The below represents my standard instruction letter to counsel in AAA arbitrations in which I am sole arbitrator. I send out a similar letter to counsel in *ad hoc* (unadministered) arbitrations and, with the concurrence of my fellow panel members, in three-arbitrator cases (*ad hoc* or AAA-administered) in which I am the Chair. It is a work-in-progress and I revise it periodically.

In addition to identifying topics for discussion at the initial preliminary hearing, it summarizes my general approach to case and hearing management. I am always open to hearing from the parties whether a different approach would be preferable to them and their lawyers.

Revised August 2016

Via email c/o AAA Western Case Management Center

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Re: Instructions for Initial Preliminary Hearing Conference Call –
AAA Case No. _____
vs.

Dear Counsel:

I am pleased to have the opportunity to serve you and your clients as arbitrator in this proceeding.

I write to you to outline the matters that will be covered in the initial preliminary hearing conference, as well as other matters relevant to management of this arbitration and conduct of the evidentiary hearing. I also enclose a bullet-point agenda for the conference.[1] Your clients or principals are welcome to attend the conference and I encourage them to do so. Initial preliminary hearings ordinarily require about an hour of time, though you should be prepared for at least an hour and a half.

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[1] This letter represents my standard instructions to counsel in AAA arbitrations. It and the enclosed agenda are subject to amendment if your arbitration agreement or applicable law, or if the type of proceeding your clients desire, requires that.

Please share a copy of this letter and agenda with your client or principal and with others who will be assisting you on this case or participating in the upcoming conference call. Please also retain a copy of this letter for future reference as it also covers information concerning the conduct of the evidentiary hearing.

Over the last several years, commercial arbitration – which was originally conceived as a less expensive, quicker, and more efficient alternative to traditional court litigation – has taken on many of the hallmarks of litigation, including the expense and delay inherent in litigation. It is my intention to conduct these proceedings with an eye toward reclaiming the promise of arbitration while still affording each party a full and fair opportunity to prepare for and present evidence at the evidentiary hearing. I ask your and your clients' active cooperation in achieving this goal.[2]

Although setting a date (or date sequence) for the evidentiary hearing is a key issue to be resolved at our conference, we will be discussing a number of other important matters. Therefore, prior to our preliminary hearing, please confer with opposing counsel concerning:

- **Information Exchange/Discovery.** What discovery is necessary to prepare for the evidentiary hearing and the time needed for mutually agreeable discovery – beyond the exchanges of lists of witnesses with knowledge or information of facts important to the case and reliance documents referenced in #s 5 and 6 below. *See* discussion of discovery below in #s 7 and 8.

- **Motions for Interim Relief or Summary Disposition.** Your intention or need to file either a motion for interim relief or a dispositive motion. *See* discussion below in #13.

- **Hearing Time Needed; Hearing Dates.** The amount of time needed for the evidentiary hearing and some blocks of time that you (and your clients and principal witnesses) would be available for the evidentiary hearing. Please then confer with your clients and principal witnesses and be prepared at the preliminary hearing to confirm their availability during the blocks of time you propose.

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[2] In this regard, I encourage you and your clients to review the College of Commercial Arbitrators' *Protocols for Expeditious, Cost-Effective Commercial Arbitration,* and the AAA report *"Top 10 Ways to make Arbitration Faster and More Cost-Effective".* The *Protocols* may be found at www.thecca.net; click on "Resources" to access them. The *"Top 10 Ways"* article is available on the AAA's website (www.adr.org, search for ""Top 10 Ways") or ask your Case Manager for a copy.

- **Hearing Location.** Since the AAA does not have an office in Seattle, please discuss where the evidentiary hearing should be held. I am happy to provide a conference room for our hearing as long as a suitably-sized room is available on the hearing dates selected.

- **Form of Award.** The form of award that should be entered in this case. *See* discussion below in #16 as to your choices.

- Your respective views on any of the other topics identified below, and any topics not identified below that you wish to raise at the preliminary hearing.

I will expect the parties to adhere to the hearing dates that will be set at our conference. The benefits of arbitration can only be fully realized if the arbitration is handled by everyone in an expeditious and cost-effective manner. Also, I remind you that I have a cancellation fee (disclosed on my AAA profile) when a scheduled hearing is cancelled or postponed on short notice, and the AAA may also impose such a fee.

