

The below represents my standard Pre-Hearing Order No. 1 & Initial Scheduling Order, entered following the initial preliminary hearing conference, in AAA arbitrations in which I am sole arbitrator. I use a substantially similar order in ad hoc (unadministered) arbitrations and, with the concurrence of my fellow panel members, in three-arbitrator cases in which I am the Chair.

AMERICAN ARBITRATION ASSOCIATION
COMMERCIAL ARBITRATION TRIBUNAL

In the Matter of the Arbitration between

_____, *Claimant*

vs.

_____, *Respondent*

AAA Case Number: _____

Arbitrator: Philip E. Cutler

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; Governing Rules and Law

- A. The Arbitrator confirmed his receipt and review of the parties' pleadings filed to date. The parties agree that their respective claims and defenses are arbitrable, there are no unsatisfied conditions precedent to arbitration, and they have a sufficiently clear understanding of them to develop a discovery plan and otherwise prepare for the Arbitration Hearing.
- B. 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 outline¹ of the claims (and defenses) and principal issues involved in this arbitration. Their respective statements shall be served and filed no later than the date indicated below:

By claimant(s):

By respondent(s):

- C. 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.
- D. The rules governing this arbitration are the AAA's Commercial Rules [as supplemented by _____]. The parties are referred to [the Federal Arbitration Act, 9 U.S.C. and] the Washington Uniform Arbitration Act, RCW Chapter 7.04A, for other legal principles applicable to this arbitration.

¹ The Arbitrator suggests a short (3-7 pp), "plain English" statement. The Arbitrator encourages the parties to include in their statements a statement of their factual and legal contentions and a summary of the relief sought. The parties are free, however, to provide their respective statements in whatever form and length they deem most appropriate.

2. Arbitrator Disclosures and Related Entities/Conflict Lists

- A. 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.
- B. 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

- A. No party indicated an intention to seek interim relief or file a motion, except as noted in this Section.
- B. [insert description of anticipated motion(s)]
- C. 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 or letter (3-5 pages) 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

- A. Basic discovery shall be as provided below in Section 7 (initial and supplemental disclosure of fact witnesses and exchange of reliance documents).
- B. Unless the parties' arbitration agreement or applicable law or rules provide otherwise, all discovery shall be by agreement of the parties and confirming order of the Arbitrator. The parties are directed to promptly discuss among themselves and attempt to agree on such other discovery as is necessary and appropriate for this case, including the timing and content of expert disclosures and the response time for written discovery. They shall provide to the Arbitrator a written report of their agreements, and any areas of disagreement, no later than sixty (60) calendar days from the date of this Order (*i.e.*, no later than _____); the the Arbitrator shall thereafter

enter an order reflecting the discovery that shall be permitted in this case. Changes to the approved discovery plan must be approved by the Arbitrator. Should there be any later disputes concerning discovery (*e.g.*, the timing, number or place of depositions, the identity of particular deponents, the appropriateness of any requested discovery or the adequacy of any party's response to discovery), the parties shall first attempt to resolve any disputes directly. Any unresolved disputes should be brought promptly to the attention of the Arbitrator for resolution. *See* note 4, below, regarding disclosure of witnesses and exhibits.

5. Arbitration Hearing Date; Continuances

- A. 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 Arbitrator's office: 1191 Second Avenue, 18th Floor, Seattle, Washington.
- B. The Arbitrator will ordinarily not continue or postpone the Hearing except for good cause shown; good cause is not necessarily shown simply by a stipulation of the parties. The Arbitrator reserves the right to require a client representative of each party to attend any further preliminary hearing to discuss a continuance or postponement of the Hearing.
- C. 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

- A. 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, and the AAA, by the same means and at the same time as the communication with the Arbitrator.
- B. 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.

- C. Documents to be served on the Arbitrator shall be served by email, *provided, however*, that any document served by email shall also be provided to the Arbitrator in hard-copy promptly thereafter. Documents sent by email should be in PDF format; no single set of email attachments shall comprise more than 2MB of data. The address for the Arbitrator is as follows:

Philip E. Cutler 1191 Second Avenue, Suite 1800
 Seattle, WA 98101
philcutler@cnhlaw.com

A copy of any email communication to the Arbitrator should also be directed to his paralegal: Amylyn Riedling (amylyn@cnhlaw.com).

- D. The Arbitrator may change or amend the provisions of this Section 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 the following events or matters may not be varied by agreement of the parties; permission of the Arbitrator is required.

| <u>Date</u> | <u>Action</u> |
|-----------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 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.

_____ **Claimant’s Statement of Claims, Contentions and Relief** is

due.

Respondent's Statement of Claims/Defenses, Contentions and Relief is due.

Initial Disclosure of Fact Witnesses and Disclosure and Exchange of Reliance Documents² is due.

