

DRAFT: 05/16/13 3:15 PM

FORM OF MEMORANDUM TO BE SENT TO COUNSEL  
IN ADVANCE OF PRELIMINARY HEARING

[INDIVIDUAL ENTRIES TO BE ADAPTED/ADJUSTED/DELETED/SUPPLEMENTED  
BASED ON THE NEEDS OF THE PARTICULAR CASE]

Charles J. Moxley, Jr.

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) XXXXXXXXXXXXXXXXXXXX  
Claimant, )  
- and - )  
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XXXXXXXXXXXXXXXXXX, )  
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Respondent. )  
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DISCUSSION MEMORANDUM  
FOR PRELIMINARY HEARING

Dear Counsel:

The Panel has conferred and compiled the following list of matters to be covered at our preliminary hearing scheduled for \_\_\_\_\_ at \_\_\_\_\_ .m. at the offices of \_\_\_\_\_ . Party representatives are welcome to attend with counsel.

**Purpose of Preliminary Hearing**

As you know, the preliminary hearing is the organizational meeting for an arbitration, at which the schedule is established, to the extent possible, for all phases of the case.

**The Parties' Acceptance of the Panel**

We will confirm the Parties' acceptance of the Panel, as constituted.

**Neutrality of Party-Appointed Arbitrators**

We will confirm our understanding that the party-appointed Arbitrators are neutral.

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**Ex Parte Communications**

We will confirm that, while there may have been *ex parte* communications between the Parties and their party-appointed Arbitrator to date, going forward there will be no *ex parte* communications between any Arbitrator and any Party.

**Applicable Rules**

We will confirm that this arbitration will be conducted pursuant to the \_\_\_\_\_ of the \_\_\_\_\_.

**Applicable Law**

We note that the \_\_\_\_\_ (the "Agreement") provides in Section \_\_\_\_ that the Agreement shall be governed by \_\_\_\_\_ law. We further note that Section \_\_\_\_\_ of the Agreement provides that the arbitration procedures shall be governed by the \_\_\_\_\_ and applicable provisions of \_\_\_\_\_ law. We will discuss the meaning of these provisions.

**Schedule**

We note that Section \_\_\_\_\_ of the Agreement provides that the Panel shall conduct this arbitration in such a way as to issue its award "as soon as practicable, but in no event later than \_\_\_\_\_ ( ) days after appointment of the independent arbitrator pursuant to this Section \_\_\_\_\_ nor later than \_\_\_\_\_ ( ) days following completion of the arbitration."

We note that the \_\_\_\_\_ e-mail of \_\_\_\_\_, to the Parties set an objections date of \_\_\_\_\_ for the appointment of the Chair, and, accordingly, subject to hearing from you on the matter if you have a different view, understand that \_\_\_\_\_ is the "appointment date" from which the arbitration clause's \_\_\_\_\_ is calculated, meaning that, under this schedule, the Panel's award is due on \_\_\_\_\_.

We will also want to discuss how the \_\_\_\_\_ days provision of Section \_\_\_\_\_ of the Agreement should be interpreted, including whether the \_\_\_\_\_ days should run from the later of the completion of the evidentiary hearing or the Parties' submission of any post-hearing briefs or other papers.

**Arbitrability**

We will want to confirm with the Parties that all issues in this case are arbitrable and subject to the jurisdiction of the Arbitrators in the case and that all conditions precedent to arbitration have been satisfied.

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**Description of the Case**

We will invite each side to set forth its views as to what this case is about, what the main factual and legal issues are, and how the case should be best administered to achieve the arbitration benefits of expedition and economy, along with full and fair opportunity for each side to develop and present its claims or defenses.

Our focus will be particularly on encouraging the Parties to identify the real issues in contention and the ones that may be dealt with in a more summary way, whether through stipulation, agreed chronologies, or the like.

**Amendments, if Any, to the Pleadings**

We will discuss whether any amendments to the pleadings would be helpful to the expeditious preparation of this case for hearing. We note in this regard that Paragraph \_\_\_ of the Demand refers to other claims that may be asserted and that Respondent has not responded paragraph by paragraph to the Demand.