Other matters that will be discussed at our preliminary hearing are the following:

1) Conflicts Checklists – In preparing my disclosures, I looked for your checklists for conflicts. If you had filed such a list by then, my disclosures reflected any that I felt necessary. At our conference, we will discuss whether all parties have filed such a list and, if not, I will set a date for that to be done. Remember to update your checklists periodically as discovery proceeds so that I am able to make any additional disclosures that may be appropriate.

2) Plain English Statement of Claims and Defenses – Even when the parties' arbitration demand and answering statement are on file, I find it helpful – especially when the demand and/or the answer are relatively brief and lack detail – for each side to submit, within 30 days after our preliminary conference, a "plain-English" letter of no more than 7 pages outlining the background of the dispute, that party's principal claims (or defenses), contentions and issues and the relief that party seeks in this arbitration. This will help me and your opponent to understand your case, and enable me to make any additional disclosures that may be appropriate. Your receipt of such a document will also enable you to properly prepare for the evidentiary hearing and to prepare for such discovery as may be approved. Please be prepared to share your views on the desirability or need for

such a statement.

3) Jurisdiction, Arbitrability and Satisfaction of Conditions Precedent – You will be asked to confirm that I have jurisdiction over all claims asserted to date and all parties joined to date, that the claims stated to date are arbitrable and that all conditions precedent to arbitration of those claims have been satisfied. You will be expected to explain why I do not have jurisdiction, any claim is not arbitrable or what conditions precedent have not been satisfied. Appropriate action will be taken based on your response.

4) Amendment of Claims – Remember that Rule R-6[3] requires the approval of the arbitrator for any party's amendment of its claim or answer; I will approve any claim amendment that the parties agree on provided that the amendment will not impact the evidentiary hearing date or, if it does, the parties agree on the impact, and I concur. At the conference a date may be set by which a motion for leave to amend must be filed, ordinarily at least 120 days prior to the evidentiary hearing. To the extent that an amendment increases the amount sought by a party, please remember that the appropriate AAA fee(s) must be paid before I may consider the claim.

5) Identification of Key Witnesses – Pursuant to Rule R-22(a), which gives me broad authority to manage discovery in a case, I propose that within 45 days after our preliminary hearing conference each party provide me and each other party a list (name, business affiliation and contact information) of those persons who that party believes have significant knowledge or information regarding the claims and/or defenses asserted to date; the list should include a general description of the witness's scope of knowledge. It is important that I have this information so that I may prepare any additional disclosures that may be appropriate. If, after you receive the other party's key witness list or plain-English statement of claims/defenses (or reliance documents, see below), you believe that additional witnesses should be identified, I will expect you to promptly supplement your list.

6) Exchange of reliance documents – I also intend to follow Rule R-22(b) and propose that within 45 days after our preliminary hearing

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[3] References to Rules in this letter are to the AAA Commercial Rules effective October 1, 2013. If you agree that another version of the Commercial Rules should govern this case, please tell me. If other AAA rules or procedures are also involved in administration of this case, I will apply them as appropriate Please familiarize yourselves with these rules.

conference call each party produce all documents:

a) upon which that party relies (or may rely) in support of its claims (including its defenses to the opposing party's claims), both as to liability and damages,

b) other documents which a reasonable person looking at the case objectively would regard as relevant or material to the claims or defenses asserted, and

c) any other documents which the parties mutually agree to produce.

If, after reviewing your opponent's production (or your, or your opponent's, plain-English statement) you feel that your initial document production should be supplemented, I will expect you to do so within 30 days following the initial production.

Also, if any party changes its claims or defenses, I will expect all parties to promptly update their document production to the extent necessary. Remember that my approval is required for any change to claims or defenses. Rule R-6.

