

Counsel: