

POINTS TO BE COVERED IN PRELIMINARY HEARING

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Draft to be Adapted to the Individual Case

Following are some general topics/points to be covered in preliminary hearings, subject to the needs of the particular case:

- **Purpose:**
 - Purpose of preliminary hearing – _____
- **Arbitration speech:**
 - Discussion with counsel about how arbitration is supposed to be different – _____
 - Discovery – _____
 - Motion practice – _____
 - Pre-hearing disputes – _____
- **Proportionality:** – _____
 - Amount at issue in this case – _____
 - Claims – _____
 - Counterclaims – _____
 - Specific discussion of the appropriate limits of this case in light of proportionality – _____
 - Discovery – _____
 - Motion practice – _____
 - Pre-hearing disputes – _____
- **Applicable arbitration rules:**
 - Commercial rules – _____
 - Employment rules – _____
 - ICDR rules – _____
 - Large and complex case rules
- **Applicable law:**
 - Substantive law – _____
 - Arbitration law – _____
- **Issues raised by the arbitration clause:** – _____
 - Special requirements:
 - Step clause
 - ????
 - Any issues as to arbitrability – _____
 - Objecting party's motion as to same – _____
 - Responding party's papers as to same – _____
- **The Parties' descriptions of their respective views of the world with respect to the case and how it should be administered** – _____

- **Amendments of Pleadings:**
 - Whether amendments of pleadings are indicated, and, if so, whether reliance documents should be attached to them – _____
 - Date for amended pleadings (complaint/answer) – _____
 - Date for opposing papers – _____
 - Date for reply papers – _____
 - Documents to be attached to each – _____
- **Particularizations:**
 - Whether particularizations of alleged claims and/or damages are indicated – _____
 - And, if so:
 - Opening particularization by (Claimant/Respondent) – _____
 - Corresponding particularization by (Claimant/Respondent) – _____
 - Response to particularizations by (Claimant/Respondent) – _____
 - Response to particularization by (Claimant/Respondent) – _____
 - Date for particularizations of claims – _____
 - Date for particularization of damages – _____
 - Whether documents are to be attached – _____
- **Possible substantive motions:** – _____
 - Procedure to be followed:
 - generally, exchanges of letter briefs of 3-5 pages as to why hearing the proposed motion would foster the expeditious, economical, and fair administration of the case
 - generally, with the case proceeding in the ordinary course in the meantime, subject to what makes sense on the facts of the particular case
 - schedule as to same
 - date for initial letter of proponent – _____
 - opposing papers – _____
 - reply papers – _____
 - oral argument as to same – _____
 - cut-off date for substantive motions – _____
- **Confidentiality:**
 - As to documents – _____
 - As to the entire proceeding as a whole – _____
 - Date for submission of proposed stipulation of confidentiality to be so ordered or to submit any dispute concerning same to the Tribunal – _____
 - **Things to avoid in the stip:**
 - Binding the arbitrator – arbitrator is bound under the AAA rules and ethical rules – _____
 - Binding the AAA -- same – _____
- **Discovery Master:**
 - Whether the Chair will serve as Discovery Master or the entire Panel will hear discovery and routine administrative matters – _____
 - Chair to do it – _____

- Entire Panel to do it – _____
- **Reliance Documents:**
 - Whether the production of reliance documents makes sense in place of, in advance of, or along with normal document production – _____
 - Date for submitting reliance documents – _____
 - Date for any responses to reliance documents – _____
- **Witness Statements:**
 - Whether sworn witness statements, with reliance documents attached, will be used in the case, in whole or in part, in lieu of direct testimony – _____
 - Date for the parties' deciding whether they wish to use witness statements – _____
 - Date for submitting witness statements – _____
 - Date for submitting responsive witness statements – _____
- **Document Production:** Schedule for document production, if any, including for the following:
 - Document requests – _____
 - Responses and objections – _____
 - Counsels' meeting and conferring on objections – _____
 - Privilege logs, if any – _____
 - Production of uncontested documents – _____
 - Possibility of use of generic descriptions in the logs – _____
 - Letter briefs to the Discovery Master or the Panel concerning any discovery disputes – _____ and _____
 - Schedule for argument of any discovery disputes before the Discovery Master or Panel – _____
- **Client Files:** The expectation that Counsel will familiarize themselves as to how their clients' files are maintained and as to how discovery can best be managed, including electronic discovery – _____
- **Discussion of how electronic discovery can be most effectively managed in the case, including with respect to such matters as:**
 - Date for counsel to meet and confer on the subject – _____
 - Date for conference call with the Discovery Master or Panel if it would be helpful – _____
 - Search terms – _____
 - The possible testing of search terms – _____
 - Hit counts – _____
 - Time periods – _____
 - Custodians – _____
 - Format in which documents will be produced – _____
 - The possible use of predictive coding – _____
 - Possible communications among each side's electronic search experts – _____
 - Other points relating to electronic discovery that are of concern on the facts of the particular case – _____

- **General approach as to submissions to the Tribunal:** General procedure to be followed before submitting a detailed letter brief to the other side:
 - Meet and confer first– _____
 - Confirm in any communication to the Tribunal that such meeting and conferring has taken place – _____
- **Timetable for communications among counsel and to the Tribunal:** Turnaround time concerning communications from either side
 - Response by the other side – within 24 hours – _____
 - Response by the Arbitrator – within 24 hours thereafter – _____
 - Subject to faster turnaround, if needed– _____
- **Extensive written application to be avoided as possible:** General point as that many matters may be handled by conference call with the Arbitrator without substantial written submissions
- **Other discovery,** if any – _____
 - **Interrogatories** – _____
 - **Requests to admit** – _____
 - **Offers of Proof** – _____
- **Non-party subpoenas:** – _____
 - Dates for submitting discovery subpoenas to the Tribunal– _____
 - Date for submitting hearing subpoenas to the Tribunal – _____
 - General rule – 3 business days for the other side to respond before the Tribunal will sign – _____
- **Cooperation of parties as to non-party witnesses:** Expectation that parties will exert best efforts to make non-parties over whom they have influence available for discovery or testimony in the case, where such non-parties have relevant and material documents or information – _____
- **Cut-off date for fact discovery** – _____
- **Experts:** – _____
 - Identification of areas of expert testimony on issues as to which a party has the burden of proof – _____
 - Identification of each side’s anticipated expert witnesses on issues on which a party has the burden of proof – _____
 - Identification of rebuttal expert testimony – _____
 - Identification of each side’s anticipated expert witnesses on other issues – _____
 - _____
 - Date for experts’ reports on issues as to which a party has a burden of proof – _____
 - _____
 - Date, where applicable, for reply experts’ reports – _____
- **Status conferences:** – _____
 - _____
 - _____
 - _____
 - _____
- **Possible Stipulated Facts:** – _____

- **Summaries, Chronologies and *Dramatis Personae***: – _____
- **Witness lists**: Identification of witnesses, including as follows:
 - Their present business affiliations – _____
 - Their anticipated areas of testimony – _____
 - Mode of testimony – _____
 - In person – _____
 - By videoconference – _____
 - By telephone – _____
 - By deposition testimony, whether videotaped or not – _____
- **Hearing exhibits**, including as follows: – _____
 - Date for the Parties' exchanges of exhibits to be offered – _____
 - Date for counsels' meeting and conferring to agree on joint exhibits and avoid duplication – _____
 - Finalization of joint exhibits and of each side's identification of its other exhibits and – _____
 - Organization of exhibits binders by category or chronology or the like, as makes sense in the case – _____
- **Key Exhibits** – _____
- **Demonstrative exhibits** – _____
- **Pre-hearing memoranda** – _____
- **Motions *in limine*** – _____
- **The hearing:**
 - When – _____
 - Where – _____
 - Hours – _____
 - Particular focus on length of hearing day – _____
 - Panel's approach to evidentiary, administrative, timing, and other matters – _____
- **Evidentiary nature of designated hearing exhibits**, including as follows:
 - The most typical approach: exhibits to be received into evidence as of the opening of hearing, unless objected to in advance thereto or – _____
 - The more restrictive approach, whereby only documents actually used at the hearing are deemed in evidence – _____
 - Clarification that foundations for the admission of documents need not ordinarily be laid and – _____
 - Decision as to whether pre-marking applies to documents used for impeachment only – _____
- **Provision to arbitrators of copies of cases and other authorities relied upon:** – _____
 - Hard copies – _____
 - Electronic copies – _____
- **Accelerated Exchange Program** – _____
- **Form of the Parties' submissions** to the Arbitrators, whether by electronic and/or hard copies – _____
- **Word copies of submissions**, including briefs and experts' reports