7) Information Exchanges – What is Referred to as "Discovery" in Litigation – One of the most attractive features of arbitration as a method of dispute resolution is its general economy as compared with traditional court litigation. Experience has shown that discovery is ordinarily the single most expensive aspect of litigation. To underscore the difference between "discovery" in court litigation and what we will discuss at our upcoming conference and thereafter, I will refer to this aspect of the case as "information exchange" as that is how the process is referred to in all AAA rules. While a limited amount of information exchange is generally appropriate in arbitrations, the amount and nature of appropriate information exchange is dependent on many factors, including the amount in controversy and the issues and claims presented. Under AAA rules, discovery of information to prepare for the evidentiary hearing is governed generally by Rule R-22, which I intend to follow.

a) *General Principles*: Any party may undertake "discovery" of another party, or a third party, only with my approval, unless the "discovery" is permitted as of right by your arbitration agreement or applicable law. Any requests for information or documents should be directed to information you need to prosecute or defend your claims or defenses and should be consistent with the goals of

arbitration: an expeditious and cost-effective resolution of a dispute.

b) *Plan for Obtaining Necessary Information*: The wholesale importation into any arbitration of court rules and procedures is most often undesirable and serves to increase the expense of the case and delays ultimate resolution. Please discuss among yourselves, prior to our conference, what information you each believe is necessary in order to:

- realistically evaluate your and the other side's case (see item 22 below) and
- prepare for the evidentiary hearing

and be prepared to request approval for:

(i) any written discovery requests beyond the exchange of witnesses and reliance documents referenced above in item 6[4] and

(ii) the number of depositions (if any), and length, that should be permitted.[5]

Even if you agree on a discovery plan, I reserve the right to evaluate your agreement in the context of the claims asserted in the case and the amount in controversy; I often use Article 21 of the AAA/ICDR International Dispute Resolution Procedures effective June 1, 2014 as a guide when evaluating parties' proposed discovery plan or any party's request for particular discovery vehicles or requests. Those rules are available at www.adr.org (click on "Rules & Procedures" and then "Search Rules"). I also reserve the right to schedule a hearing on the scope of requests for information or documents, to be attended by your client representative. Whatever limits are set – whether at our

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[4] Any document requests should be limited to documents which are directly relevant to significant issues in the case or to the case's outcome. They should also be restricted in terms of time-frame, subject matter, and persons or entities to which the requests pertain. I do not look with favor on broad phraseology such as "all documents directly or indirectly related to."

[5] "Speaking" objections shall not be made at depositions except to preserve privilege. Nor shall witnesses be instructed not to answer a question except on the basis of privilege.

initial preliminary conference or later – will be enforced; while I will entertain a request for variance, I will require a showing of substantial need in order to permit a variance from them. A date will be set by which all discovery must be completed, ordinarily about 45 days prior to the evidentiary hearing.

c) *Interrogatories*: Lengthy and detailed interrogatories – on any subject, but particularly about "facts" or "contentions" – are inappropriate and will not ordinarily be allowed. If you wish to use interrogatories, please discuss with all other parties the information you request and then ask for my approval. As long as you demonstrate substantial need for the information, I am likely to approve your request. I encourage you to limit what interrogatories you may contemplate to inquiries regarding the existence and whereabouts of documents, and persons with knowledge or information relevant to key issues in the case.

d) *E-Discovery*: If you foresee the need for e-discovery beyond the document exchanges referenced above in item 6, please discuss it with opposing counsel. Ordinarily, I will impose limits on e-discovery along the following lines, which are consistent with Rule R-23(b):

- Production of electronic documents will be limited to sources used in the ordinary course of business. Absent a showing of compelling need, no documents are required to be produced from back-up servers, tapes or other media.

- The fact that a "document" was originally created electronically does not, in the absence of a showing of compelling need, require production of the document in electronic form.

- Absent a showing of compelling need, production of electronic documents will normally be made on the basis of generally available technology in searchable format which is usable by the party receiving the e-documents and convenient and economical for the producing party.

- Absent a showing of compelling need, metadata need not be produced with the exception of header fields for email correspondence.

- Where the costs and burdens of e-discovery are disproportionate to the nature and gravity of the dispute or to

the relevance (or potential relevance) of the materials requested, I will either deny such requests or order disclosure on condition that the requesting party advance the reasonable cost of production, subject to further allocation of costs in the Final Award.

e) *Requests for Production of Documents and Identification of Potential Witnesses*: As you can see from items 5 and 6 above, I require the timely, voluntary and mutual exchange of relevant documents, including particularly all documents upon which a party relies, as well as the names of all persons who a party may call as witnesses at the evidentiary hearing. If, after reviewing the other party's initial and supplementary document production and list of witnesses, you believe that additional specific document requests or requests for identification of witnesses are needed, I expect you to discuss such needs with the other party and then present me with a request for my approval. Alternatively, if you know that a particular document exists that is germane to the issues, ask me to order the other party to produce it or subpoena it from the third party who possesses it.

