

Following the initial preliminary hearing conference in FINRA-administered cases in which I am the sole arbitrator or the chair, I circulate a scheduling order using the following form, memorializing the discussion at the IPHC. If the parties do not agree to "direct communication", section 9 is changed accordingly. I do, however, encourage parties to agree to direct communication as doing so makes the process more expedient, especially in cases heard by a panel of 3 arbitrators.

INITIAL PRE-HEARING CONFERENCE
Scheduling Order

FINRA DISPUTE RESOLUTION

PRE-HEARING ORDER NO. 1 – INITIAL PRE-HEARING CONFERENCE SCHEDULING ORDER & ORDER GRANTING REQUEST FOR RULE 12211 [13211] COMMUNICATIONS

IN THE MATTER OF:

CLAIMANT(S):

RESPONDENT(S):

CASE #:

An initial pre-hearing conference was held by telephone conference call in the above-captioned matter on _____, 2014. Participating in the hearing were:

Chair/Presiding Arbitrator: Philip E. Cutler, Esq., of Seattle, WA

Non-Public Arbitrator: _____ of _____, Seattle, WA

Public Arbitrator: _____ of _____, Seattle, WA

Attorney for Claimant(s): _____, Esq., of _____, Seattle, WA

Attorney for Respondent(s): _____, Esq., of _____, Seattle, WA

FINRA DR Staff: _____

The following was agreed upon during the conference and is now entered as the Initial Pre-hearing Conference Scheduling Order:

(1) Panel Composition. The parties accepted the panel's composition.

- (2) **Discovery Disputes.** The parties agreed that discovery disputes may be resolved by the Chair/Presiding Arbitrator without involving the full Panel, unless the Chair/Presiding Arbitrator determines, in his discretion, that the involvement of the full Panel is desirable. Notwithstanding the foregoing, any party may request that a discovery dispute be resolved by the full Panel; such a request should be directed to the Chair/Presiding Arbitrator; the Chair/Presiding Arbitrator may grant or deny such a request in his discretion.
- (3) **Discovery – General.** The parties are directed to tailor all discovery requests to the issues raised by this case and, to the extent possible, cooperate in the making of and responding to discovery. All parties shall promptly respond to any discovery request permitted by the *Code of Arbitration Procedure* or (for customer cases) the *Discovery Guide*. Discovery abuse shall not be tolerated. The parties are directed to bring unresolved discovery disputes promptly to the Chair/Presiding Arbitrator for resolution.
- (4) **Discovery – Subpoenas.** Any party desiring issuance of a subpoena for discovery purposes shall first furnish all opposing parties to this proceeding with a draft of the subpoena and the parties shall cooperate to resolve any objections. Issuance of a subpoena shall be requested by letter to the Chair/Presiding Arbitrator (with a copy served contemporaneously on all parties and FINRA DR), enclosing the original subpoena desired to be issued; the requesting party shall indicate in the cover letter whether the subpoena is objected to by any party and, if so, the nature of the objection. If any party disagrees with the requesting party's description of an opposing party's objection (or statement that there are no objections), that party may, within ten (10) calendar days of receipt of the requesting letter, file with FINRA DR (and serve all other parties and the Chair/Presiding Arbitrator) a succinct statement of objections. The requester of the subpoena may serve and file a reply within a further ten (10) calendar days. *See* Rule 12512 (customer cases) and Rule 13512 (industry cases). The Chair/Presiding Arbitrator shall then determine whether to issue the subpoena and so advise all parties and FINRA DR. An oral hearing shall not be held unless the Chair/Presiding Arbitrator determines that such a hearing would aid him in making a decision.
- (5) **Arbitration Hearing/Form of Award.**
- (a) Hearing Date, Time and Location: The Arbitration Hearing in this matter shall begin at 9am PT on _____ **day**, _____, **in Seattle, WA.** This hearing shall be for the purpose of receiving the parties' proofs and evidence on the merits of the dispute. The hearing shall continue on _____ **day through _____ day**, _____ - _____ as necessary. FINRA DR shall give all parties and members of the Arbitration Panel timely notice of the exact location of the hearing.
- (b) Hearing Logistics: The parties are referred to Section 7 below (*Joint Statement of the Evidence and Hearing Begins/Exhibits*) for presentation of exhibits to be

offered at the Hearing. Unless otherwise directed: each Hearing day shall begin promptly at 9am and conclude at approximately 5pm, with periodic breaks during the day as necessary; the parties shall argue the case orally after each side has rested. Other hearing logistics may be discussed at the Final Pre-Hearing Conference established below in Section 7.

- (c) Form of Award: No later than twenty (20) days prior to the first day of the Arbitration Hearing (*see* Rule 12514 (consumer cases) and Rule 13514 (industry cases)), the parties may jointly request, in writing, that the Arbitrators enter an explained decision (*see* Rule 12904 (consumer cases) and Rule 13904 (industry cases)).

