

## PRE-HEARING ORDER NO. 1

### RECORD OF \_\_\_\_\_ PRELIMINARY HEARING AND INITIAL SCHEDULING ORDER

#### *Preliminary Hearing*

A preliminary hearing in this arbitration was held by telephone conference call on \_\_\_\_\_, pursuant to notice duly provided. The hearing was attended by the duly appointed Arbitrator, Philip E. Cutler and the following representatives of the parties: \_\_\_\_\_, attorneys for claimant(s); and \_\_\_\_\_, attorneys for respondent(s). AAA Case Manager \_\_\_\_\_ convened the hearing and took roll, then exited the call.

#### *Purpose of Preliminary Hearing*

The purpose of the hearing was to (1) discuss various procedural matters concerning the case, and (2) establish a date for the Arbitration Hearing in this case.

#### *Actions Taken*

##### 1. Arbitrability; Statement of Claims, Issues and Relief

The Arbitrator confirmed his receipt and review of the parties' pleadings filed to date. The parties agree that their respective claims are arbitrable and that they have a sufficiently clear understanding of their respective claims to develop a discovery plan and otherwise prepare for the Arbitration Hearing.

As an aid to the Arbitrator's and the parties understanding of this case and the claims and defenses asserted, the parties agreed to provide each other and the Arbitrator directly, and the AAA, with an outline<sup>1</sup> of the claims (and defenses) and principal issues involved in this arbitration. Their respective statements shall be served and filed by 4pm Pacific Time on the date indicated below:

By claimant(s):

By respondent(s):

The parties are reminded that new claims (including counterclaims) and new defenses

may be asserted, and existing claims, counterclaims and defenses changed or amended, only with the Arbitrator's consent. Rule R-6, AAA Commercial Rules. The parties are further reminded that, depending on the monetary amount of relief sought under new or changed claims or counterclaims, additional AAA fees may be required to be paid. The monetary amount of relief sought should be quantified at the earliest possible time.

## 2. Arbitrator Disclosures and Related Entities/Conflict Lists

If they have not already done so, counsel for the parties shall promptly send to their client representative a copy of any disclosures the Arbitrator has previously made. Counsel shall do the same with any future disclosures the Arbitrator may make. The parties shall promptly bring to the attention of the AAA Case Manager (only . . . not the Arbitrator) any concerns they may have regarding any disclosure by the Arbitrator.

Any party that has not submitted a "related entities and checklist for conflicts" shall submit such a list, to the AAA and to the Arbitrator directly, on or before \_\_\_\_\_. The parties' respective checklists for conflicts should be seasonably supplemented as necessary. It is important that the Arbitrator know, at the earliest possible time, whether any additional disclosures need to be made.

## 3. Motions; Interim Relief

No party indicated an intention to seek interim relief or file a motion, except as noted in this paragraph.

[insert description of anticipated motion(s)]

The parties are reminded that dispositive motions – *e.g.*, motions to dismiss for failure to state a claim, motions for summary judgment or partial summary judgment – are not specifically permitted either by the Federal Arbitration Act or the AAA Commercial Rules, though they are referenced in Section 15 of the Revised Uniform Arbitration Act, which many states (including Washington) have adopted, and are, for a variety of reasons generally disfavored in arbitration. The Arbitrator ordinarily will permit a party to file a dispositive motion only when:

- (1) the parties' arbitration agreement expressly gives the parties the right to present dispositive motions;
- (2) all parties agree that the motion should be heard and are agreed on the stage of the proceeding when it should be heard; or

- (3) the Arbitrator concludes, after hearing from all interested parties, that considering such a motion at a particular stage of the proceeding is appropriate.

Factors important to the Arbitrator's determination include:

- (a) the factual and legal basis for the motion;
- (b) the facial likelihood of the motion succeeding;
- (c) the ability of the opposing party to respond at that point in time (*i.e.*, the opposing party's need for time to develop its case or obtain discovery); and
- (d) the relative burden on the parties in filing and responding to a dispositive motion versus the burden of proceeding through the hearing-on-the-merits.