f) *Requests for Admission*: Requests for Admission are rarely effective in arbitration. If you want to use them, consider using them to pin down what you have learned from the information exchanges or other discovery has found and be prepared to demonstrate to me that their use in this case is appropriate. Rather than using Requests for Admission, consider working with the other parties to create stipulations that will narrow the issues.

g) *Disputes over Information Requests*: You and your clients are expected to cooperate and engage in good faith negotiation so as to resolve disputes over information requests without my intervention. If you are unable to resolve a discovery issue, I expect you to bring the nature of the dispute to my attention promptly so that it can be resolved and case preparation can continue without undue delay; a prompt oral discussion or submission of brief letters is ordinarily sufficient. A dispute as to one area of discovery should not impede the progress of discovery and case preparation in areas where there is no dispute. I will not tolerate discovery abuse of any kind. Engaging in such behavior will not stand you or your client in good stead. Under Rule R-23 I have such powers to enforce orders and agreements as are necessary to accomplish the goals of a fair and efficient arbitration process. This includes the ability to allocate the costs of producing

documentation, and to take certain actions in the event of willful non-compliance with any order I may enter.

8) Experts – At the preliminary hearing conference, please be prepared to discuss whether you expect to present expert testimony at the evidentiary hearing. Please also discuss with opposing counsel, prior to the conference, a schedule for identification of experts and production of expert reports (simultaneous or staged), and the necessity for and timing of any expert depositions.

9) Protective Order – *See* Rule R-23(a). Is there a need for one? If so, please discuss among yourselves, prior to the preliminary hearing conference, the form and content of such an order. If one is required, I will expect you to submit a proposed form of order within 30 days after our initial conference.

10) Mid-case and final pre-hearing conference – If the case warrants it, I will schedule a further preliminary hearing conference call mid-way through the process. A final pre-hearing conference call will be held a couple of weeks immediately prior to the Hearing; we will, at that time, go over and discuss logistics for the Hearing.

11) Hearing management procedures – In some cases, it is appropriate to adopt procedures that might promote brevity and time efficiency in the conduct of the evidentiary 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 experts testify back-to-back, that the direct testimony of all witnesses, or perhaps only the expert witnesses or key party-sponsored witnesses, be in narrative form 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. We will discuss at our conference your preliminary views on the appropriateness of any of these procedures. They will be discussed again at our mid-case status conference (if one is scheduled) and resolved at our final pre-hearing conference.

12) Motions –

    a) *In general*:

(i) Arbitration does not contemplate the broad sort of motion practice common in court litigation. Only discovery motions and motions to amend a party's claims or defenses may be filed without my permission; whether to hear a motion is subject to my discretion. Dispositive motions and motions for interim relief are specifically addressed below.

(ii) Before serving and filing any motion, I expect counsel to discuss with all other parties the need for such a motion and the nature of the relief that will be sought. Your filing of any motion will constitute a certification that such a conference has occurred and that it did not produce a resolution of the matter, thus necessitating your filing a motion. Ideally, you will also discuss a proposed briefing (and, if necessary, a hearing) schedule; if you do not, and I determine that I will hear the motion, I will set a schedule.

b) *Motions for interim relief or summary disposition*: If you foresee a realistic possibility that you will want to file a motion for interim relief (*see* Rule R-37) or for summary disposition (*see* Rule R-33), I will expect you to advise me at our initial preliminary conference of the nature of your motion, the time-frame in which you propose to file it, and – very briefly and in summary form – the factual and legal basis for it. Unless all parties agree on the appropriateness and timing of a dispositive motion, I will require the proponent to succinctly demonstrate to me (ordinarily in a 3-5 page letter) that the motion is likely to succeed and dispose of or narrow the issues in the case, as required under Rule R-33. The opposing party will have a brief period within which to respond. Based on the parties' submissions, I will decide whether to allow and hear the motion and, if I do, set a comprehensive briefing schedule (usually with page limits on briefs and other submissions) and a date for argument. I will not ordinarily permit the filing of a dispositive motion to stay any aspect of the arbitration or adjust any other case event deadlines.