(6) Motions.

- (a) Non-Discovery Motions: [The parties do not anticipate any non-discovery motions.] [Respondents anticipate filing a motion to dismiss; any such motion shall be considered according to the standards set out in Rule 12504 (customer cases) or Rule 13504 (industry cases). If a briefing and hearing schedule for the motion was discussed and agreed upon, the schedule is set forth below in Section 7 of this Order. If no briefing schedule was agreed upon, the parties are referred to Rule 12504 (customer cases) or Rule 13504 (industry cases) for the due dates for briefs. Although the parties do not anticipate any other non-discovery motions, if any party seeks relief by motion (other than with respect to discovery), the parties shall follow Rule 12503 (customer cases) or Rule 13503 (industry cases).]
- (b) Discovery Motions: If a date for consideration of discovery motions is established, that date will appear below in Section 7. If a date is not established, the parties are directed to bring any unresolved discovery disputes to the attention of the Chair/Presiding Arbitrator as soon as possible. Discovery motions and deadlines for briefs shall be governed by Rules 12509 and 12503 (customer cases) or Rules 13509 and 13503 (industry cases). However, in order to facilitate the Chair/Presiding Arbitrator's consideration of discovery motions, the above rules are modified as follows with respect to disputes concerning responses to a total of five (5) or more Requests for Production or Requests for Information:¹
- Motion: The moving party's motion shall include (i) an introductory statement setting forth the context in which the discovery dispute arose and summarize the relief requested and (ii) for each discovery request that is the subject of the motion, set forth the full text of the discovery request, immediately followed by the other party's response, a description of the moving party's position and the legal authority and argument supporting the requested relief. The moving party shall

¹ The procedure described here is essentially that adopted by the U.S. District Court for the Western District of Washington. *See* W.D. Wash. Local Rule 37(a)(1)(B)(i)-(iv). However, the time-lines are those in the FINRA rules and no page limitation is imposed

provide the motion to other parties electronically in MS Word in order to facilitate the opposing party's opposition. A copy shall be filed with FINRA DR.

- **Opposition:** Using the moving party's electronic MS Word document, the responding party shall insert after the moving party's introductory statement any introductory statement of its own and, immediately following the moving party's position statement and argument in support of the relief requested, insert the opposing party's rebuttal to the relief requested. If the opposing party no longer objects to the relief requested it shall expressly so state. The new document shall be provided to the moving party electronically in MS Word to facilitate its reply. A copy shall be filed with FINRA DR.
- **Reply:** Using the opposing party's submission, the moving party shall insert any reply to the opposing party's position statement and argument immediately following that portion of the document.
- The moving party shall thereupon serve the Chair/Presiding Arbitrator with the complete document containing both parties' introductory statements, the text of the request and challenged response, and their respective position statements and argument. *See* Section 9(d)-(f) below. A copy shall be filed with FINRA DR and served on all other parties.

(7) **Pre-Hearing Schedule.** The parties shall adhere to the following pre-hearing schedule with respect to this Arbitration:

Promptly	<i>Commencement of Discovery.</i> The parties may immediately, and are encouraged to, commence discovery permitted by the <i>Code of Arbitration Procedure</i> and, for customer cases, the <i>Discovery Guide</i> .
_____, 2014	[IPHC + 60 days] <i>Amendments to Claims or Defenses.</i> No later than this date, any party may seek permission of the Arbitrators to amend their claims or defenses. Such a request will ordinarily be granted unless the Arbitrators determine that doing so would prejudice another party or would likely cause significant disruption to the arbitration.
_____, 2014	[H-120 days] <i>Last Date to Serve Discovery Requests to Parties.</i> All discovery requests must be served and filed on or before this date. The parties are directed to bring unresolved discovery disputes to the Chair/Presiding Arbitrator for resolution as soon as possible.