The Arbitrator will normally require the party desiring to file a dispositive motion to demonstrate good cause by presenting him with a short brief addressing these matters. After reviewing that party's submission, the Arbitrator will either deny the request or require the opposing party to respond to it. If the Arbitrator requests a response from the opposing party, he will, after receiving that party's submission, ordinarily hold a further preliminary hearing, giving all parties an opportunity to argue their views orally as to the appropriateness of permitting the filing and consideration of a dispositive motion. If the Arbitrator determines that he should consider such a motion at that time, he will set a briefing and hearing schedule.

#### 4. Discovery

Unless the parties' arbitration agreement or applicable law or rules provide otherwise, all discovery shall be by agreement of the parties or order of the Arbitrator. The parties are referred to the Arbitrator's "I am your arbitrator" article for guidance. The parties shall first attempt to resolve directly any disputes concerning the timing, number or place of depositions, the identity of particular deponents, the appropriateness of any requested discovery and the adequacy of any party's response to discovery. Any unresolved disputes shall be brought to the attention of the Arbitrator (if the parties have agreed to participate in the accelerated exchange program) or the AAA Case Manager. *See* note 2, below, regarding disclosure of witnesses and exhibits.

#### 5. Arbitration Hearing Date

With the agreement of the parties, the Arbitrator set the Arbitration Hearing in this matter for \_\_\_\_ (\_\_) days, to wit: \_\_\_\_\_. The Hearing will be held at the Seattle Regional Office of the American Arbitration Association, One Convention Place, Suite 950, 701 Pike Street, Seattle, Washington.

The parties are reminded of the Arbitrator's policy regarding cancellation or postponement of a scheduled arbitration hearing: a cancellation fee (up to one-half the Arbitrator's estimated compensation) may apply if the arbitration hearing is canceled or postponed fewer than 14 days before the scheduled hearing date (fewer than 30 days for multi-day hearings). The parties are further reminded that a postponement or cancellation fee may also be imposed by the AAA.

6. Direct Communication with the Arbitrator

The parties may communicate directly with the Arbitrator in writing provided that a copy of the communication, and any attachments or enclosures, is provided to all parties by the same means and at the same time as the communication with the Arbitrator. The parties may communicate orally with the Arbitrator only if all other parties participate; the parties should initiate oral contact with the Arbitrator only when a matter is extremely urgent or time sensitive and should, under such circumstances, direct the oral communication first to the Arbitrator's office staff. The Arbitrator may change or amend the provisions of this paragraph at his discretion.

7. Pre-Hearing Schedule

Following extended discussion with the parties' representatives, the parties agreed to, and the Arbitrator approved, the following pre-hearing schedule, which will be applicable to the proceedings in this Arbitration. Dates for events or matters designated with an asterisk (\*) may be varied by agreement of the parties, provided that the Arbitrator is notified of the variance. Permission of the Arbitrator is required for variance of all other dates (indicated by **boldface**). The parties are referred to the Arbitrator's "I am your arbitrator" article for guidance on matters not discussed below.

Date

Action

**Promptly**

**Development of Discovery Plan.** The parties shall promptly confer and develop a mutually agreeable (1) discovery plan, including such depositions as the parties agree are necessary and appropriate, and (2) protective order, to the extent such is necessary or

desirable.

\_\_\_\_\_ **Related Entities/Conflicts List** due from \_\_\_\_\_ . To be provided to the AAA and the Arbitrator only. The parties' respective conflicts checklists should be seasonably supplemented as necessary.

\_\_\_\_\_ **Claimants' Statement of Claims, Contentions and Relief** is due.

\_\_\_\_\_ **Respondents' Statement of Claims/Defenses, Contentions and Relief** is due.

\_\_\_\_\_ *\*Claimants' Expert Disclosures due.* See Section 8, below.

\_\_\_\_\_ *\*Respondents' Expert Disclosures due.* See Section 8, below.

\_\_\_\_\_ **Mid-Case Status Conference**, by telephone conference call convened by the AAA.

\_\_\_\_\_ *\*Discovery Cut-Off.* All discovery shall be completed by this date. Unresolved discovery disputes shall be brought to the attention of the Arbitrator or Case Manager as soon as practicable but in any event sufficiently in advance of the discovery cut-off so that the dispute may be resolved and any permitted discovery completed by the discovery cut-off.