13) Exchange of preliminary Hearing witness lists and exhibits – I will expect the parties to exchange their preliminary list of witnesses and exhibits[6] at least 3 weeks prior to the evidentiary hearing. Witnesses

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[6] I expect all parties to designate only those exhibits which they reasonably anticipate needing or using at the hearing. A "document dump" of all, or nearly all, documents exchanged or produced during discovery is unacceptable.

should be identified by name, with their contact information, and the party should describe generally the matters on which each witness is expected to testify and the form in which the witness will testify. Witnesses not identified at this time will not be permitted to testify over another party's objection except with my consent and approval. The same goes for exhibits. This restriction does not apply to rebuttal witnesses or exhibits or witnesses or exhibits used for impeachment.

14) Joint Statement of the Evidence – Between your exchange of your preliminary witness and exhibit lists and approximately 10 days prior to the evidentiary hearing, I will expect you to meet and confer (either in-person or by telephone) to (a) eliminate duplicate exhibits and (b) winnow-down your respective exhibit and witness lists. Approximately ten days prior to the Hearing, I will expect you to furnish me with a written "joint statement of the evidence" identifying the witnesses who each side expects to testify (with a description of the subjects on which a witness is expected to testify) and listing the exhibits each side intends to offer. Please use an exhibit list identifying each exhibit, its date, and a general description; when I provide you with a detailed scheduling order after our conference, I will provide you with a sample form. It may be appropriate for you to discuss with opposing counsel submission of a separate set of "core exhibits" – those exhibits that will be referred to often during the evidentiary hearing – preferably organized chronologically.

15) Briefs – Although briefs are not required, I encourage parties to submit them. I propose that approximately a week prior to the evidentiary hearing the parties submit briefs of no more than 20 pages outlining the facts and law applicable to the case, with a copy of court opinions and relevant statutory provisions cited. You are welcome to highlight key holdings in cases. Any highlighting in the briefs you supply me should also be shown in the copy of your brief that you furnish to the opposing party. Briefs and attachments should be provided to me in electronic form (preferably PDF) as well as in hard-copy. Copies of case and other authorities do not count against the 20-page limit.

16) Form of award – We will also discuss your respective views on the form of award that should be entered. *See* Rule R-46. You have the following choices: (a) a "bare award" (essentially just a statement of who prevailed on which claim or defense and, if appropriate, in what amount), (b) a "reasoned award", and (c) a bare award accompanied by formal findings of fact and conclusions of law. If you agree on the

form of award, I will abide by your agreement; if you do not agree, I will enter the type of award I believe is most appropriate for the case. If you desire formal findings of fact and conclusions of law I will expect counsel to submit, prior to the evidentiary hearing, their proposed findings and conclusions. Please discuss this subject among yourselves and with your clients prior to our conference. You and your clients should remember that once an award is entered, any party may seek to confirm or vacate it and the award will be filed with the court. As a consequence, whatever award is entered will become a public record including, if it is a reasoned award or accompanied by findings of fact and conclusions of law, key factual and findings and legal analysis supporting the award. Although you need not come to an agreement by the time of our conference, I will need to know your position prior to the hearing. If unresolved at our conference, we will discuss this subject again at our final pre-hearing conference.

17) Statement of relief requested – Regardless of your decision on the form of award, I will expect each party to give me, on the first day of the evidentiary hearing, a written claim-by-claim statement of the relief that party requests that I award, preferably in words that party desires that I use. Unless doing so will result in substantial prejudice to the opposing party, you will be permitted to amend your statement prior to closing argument.

18) Governing law and rules; Contract – At our conference, I will want you to confirm what law governs this case (federal and/or state and, if state law, which state's law) and rules should be applied in this case. If the entire contract (or portions other than the dispute resolution clause) is at issue, I will want you to provide me with a copy of the full contract.