- **Use of electronics at hearings** – _____
- **Post-hearing submissions, including:**
 - Post-hearing memoranda and – _____
 - Closing statements and possibly schedule as to same – _____
- **Form of award:** – _____
 - Standard – _____
 - Reasoned – _____
 - Reasoned lite and – _____
 - Findings of fact and conclusions of law – _____
- **Court reporter** – _____
- **Cyber security** – _____
 - Discuss – _____
 - Areas of focus – _____
 - Means of exchanging documents and other materials – _____
 - Paper only – _____
 - Email – _____
 - What requirements as to type of programs – _____
 - What requirements as to whether emails are to be encrypted – _____
 - Means of storing it – _____
 - Means of using it – _____
 - Means of disposing of it – _____
 - What to do with the passwords – _____
 - Need to constantly change the password – _____
- **Level of cyber securities sensitivity and whether special measure should be taken** – _____
 - Communications with the Panel
 - Submissions to the Panel
 - Exhibits
 - Transcripts
 - Anything else
- **Length of time by which I may destroy the case files**
 - Hard copies other than pleadings
 - Exhibits and transcripts from the hearing
 - Electronic copies of same
- **Costs and attorneys' fees, including:** – _____
 - Whether to be handled through post-hearing declarations and computer sheets as to attorney time – _____
 - Or in a separate process after the merits of the case are decided by interim award or the like – _____
- **Parties' ongoing duty of disclosure as to conflicts** – _____
- **Mediation window** – _____
- **Document retention** – _____
- **Parties' expectations** – _____

- Anything else either side or any panel member wants to raise – _____

_____ and _____
REPORT OF PRELIMINARY HEARING AND SCHEDULING ORDER

Particularizations by Claimant as to the Trade Secrets and Other Proprietary Information of Claimant that Claimant Contends Respondent Wrongfully Disclosed or Used or the Like

1. By _____, Claimant will serve and file a Particularization, setting forth in reasonable detail the trade secrets or other proprietary information of Claimant that Claimant contends Respondent wrongfully disclosed or used or the like and will produce the documents upon which Claimant relies for such contentions.

2. It is suggested that this Particularization include a chart with numbered boxes, wherein each particular assertion is particularized and the related documents identified, to facilitate Respondent's response to said Particularization.

3. By _____, Respondent will serve and file its Response to Claimant's foregoing Particularization and will produce the documents upon which it relies for such Response.

4. It is requested that Respondent's Response to Claimant's said Particularization include a column that Respondent adds to Claimant's Particularization, setting forth Respondent's response to each individual assertion, box by box, set forth therein and identifying the documents upon which Respondent relies for such Response.

5. It is understood that Respondent will provide its Response to Claimant's said Particularization based on documents then available to Respondent and witnesses who are still employed by Respondent; provided, however, that to the extent Respondent is able, within the foregoing time frame, to also include information from outside sources, including former

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employees, and information as to what is available in the public domain, it will do so, but without prejudice to further elaboration on such matters later.

6. A major purpose of this process of Particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

Additional Contract Documents

7. By _____, Respondent will provide to the arbitrators copies of the additional contract documents referenced in the pleadings that have not previously been provided to the Arbitrators.

Particularizations as to Respondent's Counterclaim for \$ _____

8. By _____, Respondent will serve and file a Particularization of its claim for \$ _____ plus additional monthly accruals and interest, setting forth the bases for that claim with specificity.

9. Said Particularization will list each individual item or similar group of items of work making up said alleged damages with particularity, including as to the following: the identity of the work in question, the dates thereof, and Respondent's bases for contending that Claimant is liable to Respondent for such work.¹

¹ This Particularization addresses the factual and contractual bases for Respondent's counterclaim for \$ _____; provided, however, that issues as to the scope of the work under the _____ will be addressed by Respondent in a separate Particularization and need not be addressed in this Particularization, except by general reference to Respondent's position as to the scope of that agreement.

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10. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Claimant's responsive Particularization on an item by item basis.

11. By _____, Claimant will serve and file its responsive Particularization, setting forth with specificity its response to each item or group of items set forth by Respondent in its Particularization

12. Each side's said Particularization will include as attachments the documents upon which the side relies in support of its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to each item or group of items of work set forth therein.

Particularizations as to Funding Available in a _____

13. To the extent that items included within Respondent's \$_____ counterclaim are for amounts beyond the agreed monthly payments under the _____ (the "_____"), Respondent will, by _____ serve and file a Particularization of its bases for contending that such items are payable under the _____, including the provisions thereof concerning payments through funding available in a _____.