\_\_\_\_\_ **Initial List of Hearing Witnesses and Exhibits.**<sup>2</sup> On or before this date the parties shall (1) serve each other with their initial witness lists (name, address, and brief summary of anticipated testimony by subject area), together with an indication as to whether the witness will testify in person, by telephone, by affidavit or declaration, or by deposition<sup>3</sup> and (2) exchange with one another a legible copy of all documentary exhibits each reasonably anticipates offering into evidence at the Arbitration Hearing. Prior to \_\_\_\_\_, 2009 the parties shall confer to eliminate duplicate exhibits and to finalize their lists of witnesses who will testify at the Hearing.

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**Final Pre-hearing Conference** (via telephone conference call, arranged by the AAA) to discuss case status. In addition to status, the parties should be prepared to address the following subjects: (1) possible factual or legal stipulations that may simplify and/or shorten the Arbitration Hearing; (2) an agreed statement of the principal issues to be decided by the Arbitrator; (3) the form of Award to be used by the Arbitrator; (4) hearing management procedures; and (5) the amount of money each side will seek to recover in this arbitration.<sup>4</sup>

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**Joint Statement of the Evidence – Final Witness and Exhibit Lists.** On or before this date the parties shall confer and prepare and deliver directly to the Arbitrator, and file with the AAA, a Joint Statement of the Evidence, identifying (1) the witnesses (by name and brief summary of anticipated testimony by subject area) each party anticipates will testify at the Hearing, together with an indication as to whether the witness will testify in person, by telephone, by affidavit or declaration, or by deposition<sup>5</sup> and (2) the documents each party anticipates presenting as an exhibit at the Hearing. *See also* Section 9-A below.

The parties shall also exchange with one another a copy of the affidavit or declaration of a witness testifying only in that form.

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**Stenographic Record.** Any party desiring a stenographic record of the Hearing shall so notify the Arbitrator and the Case Manager by this date, shall make all arrangements therefore, and shall be solely responsible for all costs thereof. *See also* Section 9-D below.

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**Arbitration Briefs.** The parties shall serve each other and the Arbitrator directly, and file with the AAA Case Manager, any Arbitration Brief they desire the Arbitrator to consider. Briefs are not required, but the submission of succinct briefs addressing relevant issues (legal and factual) in the case, and/or applying applicable law to the facts, is encouraged. A copy of key decisional or other authority on

which a party relies shall be attached to that party's Arbitration Brief.

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**First Day's Witnesses.** Claimant shall serve respondent and the Arbitrator, and file with the AAA, a list of the witnesses claimant expects to testify at the first day of hearing and the order in which such witnesses are expected to testify. If claimant reasonably believes that claimant's case-in-chief will be completed by 3:30 pm on the first day of hearing, claimant shall so advise respondent, who shall then promptly serve claimant and the Arbitrator, and file with the AAA, a list of the witnesses respondent expects to testify at the first day of hearing and the order in which such witnesses are expected to testify.

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**Hearing begins; Statement of Relief Requested in Award; Exhibit Books.** On the first day of hearing, each party shall submit to the Arbitrator a claim-by-claim statement of the relief that party requests that the Arbitrator award. At closing argument the parties may serve and file an amended statement of relief requested. Also on the first day of hearing, the parties shall deliver to the Arbitrator one or more binders containing all of the parties' exhibits, with an exhibit list or index. The parties shall provide a separate set of exhibits for use at the Hearing by witnesses. *See* discussion in the Arbitrator's "I am your arbitrator" article and Section 9-A below. At the close of each Hearing day, the parties will advise each other and the Arbitrator of the order of witnesses expected to testify on the following day.

## 8. Expert Witnesses

To the extent that a party intends to present, or reasonably anticipates presenting, expert testimony at the Arbitration Hearing, the Arbitrator expects that party to notify the other party of the expert's qualifications, opinions, and the basis for such opinions, on the date set above for "Expert Disclosures." A copy of any report by the expert, should be provided sufficiently in advance of the discovery cut-off to enable the opposing party to evaluate the same and request reasonable discovery of the expert. If any expert prepares a report for the party calling the expert to testify, and a deposition of the expert is to be taken, the expert's report should be made available to counsel for the adverse party at least one week prior to the expert's deposition.