19) Communication with the Arbitrator – *See* Rule R-19.

    a) *Oral Communications*: The parties may not under any circumstances communicate orally with me unless all parties participate in the conversation. Other oral communications should be directed to the Case Manager, who will contact me if appropriate.

    b) *Written Communications*: As long as all parties are represented by counsel, please communicate in writing directly with me. However, when doing so, you must contemporaneously (and by the same method of transmission) supply all other parties, and

the Case Manager, with a copy of your communication and any papers submitted with it. If all parties are not represented by counsel (or become unrepresented), we will discuss whether to permit direct communications.

c) *Use of email to communicate with me*: If direct written communication is permitted, please do so by email but you will be expected to have a hard-copy of all attachments (briefs, declarations, exhibits, case and other authorities, etc.) delivered to me. If appropriate, I will provide you with my email address when I distribute Pre-Hearing Order No. 1. I will not ordinarily acknowledge receipt of your email communications; if you desire proof that your email transmission has been seen by me, please mark your email "read-receipt requested."

d) *Attachments*: Please provide me with case papers (briefs, affidavits/declarations, case and other authorities) and correspondence electronically in PDF format as an attachment to your email, and follow up electronic service with a hard-copy delivered to me at my office. Emailed attachments should be limited to no more than a total of 2mb of material in a single transmission. If your attachments are larger than that, please send them in more than one transmission.

20) Continuances and Postponement of the Hearing – I recognize that occasionally unforeseen circumstances ("good cause") require that hearing dates must be changed. Should such circumstances arise, I expect that you will immediately notify the other party and seek agreement on the length of the continuance and perhaps a new hearing date or range of dates. Ordinarily, if the parties agree on the need for a continuance I will grant it, though not until a new hearing date is set – which will generally require a short conference call. I reserve the right to require that the parties themselves (or a corporate representative of a party) personally attend such a conference call to ensure that the parties are in accord with the need for and length of a continuance.

21) Cooperation – The parties are expected to cooperate fully to expedite the process and reduce costs.

22) Mediation and Settlement – It is a reality that most business and commercial disputes settle prior to trial or an adjudicative hearing. Your clients will be grateful if you bear that in mind as this case progresses. Also, Rule R-9 specifically requires mediation of most

cases unless a party opts out; mediation ordinarily takes place on a parallel track with administration of the arbitration. While I will not involve myself in any of your settlement or mediation discussions, I encourage you to:

- Focus your discovery efforts on first gaining information necessary to realistically evaluate your and the other side's case.

- Let me know if there are factual or legal issues that, if resolved expeditiously, will assist in making your settlement discussions productive, or if there are other ways you think I may facilitate meaningful mediation or settlement discussions.

If you intend to mediate, select a mediator who may, by temperament, background or training, best facilitate settlement. While you may both know good mediators, your Case Manager can also provide you with names and profiles of potential mediators.

23) Document Preservation – If you have not already instructed your client to preserve relevant documents – paper documents and files as well as electronic files – please do so immediately. Doing so will remove or reduce claims about spoliation of evidence as well as ensure that relevant documents are available for information exchange.

24) Reminders – I expect you to docket case events so that deadlines are timely complied with. Please do not expect me to send you reminders. If I do, on occasion, remind you of upcoming case events it is only as a courtesy.

25) Other matters – If there are matters other than the foregoing, or matters discussed below, that you wish to discuss at our initial preliminary conference, please advise me, through the AAA Case Manager, a couple of days prior to the conference.

Following our initial preliminary conference call I will prepare Pre-Hearing Order No. 1, which will include a detailed scheduling order recapping the schedule of case events.

Because I think it important for you and your clients to have advance information concerning my case management and conduct of the evidentiary hearing, here is a summary of key points. Once again, while the below reflects my normal case and hearing management procedures, if you or your clients desire that any of them be changed, please let me know.

GENERAL

- Pre-Hearing Orders and firmness of dates set – Most orders will be in that form, appropriately headed "Pre-Hearing Order No. xx." However, on occasion I will simply use an email which may or may not bear that caption. Regardless of the form, however, I expect you to comply with any directions given. Dates that I set are not aspirational; they are firm and set with an eye toward keeping your case moving efficiently toward resolution, something both you and your clients should expect from me. Dates are firm and, unless expressly stated otherwise, I expect you to adhere to them.

- Identification and exchange or proposed hearing exhibits – On the date set for identification and exchange of proposed hearing exhibits I expect all parties to designate only those exhibits which they reasonably anticipate needing or using at the hearing. A "document dump" of all, or nearly all, documents exchanged or produced during discovery is unacceptable.