Initial *Supplemental* Disclosure of Fact Witnesses and Disclosure and Exchange of Reliance Documents is due.³

Report of Proposed Discovery Plan is due. This document should describe the discovery vehicles the parties have agreed are appropriate, any limitations on particular discovery vehicles, the number of depositions, etc. If the Arbitrator has any question or concern, a further preliminary hearing will be scheduled – perhaps with client representatives attending – to discuss the matter. The Arbitrator will enter an appropriate order after reviewing the parties proposed discovery plan.

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

² The parties are expected to provide (a) the name and last-known contact information for all persons reasonably believed to have knowledge or information concerning the merits of the parties' claims and defenses and (b) a legible copy of all documents they expect to rely on in support of their claims and defenses. The parties are expected to seasonably supplement their disclosures throughout the case and, in any event, sufficiently in advance of the discovery cut-off to allow the other party to seek further discovery. See also note 4 below.

³ After reviewing the other party's initial disclosures, the parties are expected to review the adequacy of their disclosures in light of those disclosures. These disclosures are intended to broaden a party's initial disclosures to the extent required. The parties are expected to seasonably supplement their disclosures throughout the case and, in any event, sufficiently in advance of the discovery cut-off to allow the other party to seek further discovery. See also note 4 below.

permitted discovery completed by the discovery cut-off.

Initial List of Hearing Witnesses and Exhibits.⁴ 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 deposition⁵ 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 _____ the parties shall confer to eliminate duplicate exhibits and to finalize their lists of witnesses who will testify at the Hearing. See Joint Statement of the Evidence, below.

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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; (5) when exhibits should be presented to the Arbitrator; and (6) the amount of money each side will seek to recover in this arbitration, and the nature of any other relief sought.⁶

⁴ 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.

⁵ A party proposing to submit a witness's deposition testimony should identify the portions it desires to present. Cross-designations should be identified by all other parties so that a final list of deposition designations can be identified by the date for the Joint Statement of the Evidence.

⁶ 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.

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 listing (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 how the witness’s testimony will be presented (*e.g.*, in person, by telephone or video conference, by affidavit or declaration, or by deposition⁷) and (2) the documents each party anticipates presenting as an exhibit at the Hearing. See also Section 8-A below. Exhibits shall not be provided to the Arbitrator at this time; they shall be provided to him on the first day of Hearing.

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

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. **Note:** The transcript will *not* be the official record of the Hearing except under the terms and conditions of Rule R-26, AAA Commercial Rules.

Hearing Briefs. The parties shall serve each other and the Arbitrator directly, and file with the AAA Case Manager, any 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 Hearing Brief.

First Day’s Witnesses. Claimant shall serve respondent and the Arbitrator, and file with the AAA, a list of the witnesses

⁷ Designations and cross-designations of deposition testimony should be exchanged as part of this process.

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.

Hearing begins; Statement of Relief Requested in Award; Exhibit Books. On the first day of hearing, each party shall submit to the Arbitrator a written, 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, unless to do so would prejudice any other party. 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. 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. Arbitration Hearing Procedures

The following procedures will be followed at the Arbitration Hearing:

A. *Exhibit Notebooks and Lists.*

- (1) 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. Each party should have its own set of exhibits.
- (2) 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. The Arbitrator encourages the parties to arrange exhibits chronologically and to consider the desirability of a separate (but not duplicative) set of “core” exhibits which will be referred to frequently during the Hearing.

(3) The parties may highlight – *in the Arbitrator’s and other parties’ exhibit binders only* – key portions of any exhibit if they choose; any highlighting should be shared with the other party. The binder(s) for use by witnesses shall contain no highlighting.

- B. *Rules of Evidence.* In the absence of the parties’ agreement on the application of other rules, the Arbitrator will follow Rule R-31, AAA Commercial Rules, concerning the admission of evidence.
- C. *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.
- D. *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.
- 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. *Form of Award.* [The parties agreed that the Award in this case should be a “_____” award.] [The form of award will be discussed at a further preliminary hearing; if the parties cannot agree on the form of award to be used, the Arbitrator will use the form of award he believes most appropriate for this case.]

- 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. That decision will normally be reflected in a Partial Award.

9. Hearing Management Procedures

- A. 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.
- B. 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 _____.

10. Additional Preliminary Hearings

If at any time any party believes 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 Arbitrator and the Case Manager.

11. Notification to Arbitrator and 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 Arbitrator and the AAA Case Manager.

Follow-Up by Case Manager

The Case Manager is requested to promptly send formal notice to the parties of :

- (1) the date and time for the [Mid-Case Status Conference (_____) and] Final Pre-Hearing Conference (_____); and
- (2) the dates established for the arbitration Hearing in this matter (_____).

IT IS SO ORDERED.

Dated: _____

PHILIP E. CUTLER
Arbitrator

DECLARATION OF SERVICE

I certify that on this date I served a copy of the foregoing document (including the attached exhibit list) on all parties by emailing a PDF version of the executed document to counsel for the parties:

_____, attorney for claimant: _____@_____
_____, attorney for respondent: _____@_____

and to the American Arbitration Association:

_____, Case Manager: _____@adr.org

Dated: _____

PHILIP E. CUTLER
Arbitrator