**Substantive Motions**

The Parties will be asked if there are any substantive motions contemplated and, if there are, for a description of them and a statement as to why it is believed that any such motion would foster the efficient and fair administration of the case.

**Discovery Master**

The Parties will be asked whether they wish to have the entire Panel hear discovery and routine procedural matters or to delegate such matters to the Chair as Discovery Master, subject to involving the entire Panel if the Chair or any Party so desires in any particular instance. It is contemplated that, if the Chair is appointed Discovery Master, either of the other Arbitrators may serve as Discovery Master if a discovery or similar issue arises at a time when the Chair is unavailable.

**Reliance Documents**

We will discuss whether, separately from the ordinary document production procedures, it might be helpful in this case for the Parties to produce early on the documents of which they are presently aware upon which they anticipate relying at the hearing.

**Document Production**

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We will establish a schedule for document disclosure, including possibly for such matters as the following: document requests, objections, production, Counsels' meeting and conferring on objections, privilege logs, and the resolution of any remaining discovery disputes by the Panel or Discovery Master.

We request that you inform yourselves in advance of the preliminary hearing as to how your clients' files are maintained and consider how you think we can most efficiently manage discovery, including electronic discovery, in this matter.

**Electronic Discovery**

This will involve a discussion of how electronic discovery can be most effectively managed in this case, including through the early addressing of such issues as search terms, custodians, hit counts, format, metadata, and the like.

**Stipulation of Confidentiality**

This will address the process for establishing a stipulation of confidentiality as to sensitive documents, if the Parties so desire.

We will also discuss whether the Parties will be requesting a confidentiality order in this arbitration, with respect to the confidentiality of the arbitration proceedings.

**Depositions**

We note that the arbitration clause in this matter contemplates depositions of parties and third-parties, as well as document production. We will discuss what particular depositions the Parties believe are needed in this case and how long such depositions should be.

As a general matter, we will encourage the Parties to limit depositions to those that are really necessary, so as to enable this process to achieve the arbitral goals of expedition and economy, to the extent consistent with the Parties' ability to do what they need to do to prepare and present their claims or defenses.

**Completion of Discovery**

We will want to establish a completion date for discovery.

**Cut-off Date for Further Pleadings and Motions**

We will address the subject of appropriate cut-off dates for further pleadings and motions.

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### **Non-Party Subpoenas**

This will involve a discussion of what, if any, non-parties may need to be subpoenaed and of the schedule and process to be followed with respect to subpoenas.

We will encourage the Parties to get working on non-party subpoenas as promptly as possible and will request that the Parties cooperate with each other in trying to make witnesses available informally.

### **Experts' Reports**

This will involve a discussion of whether the Parties anticipate presenting expert witnesses in the case, and, if so, the schedule for experts' reports, which it is contemplated will serve as the direct testimony of the expert witnesses, subject to an agreed warm-up period.

### **Status Conferences**

We will want to schedule periodic status conferences, either with the entire Panel or with the Discovery Master, as you prefer.

### **Possible Stipulated Facts**

This will involve a discussion of whether it will potentially be productive for the Parties to attempt to agree to stipulated facts in this matter.

### **Summaries, Chronologies and *Dramatis Personae***

We will encourage the Parties to prepare, either jointly or separately, whatever summaries, chronologies and *dramatis personae* they think might be helpful to the Arbitrators.

It particularly struck us that the facts of record as to the sales of \_\_\_\_\_ that are a focus of this dispute may efficiently be set forth in summary form, in one way or another, accompanied by the applicable documents, thereby potentially saving the substantial time that might have otherwise been necessary to present such matters. Obviously, the disputed facts as to such sales would be the subject of more detailed evidentiary presentations at the hearing, to the extent necessary.

### **Identification of Witnesses and of Mode of Testimony**

This will involve a discussion of the timing of the Parties' identification of the witnesses they expect to call at the hearing in this matter and also discussion of a schedule for the Parties' discussing whether some witnesses may appear at the hearing by video-conference, conference call, or the like.