- Retention of case papers – I will retain a hard copy of all hearing exhibits and correspondence, and all case papers that you send me, for at least ninety (90) days following delivery of my award and will take reasonable steps to assure that I have an electronic copy of such papers prior to any destruction of the hard copy.[7] I will retain an electronic copy of all case papers and other documents for at least one hundred eighty (180) days following delivery of my award. If you desire that I retain hard copies or electronic copies for a longer period, please so advise me no later than 90 days after delivery of my award.

THE EVIDENTIARY HEARING

- Rules of evidence – In the absence of the parties' agreement on the application of other evidentiary rules, I will follow Rule R-34, AAA Commercial Rules, concerning the admission of evidence. Rule R-34 provides:

> *(a) The parties may offer such evidence as is relevant and material to the dispute and shall produce such evidence as the*

[7] Certainly any case papers you send me in electronic form will be retained by me in that form. However, I (a) usually make notes on my copy of exhibits and (b) do not as a matter of practice scan hearing exhibits as PDF files. Accordingly, you should retain a paper and/or electronic copy of all exhibits.

arbitrator may deem necessary to an understanding and determination of the dispute. Conformity to legal rules of evidence shall not be necessary. All evidence shall be taken in the presence of all of the arbitrators and all of the parties, except where any of the parties is absent, in default or has waived the right to be present.

(b) The arbitrator shall determine the admissibility, relevance and materiality of the evidence offered and may exclude evidence deemed by the arbitrator to be cumulative or irrelevant.

(c) The arbitrator shall take into account applicable principles of legal privilege, such as those involving the confidentiality of communications between a lawyer and client.

(d) An arbitrator or other person authorized by law to subpoena witnesses or documents may do so upon the request of any party or independently.

- Exhibits – I will admit all exhibits to which no objection is made. However, I will not ordinarily consider an exhibit that a witness has not identified and discussed in some sense; please bear that in mind as you plan your oral testimony. At our final pre-hearing conference, or immediately prior to the commencement of the evidentiary hearing, we will discuss the most expeditious manner of handling objections. Exhibits should be placed in one or more tabbed 3-ring binders and numbered, using arabic numbers (in number ranges if appropriate, *e.g.,* claimant's exhibits Exs. 1-199, respondent's exhibits Exs. 200-399); *please do not use prefixes* (such as "claimant's" (or "C"), "respondent's (or "R"). I suggest that exhibits be listed in chronological or topical order. If there are a number of exhibits that will be referred to many times, please consider giving me a separate binder of "core exhibits", also in chronological or topical order.

  Each party should have a set of exhibits for its own use at the evidentiary hearing; there should be another set for use by witnesses; and another set for me. At our final pre-hearing conference we will discuss whether you should provide me with my set of exhibits prior to the first day of Hearing. I encourage you to highlight (using different colors) key portions of exhibits – in the arbitrator's set only; the witness's exhibit book should be "clean". Any highlighting in the arbitrator's set of exhibits should also be done for opposing counsel's set.

- Confidentiality of the hearing – Unless required by law or your arbitration agreement, attendance at the hearing will be limited to the parties or a corporate or entity representative of a party, the parties' counsel and their support staff, an interpreter if one is needed, and any disclosed experts who are expected to testify. Fact witnesses, other than a party or corporate/entity representative who may testify, will be excluded from the hearing room until after they have testified.

- Presentation of witnesses' testimony – A witness may testify at the hearing in-person, by telephone conference call, by video conference (though I will expect counsel to make appropriate arrangements for such), or by deposition (if the deposition has been authorized by me). I will also permit a witness to testify by affidavit or declaration (*see* Rule R-35), though I will require the party presenting such a witness to furnish the other parties with a copy of the affidavit or declaration prior to the hearing. If a witness testifies only by affidavit or declaration and is not otherwise subject to cross-examination, I will accord the affidavit or declaration the weight I believe it is entitled to. I encourage such a witness to be available by telephone (or video conference) for cross-examination. I will apply normal rules of direct and cross-examination; I reserve the right to pose questions of my own to witnesses.

- Order of Witnesses – Two business days prior to the hearing I will expect the claimant to provide both me and respondent with the name of each witness that claimant expects to testify on the first day of hearing, and the order in which those witnesses are expected to testify. If claimant reasonably expects to conclude his case prior to the end of the first hearing day, I will expect claimant to so advise respondent – and responded then to provide me and claimant a similar witness list promptly thereafter. At the close of each hearing day, the parties will be expected to notify me and the other parties of the witnesses who are expected to testify the following day and the order in which they are expected to appear.