## 9. Arbitration Hearing Procedures

The following procedures will be followed at the Arbitration Hearing:

- A. *Exhibit Notebooks and Lists.* The parties shall prepare a consolidated set of hearing exhibits (in one or more binders) for the Arbitrator's use during the Hearing. These notebooks shall contain the exhibits that each party reasonably anticipates offering as documentary evidence at the Hearing. The exhibit notebooks should also contain an exhibit list identifying the exhibits in summary form. *See* form attached. A separate binder of exhibits shall be prepared for use by witnesses testifying at the Hearing. The parties shall cooperate with each other so that duplicate exhibits are not presented. Exhibits shall be numbered with Arabic numbers (*e.g.*, 1, 2, 3) sequentially (or in a range...claimant's exhibits = 1-100, respondent's exhibits = 200-299); letter or other designations of the party offering the exhibit shall not be used.
- B. *Arbitration Hearing Day.* Although the length of the Hearing day is subject to adjustment as needed, the parties may expect that the Hearing will begin at 9:00 a.m. and conclude at 4:30 - 5:00 p.m. each day, with a 1 to 1½ hour lunch break.
- C. *Next Day's Witnesses.* The party presenting evidence shall give notice to the other party at the close of each hearing day hearing the names of the witnesses who will be called to testify the next day and of the order in which the witnesses will be called. If that party reasonably anticipates that it will conclude its case prior to 3:30pm the next day, it shall so advise the other party and that party shall then notify the other party of the names of the witnesses it will call to testify the next day and of the order in which those witnesses will be called.
- D. *Stenographic Record.* Any party desiring a stenographic record of the Hearing shall so notify the Arbitrator and the Case Manager by the date set forth above in this Scheduling Order, shall make all arrangements therefore, and shall be solely responsible for all costs thereof. If all or any portion of the Hearing is reported, no party may quote from the transcript in examination of any witness or in argument unless a copy thereof is provided to all other parties and to the Arbitrator at no cost. Notwithstanding the foregoing, the court reporter's report of proceedings will not be the official record of the Hearing except as provided by Rule

R-26, AAA Commercial Rules or pursuant to order of the Arbitrator.

- E. *Interpreters.* It shall be the responsibility of the party presenting a witness whose first language is not English, or who is not fluent in English, to provide a qualified interpreter. Any dispute concerning the qualifications of the interpreter should be brought to the attention of the Arbitrator (through the AAA Case Manager) for resolution prior to the commencement of the Arbitration Hearing.
- F. *Statement of Relief Requested in Award.* On the first day of hearing, each party shall submit to the Arbitrator a claim-by-claim statement of the relief that party requests that the Arbitrator award.
- G. *Form of Award.* The parties agreed that the Award in this case should be a \_\_\_\_\_ award [; they also agreed that the Arbitrator should \_\_\_\_\_].
- H. *Attorneys' Fees and Costs.* Issues concerning a party's entitlement to attorneys' fees and costs, and the amount of such fees and costs, will be addressed after the hearing on the merits is concluded and a determination made as to which party is the prevailing party. However, if **any** party claims to be entitled to recover its attorneys' fees, whether under statute or contract, the Arbitrator will expect **each** party to provide all other parties and the Arbitrator, within 1 week after the Hearing, with a statement of the number of hours of legal professional time,<sup>6</sup> hourly rate, and the book value of that time, by billing professional, devoted to the case through the last day of hearing. For example:

Jane Doe (associate)	125 hrs	\$200/hr	\$25,000
Richard Roe (partner)	200 hrs	\$300/hr	\$60,000
Elizabeth Jones (paralegal)	100 hrs	\$100/hr	
			\$10,000
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Totals	425 hrs		\$95,000

A schedule for submitting a formal application for attorneys' fees and costs, and papers in opposition, will be established after the Arbitrator has made a decision on the merits. That decision will normally be reflected in a Partial Award.