- _____, 2014
at ____ PT **Mid-case Status Conference.** The parties, and the Chair/Presiding Arbitrator only, shall participate in a pre-hearing conference call, to be arranged by FINRA DR. Principal topics to be discussed shall be identified by the Chair/Presiding Arbitrator but shall include the parties' progress in preparing the case for Hearing and whether the Hearing Date shall be maintained and the number of days set aside for Hearing adequate.
- _____, 2014 [H-90 days] **Last Date to Request Third-Party Discovery Subpoenas.** Any request for issuance of a subpoena to a third-party must be made by this date.
- _____, 2014 **Last Date to File Discovery Motions.**
- _____, 2014 **Hearing on Discovery Motions.**
- _____, 2014 [H-20 days] **20-Day Exchange of Witness Lists and Exhibits.** The parties shall serve each other party with a list of witnesses (with contact information and a brief summary of each witness's anticipated testimony, and an indication of how the witness shall testify – *e.g.*, in-person, by telephone, etc.) whom that party reasonably anticipates shall be called to testify at the Hearing. The parties shall also serve each other party with a list, and a copy,² of all exhibits that party reasonably anticipates offering into evidence at the Hearing.³ The parties shall make a good faith effort to identify as exhibits only those documents necessary to present their case. An exhibit list identifying as potential exhibits all documents produced in the case (or produced by a designated party) is not acceptable. A copy of the parties' witness and exhibit lists shall be filed with FINRA DR and served on each arbitrator directly.
- _____, 2014 [H-20 days] **Deadline to Request Explained Decision.** If the parties jointly desire that the Arbitrators enter an explained decision (*see* Rule 12904 (customer cases) or Rule 13904 (industry

² If a proposed exhibit has previously been produced in discovery, in lieu of providing a copy the offeror may identify the exhibit by production number or other identifying information that shall permit other parties to locate the document.

³ Witnesses or exhibits – other than rebuttal witnesses, demonstrative exhibits, rebuttal exhibits and documents used for impeachment – disclosed for the first time after this date shall only be permitted to testify – or be admitted – by agreement of the parties or with the permission of the Arbitrators.

cases)), they must jointly make such a request, in writing, to the Arbitrators by this date. Rule 12514 (customer cases) and Rule 13514 (industry cases). If a joint request for an explained decision is not timely filed, the Arbitrators' decision will be in such form as the Arbitrators, in their sole discretion, determine.

_____, 2014

[H-10 days] **Joint Statement of the Evidence.** Between the date set for the 20-day exchange and this date, the parties shall work cooperatively to eliminate duplicate exhibits and prepare a Joint Statement of the Evidence, consisting of:

- a *list of all witnesses* expected to testify at the Hearing (with a brief summary of each witness's anticipated testimony and an indication of how the witness shall testify – *e.g.*, in-person, by telephone, etc.) and
- a *list of all exhibits* expected to be offered at the Hearing. To the extent practicable, exhibits should be listed sequentially by number rather than by the party offering them – *i.e.*, use numbers only (1, 2, 3...) rather than letter/number combinations (C-1, R-55).

The Joint Statement of the Evidence shall be filed with FINRA DR; a copy shall be furnished to each member of the Arbitration Panel directly. *See* Section 9 below.

_____, 2014
at ____ PT

[H-10 days] **Final Pre-Hearing Conference.** The parties, and the Chair/Presiding Arbitrator only, shall participate in a final pre-hearing conference call, to be arranged by FINRA DR. Principal topics to be discussed shall be identified by the Chair/Presiding Arbitrator but shall include logistics for the Hearing and the readiness of the parties to proceed.

_____, 2014

[H-7 days] **Hearing Briefs.** Each party shall serve each other party and each member of the Arbitration Panel directly, and file with FINRA DR, any brief that party wishes the Arbitrators 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; the parties are encouraged to highlight (in all copies of their Brief) relevant portions of cited authorities. Briefs shall not exceed thirty (30) pages without prior permission of the Arbitrators; attachments and exhibits do not count against the page limitation.

_____, 2014 [H-2 business days] **First Day's Witnesses – Claimant(s).** Claimant(s) shall provide respondent(s) with a list of the witnesses, in order, that claimant anticipates calling on the first day of hearing. If claimant reasonably anticipates that claimant's case shall be concluded by 3:30pm on the first day of Hearing, claimant shall so notify respondent. At the close of each hearing day, the party presenting evidence shall give notice to all other parties of the witnesses, in order, that party anticipates presenting on the next day of hearing.

_____, 2014 [H-1 business day] **First Day's Witnesses – Respondent(s).** If claimant(s) notify respondent(s) that claimant reasonably anticipates that claimant's case shall be concluded by 3:30pm on the first day of Hearing, respondent shall provide claimant with a list of the witnesses, in order, that respondent anticipates calling on the first day of hearing. At the close of each hearing day, the party presenting evidence shall give notice to all other parties of the witnesses, in order, that party anticipates presenting on the next day of hearing.

_____, 2014 [H] **Hearing Begins.** All parties shall be prepared to present at 9am PT their proofs and evidence on the issues to be adjudicated at the Hearing.

(8) Hearing Logistics – Exhibits and Witnesses.