- Witness scheduling – I will expect witnesses to be scheduled to avoid delays, and to make full use of the hearing time reserved. Unless doing so will substantially prejudice another party, I will accommodate witnesses' schedules.

- Hearing time allocation – In the absence of my adoption of some or all of the hearing management procedures outlined above, unless you advise me differently I will assume that each side will be allocated approximately half of the hearing time reserved. I will not keep a

"chess clock" unless you tell me that is necessary.

- The hearing day – We will commence the evidentiary hearing promptly at 9am on the date set and will resume each subsequent business day at 9am. We will take a break at approximately 10:30am and again at approximately 3pm. We will break for lunch at approximately noon and resume by 1 or 1:30pm. I will expect counsel, parties and witnesses to be prompt. We will normally recess for the day by 5pm. This schedule is subject to adjustment depending on case progress. I will ordinarily be prepared to continue beyond 5pm with appropriate additional breaks.

- Court reporter – If you wish to have a court reporter for all or a portion of the evidentiary hearing, please advise me and opposing counsel at least a week prior to the Hearing. Unless the parties come to some other agreement, (a) the reporter's attendance fee will be the responsibility of the party arranging for same and (b) if any party obtains a transcript that it will reference directly or quote in examining witnesses or in argument, that party will be expected to provide me and the opposing party with a copy at no cost. The transcript will not be the official record of the proceeding except under the conditions set out in Rule R-28.

- Interpreters – If you intend to present a witness whose native language is other than English, it will be your responsibility to provide a qualified interpreter. Please advise opposing counsel of the name and qualifications of your proposed interpreter a couple of weeks prior to the hearing. Any concerns over the proposed interpreter's qualifications should be brought promptly to my attention for resolution.

- Opening statements – Each party will be permitted to make an opening statement, the length of which will be dictated by the detail in the arbitration brief and the complexity of the case. We will discuss this subject again at the final pre-hearing conference.

- Closing arguments – I prefer to hold closing argument (in-person) at the conclusion of the case, though in an appropriate case argument may be by way of telephone conference call or a post-hearing brief. If you have strong feelings on this subject, please be prepared to raise them at our pre-hearing conference. We will discuss closing argument again as the case winds toward conclusion.

- Closure of Hearing – The closure and reopening of the evidentiary hearing is governed by Rules R-39 and R-40. If any party seeks

attorneys' fees and costs (*see* below), I will ordinarily defer closing the hearing as a whole until a deadline (to be set later) for submitting an application and related briefing on attorneys' fees and costs.

- Attorneys' fees and costs – If any party expects to seek attorneys' fees pursuant to a prevailing-party contractual or statutory provision, within a week after the Hearing I will expect all parties to exchange and to submit to me a recap of their approximate attorneys' fees through the final day of Hearing (simply the number of hours devoted to the case, by billing professional, with hourly rate and book value of time – no further detail is needed or requested at that time). As the hearing winds to a close, I will inquire of you as to how you prefer that I handle briefing and ruling on requests for attorneys' fee and cost issues. In the absence of agreement or my order adopting another procedure, I will generally entertain such a request (supported by appropriate detail) *after* entering a Partial (or Interim) Award which will decide the merits of the case and, in all likelihood, determine the prevailing party. That award will include a briefing schedule if an award for attorneys' fees is indicated. My Final Award will be due 30 days after the last permitted brief on attorneys' fee issues. I expect to timely file my Final Award.

MY AWARD

- Ordinarily, my award will be due within 30 days following closure of the hearing. Rule R-46.

- Please refer to item #16 above for a description of your choices as to the form of award to be entered. If you agree on the form of award, I will abide by your agreement; if you do not agree, I will enter the type of award I believe is most appropriate for the case.

- Please remember that once my award is entered, any party may seek to vacate or confirm it in judicial proceedings. As part of that process, my award will become a matter of public record, including my reasons for entering it if it is a reasoned award or if it is accompanied by findings of fact and conclusions of law.

Once again, I look forward to serving you and your clients as arbitrator in this proceeding.

Sincerely.

Philip E. Cutler
Arbitrator

Enclosure: Agenda

cc (w/encl.): _____, Case Manager