## 10. Hearing Management Procedures

The parties expressed a willingness to consider procedures that might promote brevity and time efficiency in the administration of the Arbitration Hearing. Such procedures might include imposition of either an overall time limit on the duration of the entire Hearing, coupled with the use of a “chess clock” to allocate the parties’ time fairly, and/or separate time limits on discrete portions of the Hearing (*e.g.*, openings, closings, etc.). Such procedures might also include a requirement that the direct testimony of all witnesses, or perhaps only the expert witnesses or key party-sponsored witnesses, be submitted in writing (and exchanged in advance of the Hearing), coupled with a brief (*e.g.*, 30 minutes) opportunity for live supplemental direct examination to “introduce” the witness and highlight key points of his or her written narrative.

Because efficient and economical dispute resolution is one of the principal reasons parties turn to arbitration, the Arbitrator appreciates and encourages the parties’ willingness to explore such measures. Although no decision on this has been reached to date, it is possible that the Arbitrator may choose to adopt some or all of these measures on his own initiative if the parties are unable to agree upon them. The Arbitrator would strongly prefer, however, for the parties themselves to agree upon the hearing management procedures they believe are best suited to this particular case. Although the parties are encouraged to discuss the potential need for hearing management procedures during the discovery period, and bring any issues concerning that subject to the attention of the Arbitrator promptly, this subject will be discussed at the preliminary hearing to be held \_\_\_\_\_.

#### 11. Additional Preliminary Hearings

If at any time the parties believe it would be useful to schedule additional preliminary hearings in this matter at any time with the Arbitrator, they are directed to so advise the Case Manager for this case.

#### 12. Direct Contact with Arbitrator

There shall be no oral or written communications by any party directly with the Arbitrator *except* as permitted by the provisions of Section 6 above or a further order of the Arbitrator.

#### 13. Miscellaneous

##### *Arbitrator’s Fee for Cancellation or Postponement of Arbitration Hearing.*

The parties are reminded that a cancellation fee (up to one-half the Arbitrator’s estimated compensation) may apply if the hearing is

canceled or postponed on short notice (fewer than 30 days notice for multi-day hearings, fewer than 14 days notice for hearings of 1 day or less). The parties are further reminded that a postponement or cancellation fee may also be imposed by the AAA.

*Time for Completion of Task.* Unless a different time is set by schedule or order, all actions required to be done on or before a date certain shall be done no later than 4:00 pm Pacific Time that date.

*Service by Fax.* Documents to be served on a party or the Arbitrator, or filed with the AAA Case Manager, may be sent by confirmed facsimile transmission if the number of pages to be transmitted, including the cover page, is *15 pages or less*. **Longer documents may be sent by fax only with the prior consent of the recipient.**

*Service by email.* Documents to be served on a party or the Arbitrator, or filed with the AAA Case Manager, may be sent by email. **Any such documents should be sent in PDF (preferred) or MS Word (acceptable) format. Please confirm with your opposition and with your Case Manager that they have the capability of opening any documents you send.** Notwithstanding the foregoing, no single email transmission may exceed 2MB of data. Lengthy documents and filings containing more than 2MB of data in the aggregate should be served in hard-copy only (via US Mail or expedited/messenger delivery).

*Notification to AAA if Case is Settled.* The Arbitrator encourages the parties to attempt to resolve this dispute prior to Hearing. If this dispute is resolved at any time by settlement, the parties are directed to promptly notify the AAA Case Manager assigned to this case.

### ***Follow-Up by Case Manager***

The Case Manager is requested to promptly send:

- (1) formal notice to the parties of the date and time for the [Mid-Case Status Conference (\_\_\_\_\_) and] Final Pre-Hearing Conference (\_\_\_\_); and
- (2) formal notice to the parties of the dates established for the arbitration Hearing in this matter (\_\_\_\_\_).

The Case Manager is also requested to reserve a hearing room in the AAA's Seattle Office for the date(s) set aside for the Hearing.

IT IS SO ORDERED.

Dated:

PHILIP E. CUTLER  
*Arbitrator*