14. By _____, Claimant will serve and file its responsive Particularization, responding to Respondent's said Particularization with specificity.

15. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof,

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upon which the side relies in connection with its description of its position as to the matters in question.

16. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for \$_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

Particularizations as to the Scope of the _____

17. By _____, Respondent will serve and file a Particularization of its position as to the scope of the _____, identifying with specificity Respondent's bases for contending that the scope of the _____ changed over time and what it contends the final applicable scope is.

18. By _____, Claimant will serve and file its responsive Particularization of its position as to the scope of the _____.

19. Each side's said Particularization will include as attachments the documents upon which it relies in its Particularization and will identify the particular documents, or parts thereof, upon which the side relies in connection with its description of its position as to the matters in contention.

20. These Particularizations will be organized similarly to Respondent's Particularization of its counterclaim for \$_____, setting forth the parties' respective contentions in a format whereby such contentions are numbered and placed in individual blocks or the like to facilitate the narrowing of the issues as to the matters in contention.

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Particularizations as to Claimant's Claim for \$ _____

21. By _____, Claimant will serve and file a Particularization of its claim for \$ _____, setting forth the bases for that claim with specificity.

22. Said Particularization will list each individual payment and related billing and payment documents with particularity.

23. It is expected that this Particularization will include a detailed chart wherein the particular items at issue will be numbered and placed in individual blocks or the like to facilitate Respondent's responsive Particularization on an item by item basis.

24. By _____, Respondent will serve and file its responsive Particularization, setting forth with specificity its response as to each payment identified by Claimant in its Particularization and identifying and attached the documents upon which it relies in response.

Respondent's Counterclaim as to Claimant's Alleged Breach of the Implied Covenant of Good Faith and Fair Dealing

25. Respondent has represented that its counterclaim alleging Claimant's breach of the implied covenant of good faith and fair dealing is a claim in the alternative that does not seek additional relief beyond that demanded in connection with Respondent's other counterclaims, except that Respondent reserves the right to seek its costs and attorneys' fees in this arbitration if, in its view, discovery discloses that Claimant's positions in this arbitration as to its obligations to Respondent under the _____ are asserted in bad faith.

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Respondent's Particularization as to Any Compensation it Received Based on Information Provided or Work Done by Claimant

26. By _____, Respondent will serve and file its Particularization, setting forth in reasonable detail the amounts of money, by markup or otherwise, if any, that Respondent received based on information provided or work done by Claimant, along with the documents upon which Respondent relies in support of said Particularization.

27. Respondent is providing this information based on Claimant's request for discovery as to such matters, but is doing so without prejudice to Respondent's position that such information is not relevant or material to Claimant's damages, if any, even assuming, for discovery purposes only, that Claimant is able to establish liability.

28. The Parties agreed that, reasonably in advance of this _____ date, Claimant may elaborate on its damages theory and identify for Respondent different parameters for this Particularization by Respondent, subject to agreement between the Parties as to what those parameters would be for purposes of discovery. In such eventuality, the Parties will work together on the definition of such parameters, failing which the Parties may schedule a conference call with the Discovery Master to discuss the matter.

29. Respondent will further produce representative documents showing how the time of its engineers who worked with Claimant was reported and billed internally within Respondent and used for compensation purposes with the applicable customer(s).

30. A major purpose of this process of particularization is to enable each side, on an efficient basis, to gain reasonable discovery as to the other side's contentions. It is expected that this process should, to a considerable extent, obviate a more elaborate course of discovery.

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Project Files

31. The parties have agreed, in the interests of expedition and economy, that each side will make available to the other its respective “project files,” meaning the work files maintained by each side with respect to the work that is the subject of the claims and counterclaims in this arbitration.

32. By _____, each side will have identified to the other the project files that it has available to it and will have made arrangements to make such files available for review by the other side, subject to reasonable protocols to be worked out between the parties as to such document production.

33. The foregoing includes electronically stored documents, to the extent the project files are maintained electronically.

34. The objective of this approach is that each side will have available to it the project files available to the other side and will be able to search them and access whatever it wants from them upon reasonable notice to the other side and under reasonable conditions.

Respondent’s Particularization of Its Counterclaim for Damages

35. By _____, Respondent will serve and file a Particularization of its alleged damages on the counterclaims it has asserted in this arbitration, providing reasonable detail as to such alleged damages and producing documents, beyond those already produced, upon which it relies for said damages.