

USAGE NOTE:

Following our preliminary hearing, I commonly enter a scheduling order of this sort in all AAA-administered arbitrations. A similar form is used in NASD-administered arbitrations and in private arbitrations.

Phil Cutler

AMERICAN ARBITRATION ASSOCIATION

COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

_____, *Claimant,*

- and -

_____, *Respondent*

Case Number 75 - _____

PREHEARING ORDER NO. 1

**RECORD OF _____, 2005 PRELIMINARY HEARING
AND INITIAL SCHEDULING ORDER**

Preliminary Hearing

A preliminary hearing in this arbitration was held by telephone conference call on _____, 2005, pursuant to notice duly provided. The hearing was attended by the duly appointed Arbitrator, Philip E. Cutler; _____, of _____, attorneys for claimant _____; _____ of _____, attorneys for respondent _____; and AAA Case Manager _____.

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. Statement of Claims, Issues and Relief

The Arbitrator confirmed his receipt and review of the parties' pleadings (_____, _____, _____). The parties agreed that (1) the claims asserted are arbitrable and (2) their respective statements of claims and defenses are sufficiently clear to enable them to develop a discovery plan and otherwise prepare for the Arbitration Hearing.

[OPTIONAL: As an aid to the Arbitrator's understanding of this case, the parties agreed to provide, by _____, 2005, each other and the Arbitrator directly, and the AAA, with a short (3-7pp) outline of the claims and principal issues involved in this arbitration, a statement of their contentions and a summary of the relief sought.]

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 provided the AAA with a list of related entities, persons, and key potential witnesses shall submit such a list to the AAA, for distribution to the Arbitrator only, on or before _____, 2005. These lists 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. 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.

4. Accelerated Exchange Program

The parties agreed to participate in the AAA's "accelerated exchange program." The Case Manager will send the parties a form of agreement, which the parties shall promptly sign and return. After collecting the signed papers, the Case Manager will confirm to the parties and the Arbitrator that all parties have agreed to participate in the accelerated exchange program and thereafter the parties may communicate directly with the Arbitrator as provided in the accelerated exchange

program agreement.

5. 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.

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. The parties are referred to the Arbitrator's "I am your arbitrator..." article for further information concerning use of particular discovery methods.

_____, 2005

Related Entities/Conflicts List. Any party that has not provided the AAA with a list of related entities, persons, and key potential witnesses shall submit such a list to the AAA, for distribution to the Arbitrator only. These lists should be seasonably supplemented as necessary.

_____, 2005

[OPTIONAL: Statement of Claims, Contentions and Relief. On or before this date, the parties shall file with the AAA and serve each other and the Arbitrator directly with an outline of the principle issues presented in this arbitration and a short statement of their respective claims,

contentions, and the relief sought.]

_____, 2005

[H-90 DAYS] Deadline for Amendment of Claims/Defenses. Any party desiring to amend its claims or defenses shall, on or before this date, serve all other parties and the Arbitrator, and file with the AAA, the proposed amendment. Other parties affected by the proposed amendment shall serve and file any objection no later than 14 calendar days after service. If no objection is made, the requesting party's pleadings shall be deemed amended. If objection is made, the Arbitrator shall decide whether to allow the amendment and advise the parties and the AAA Case Manager; a hearing will not be scheduled unless the Arbitrator deems it appropriate. The parties are reminded that once a claim has been quantified, payment of the appropriate AAA filing fee is required in order for that party's claim to be heard in the arbitration.

Until _____, 2005*

[H- 4 WEEKS] *Discovery Period. With the agreement of the other party, any party may take the deposition of a party or non-party. Counsel are expected to work cooperatively with each other to schedule *all* depositions. With the agreement of the other party, any party may request the production of further documents. The parties shall first attempt to resolve directly any disputes concerning the timing, number or place of depositions, the identity of particular deponents, or the appropriateness of further discovery. Any unresolved disputes shall be brought to the attention of the AAA Case Manager, who shall contact the Arbitrator and schedule a hearing to resolve the dispute. *See* note 1, below, regarding disclosure of witnesses and exhibits.

_____, 2005
___ PT

[**OPTIONAL**: Further preliminary hearing (via telephone conference call, initiated by the AAA) to discuss case status.]