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We will also discuss whether the Witness Lists should include descriptions of the areas of testimony of the anticipated witnesses or a summary of such testimony.

**Sworn Witness Statements**

This will involve a discussion of whether you think it would be helpful to proceed by sworn witness statements for some or all witnesses, with such statements serving as the direct testimony of any such witnesses, subject to an agreed “warm-up period.”

**Hearing Exhibits**

This will involve a discussion of the process and schedule for your identifying and organizing hearing exhibits, including joint exhibits, key exhibits, and disputed exhibits (if any).

**Demonstrative Exhibits**

This will involve a discussion of the deadlines for your exchanging demonstrative exhibits, including PowerPoints, if any.

**Pre-Hearing Memoranda**

This will involve a discussion of the pre-hearing memoranda, if any, to be submitted by the Parties.

We will encourage you, to the extent practicable, to do as much of your briefing in advance of the hearing as possible so that we may move to decision quickly after the completion of the hearing.

**The Hearing**

This will involve a discussion of the length of the hearing, when and where the hearing will be conducted and of how the hearing will be conducted procedurally and as to evidentiary issues. Please have your schedules available as to possible hearing dates, including the schedules of your witnesses.

The Parties will be encouraged to consider agreeing on a maximum amount of time for each side to present its case.

We will also discuss whether a chess clock approach makes sense in this case.



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**Evidentiary Nature of Designated Hearing Exhibits**

This will involve a discussion of how and when designated exhibits will come into evidence.

**Copies of Cases and Other Authorities Relied Upon**

The Parties will be requested to provide the Arbitrators with hard copies of cases and other authorities relied upon in any memoranda submitted.

**Accelerated Exchange Program**

We will ask whether the Parties wish to adopt the AAA’s Accelerated Exchange Program, whereby submissions are sent directly to the Arbitrators, with a copy to opposing counsel and the AAA, rather than sending them to the AAA for transmittal to the Arbitrators.

**Form of the Parties’ Submissions to the Arbitrators**

The Panel will request that the Parties submit shorter documents electronically and longer documents both electronically and by express mail or other overnight delivery provider.

**Electronic Hearing**

We will discuss the extent to which the Parties want to conduct the hearing through hard or electronic copies of documents.

**Post-Hearing Submissions**

We will discuss whether the Parties will want to make closing statements, whether at the end of or some time subsequent to the end of the hearing, and whether they will want to submit post-hearing memoranda, although final decision on this will be left for later in the case.

As mentioned above, we will encourage the Parties to do as much of the briefing as practicable on a pre-hearing basis to optimize getting the case to the Arbitrators as quickly after the hearing as possible.

**Form of Award**

This will involve a discussion of whether the Parties will want a “standard” or reasoned award in this matter or detailed findings of fact and conclusions of law.

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**Court Reporter**

The Arbitrators will ask the Parties to advise as to whether they anticipate arranging a court reporter for the hearing.

**Costs and Attorneys' fees**

We note that the Agreement provides for an allocation of costs and attorneys' fees based on the extent to which the Parties prevail in the arbitration. We will discuss the timing and form of the Parties' submissions in this regard.

**Disclosures as to Conflicts**

This will involve reference to the fact that the Arbitrators are obligated on a continuing basis to disclose any additional matters that come to their attention that are subject to disclosure under the applicable ethical rules. The Parties will be asked to agree to bring to the attention of each other and the AAA any information that comes to their attention that may require disclosure.

**Mediation Window**

We will discuss whether the Parties would like to have a "mediation window," built into the schedule. This would be a time when, independently of and without the participation of the Arbitrators, the Parties consider pursuing a mediation process while the arbitration process proceeds.

**Other**

The Parties will be invited to raise any other questions, issues or concerns they would like to discuss at the preliminary hearing and are invited to propose any such matters in advance as agenda items.

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We look forward to working with you on this matter.

Thank you.

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Charles J. Moxley, Jr., Chair  
For the Panel