- (a) The parties' exhibits shall be combined and compiled into one or more tabbed binders, with an exhibit list in the form attached. Separate binders shall be presented to each Arbitrator on the first day of hearing; another binder shall be available for use by witnesses testifying at the Hearing; each party shall have binder(s) containing all exhibits. All binders should contain additional numbered tabs at the end in order to accommodate additional exhibits. The parties are encouraged to highlight, in the Arbitrators' and parties' exhibit books only, relevant portions of exhibits.
- (b) The parties shall discuss among themselves the anticipated length of each witness's testimony (direct, cross, redirect, recross) and make arrangements for an orderly schedule for the presentation of witnesses. The party calling a witness shall make arrangements for the witness to appear immediately after the preceding witness. Any witness schedule conflicts shall be brought to the attention of all other parties and the Arbitrators as soon as possible after a party becomes aware of the conflict.

(9) Voluntary Direct Communication Between Parties and Arbitrators.

- (a) All named parties requested that the Panel permit them to proceed under the

voluntary direct communication provisions of Rule 12211 (customer cases) or Rule 13211 (industry cases). The Panel **grants** this request. All parties agree that their counsel shall alert all other parties, all Arbitrators, and the FINRA DR case administrator of any changes in representation. If a party is no longer represented by counsel, the provisions of this Section shall become inoperative and all parties shall cease direct communication with the Arbitrators and direct all communication to the assigned FINRA DR case administrator, with the appropriate number of copies for distribution to the Arbitrators.

- (b) The parties shall send directly to the Arbitrators any document (i) referenced in this IPHC Scheduling Order or (ii) permitted to be filed with FINRA DR under the *Code*, including without limitation correspondence, amendments of pleadings, motions and responses to motions, reply briefs, arbitration briefs, and declarations and affidavits.
- (c) Parties shall send all papers permitted to be sent directly to the Arbitrators by this IPHC Scheduling Order on the same day and by the same method of transmission to all parties and Arbitrators. When sending the required copy to FINRA DR, parties shall clearly identify that service of same has been effected directly on all parties and Arbitrators pursuant to this Order.
- (d) **Service by U.S. Mail, Overnight or Messenger Delivery.** The parties are expected to manage their workloads so that delivery of case papers to other parties, the Arbitrators and FINRA DR by U.S. Mail, overnight or messenger delivery is completed in accordance with the due dates established by this Order.
- (e) **Service by Fax.** Documents to be served on a party, FINRA DR, or the Arbitrators may be sent by fax (confirmed fax transmission) subject to the following limitations for each filing or group of filings submitted contemporaneously: *documents transmitted by fax may not exceed fifteen (15) pages, including fax cover sheet.*
- (f) **Service by e-Mail.** Documents to be served on a party or the Arbitrators may be sent by e-Mail (and the Arbitrators prefer service of case papers on them by e-Mail) subject to the following limitations for each filing or group of filings submitted contemporaneously. Documents may be served on FINRA DR by e-Mail **only** with FINRA DR's express written consent.
 - (1) *Documents transmitted by e-Mail as an attachment may not exceed fifty (50) pages in length in the aggregate.*
 - (2) *No single e-Mail attachment, nor any group of e-Mail attachments, may exceed 2MB in data transmitted.*

Any such documents should be sent in PDF format (preferred) or in MS Word (acceptable). In addition, proof of service (a hard copy of the transmittal

letter/first page of each document) should be sent to FINRA DR by fax/US mail with a notation the complete document was sent by e-Mail. The parties shall confirm among themselves that they have the capability of opening any documents sent by e-Mail. A hard-copy of all documents served on the Arbitrators by e-Mail should be sent to the Arbitrators by U.S. Mail, messenger or overnight delivery.

- (g) Service addresses of members of the Panel are as follows:

Philip E. Cutler Cutler Nylander & Hayton PS
1191 Second Avenue, Suite 1800
Seattle, WA 98101
Fax: 206-464-0125
e-Mail: philcutler@cnhlaw.com

Xxxx
Fax:
e-Mail:

Xxxx
Fax:
e-Mail:

- (h) All faxes and electronic mail messages should include the confidentiality language previously provided to the parties by FINRA DR.
- (10) **Settlement/Mediation.** The parties are encouraged to attempt to resolve their dispute through settlement, either by direct negotiation or through the use of a neutral mediator. The parties should contact FINRA DR staff for information about FINRA DR's voluntary mediation program.
- (11) **Apportionment of IPHC Costs in the Event of Settlement Before Hearing.** If the parties settle this matter with *no* further hearings:
- (a) The cost of this IPHC shall be borne one-half by claimant(s) and one-half by respondent(s).
- (b) This preliminary assessment is joint and several among claimant(s) and respondent(s) with respect to their 50% share.
- (12) **Notification to FINRA DR if Settlement.** If this case is resolved by settlement, the parties are directed to promptly notify all members of the Arbitration Panel and FINRA DR.

This order shall remain in effect unless amended by the Arbitration Panel.

Dated this _____ day of _____, 2014.

On behalf of the Arbitration Panel:

PHILIP E. CUTLER
Chair/Presiding Arbitrator