_____, 2005*

[**H- 4 WEEKS**] **Discovery Cut-Off*. All discovery shall be completed by this date. Unresolved discovery disputes shall be brought to the attention of the 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.

_____, 2005

[**H- 3 WEEKS**] **Initial List of Hearing Witnesses and Exhibits.**¹ 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 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 _____ [**H-10 DAYS**], 2005 the parties shall confer to eliminate duplicate exhibits and to finalize their lists of witnesses who will testify at the Hearing.

_____, 2005

[**H- 2 WEEKS**] **Final Pre-hearing Conference**

¹ Witnesses or exhibits – other than rebuttal witnesses, demonstrative exhibits, rebuttal exhibits and documents used for impeachment – disclosed for the first time after the discovery cut-off will only be permitted to testify – or be admitted – by agreement of the parties or with the permission of the Arbitrator. The parties are reminded of their obligation to disclose witnesses likely to testify, and documents likely to be used as exhibits, sufficiently in advance of the discovery cut-off to enable the opposing party to undertake appropriate inquiry.

_____PT

(via telephone conference call, initiated 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.²

_____, 2005

[H- 10 DAYS] 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 and (2) the documents each party anticipates presenting as an exhibit at the Hearing.

The parties shall cooperate with each other so that duplicate exhibits are not presented. Exhibits shall be placed in binders with an exhibit list in the form attached. 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

² The parties are reminded that once a claim has been quantified, payment of the appropriate AAA filing fee is required in order for that party's claim to be heard in the arbitration.

the party offering the exhibit shall not be used.

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

Deposition excerpts shall also be identified; the opposing party shall cross-designate deposition excerpts and provide opposing counsel with such cross-designations no later than the business day prior to Arbitration Hearing.

_____, 2005

[H- 1 WEEK] Stenographic Record. Any party desiring a stenographic record of the Hearing shall so notify the Case Manager by this date, shall make all arrangements therefore, and shall be solely responsible for all costs thereof.

_____, 2005

[H- 1 WEEK] 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.

_____, 2005

[H-2 BUSINESS DAYS] Cross-Designation of Deposition Excerpts. To the extent any party has designated excerpts of any deposition, on or before this date all other parties shall serve each other party with a designation of those portions of a deposition that party desires to cross-designate.

_____, 2005

[H-1 BUSINESS DAY] First Day's Witnesses. Claimant shall serve respondent 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 serve claimant 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.

_____, 2005

[H] 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. 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.

6. 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, as well as a copy of any report by the expert, 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.

7. 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 notebooks) 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.
- 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 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.

- 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. *Attorneys' Fees.* Issues concerning a party's entitlement to attorneys' fees and the amount of such fees 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, 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	125 hrs	\$200/hr	\$25,000
Richard Roe	200 hrs	\$250/hr	\$50,000
	-----		-----
Totals	325 hrs		\$75,000

A schedule for submitting a fee application and papers in opposition will be established after the Arbitrator has made a decision on the merits.

8. [OPTIONAL: 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. This subject will be discussed at the preliminary hearing to be held _____, 2005.]

9. 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.

10. Contact with Arbitrator

There shall be no oral or written communications by any party directly with the Arbitrator *except* as permitted by the accelerated exchange program agreement, this Scheduling Order or a further order of the Arbitrator. All other communications shall be addressed initially to the AAA Case Manager.

11. Miscellaneous

- A. *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.
- B. *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.
- C. *Service by Fax.* Documents to be served on a party or filed with the Arbitrator or 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.**
- D. *Service by email.* Documents to be served on a party or filed with the Arbitrator or the AAA Case Manager may be sent by email. **Any such documents should be sent in MS Word or PDF format. Please confirm with your opposition and with your Case Manager that they have the capability of opening any documents you send.**
- E. *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 a copy of this record of hearing to all parties and to prepare and send to all parties formal notice of the dates established for the Arbitration Hearing in this matter (_____, 2005) [and of the further preliminary hearing scheduled for _____, 2005]. The Case Manager is also requested to promptly send to all parties and the Arbitrator the

agreement for participation in the accelerated exchange program.

IT IS SO ORDERED.

Dated: _____

PHILIP E. CUTLER
Arbitrator

