

In Private Arbitration

Agreed Scheduling Order

Case Name: **Cause No.**
Plaintiff (now called Claimant)
and
Defendant (now called Respondent)
- San Antonio, Texas

Arbitrator: **WILLIAM H. LEMONS**

1. Hearing on the Merits:

Date(s): _____, **2012** Time: **9:00 a.m.**
The _____ day is blocked out to be used as necessary to develop a full and complete record.

Location: **TBD**. It might be possible to hold the hearing at the Arbitrator's office. If for some reason his facilities are not available or not acceptable, counsel may agree on a site in a neutral location or may agree to the use of hotel facilities.

2. Pre-Hearing Position Statements: (not to exceed 5 pages, not counting caption and certificate of service – please also provide the Arbitrator copies of case authority cited or relied upon)

Date: To be submitted on or before _____, **2012**.

3. Specification of Claims and Counterclaims (including dollar amounts):

Claims: To be specified on or before _____, **2012**. At a minimum, this must contain an outline of the claims, a description of the principal issues involved, a statement of each party's contentions and a summary of the specific relief requested (i.e. a "damage model").

Counterclaims: To be specified on or before _____, **2012**. At a minimum, this must contain an outline of the claims, a description of the principal issues involved, a statement of each party's contentions and a summary of the specific relief requested (i.e. a "damage model"). Also, by this date Respondent must file its Answering Statement if it has not already done so.

Note: Often, the Demand for Arbitration only specifies a category designation or provides a one-line description of the claim(s). By the above date, a party seeking affirmative relief must provide particularized factual allegations and the legal theory underlying any claim asserted in the arbitration. While this is not an invitation to enlarge or change the claim (under Rule 5, that may only be done upon motion and approval of the Arbitrator), it would be an opportunity for a party to delete or withdraw any claim the party no longer desired to pursue.

4. **The dispute involves the following:**

As specified in Claimant's Demand for Arbitration filed December 7, 2011. By its Original Answer dated January 12, 2012, Respondent denies all material allegations and asserts certain affirmative defenses.

5. **Identification of witnesses:**

Date: All parties to file and exchange final identification of fact witnesses on or before _____, 2012.

Each identification shall include the name and address of each witness, a brief summary of the witness' expected testimony by subject area, together with an indication as to whether the witness will testify in person, by telephone, by exchange of affidavit or declaration or by deposition.

6. **Identification of experts (if any), and exchange of expert reports:**

Claimant shall file and exchange expert designation(s), with reports, on or before _____, 2012. Respondent to file and exchange rebuttal designation(s), with reports, on or before _____, 2012.

Note: It is normally not necessary to present expert testimony on a request for attorney's fees.

7. **Stipulations of uncontested facts:**

Date: The parties are strongly encouraged to agree on and file Stipulations of Uncontested Facts on or before _____, 2012.

8. **Advance identification, filing and exchange of exhibits:** Date: _____, 2012.

Number of copies of exhibits to be made and brought to the hearing: 2

The parties shall exchange with one another a legible copy of all documentary exhibits reasonably expected to be offered into evidence at the hearing. Each proposed exhibit shall be premarked for identification and sufficient copies brought to the hearing for opposing counsel and for the witness. Prior to the above date, counsel shall confer to finalize their actual list of witnesses and to eliminate duplicate exhibits and the Arbitrator strongly encourages the parties to attempt to create a joint exhibit notebook.

Counsel shall submit a set of exhibits directly to the Arbitrator not later than _____, 2012.

NOTE: It is the parties' responsibility not only to produce the required evidence, but also to specifically point it out for the Arbitrator; and this Arbitrator will not pick through hundreds of pages of exhibits searching for evidence to help one of the parties. See *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1296 n.16 (5th Cir. 1994) ("Judges are not like pigs, hunting for truffles buried in briefs."); *Georgen-Saad v. Texas Mut. Ins. Co.*, 195 F.Supp.2d 853, 859 n. 5 (W.D.Tex. 2002)(Nowlin, Judge). The Arbitrator will consider all the evidence that is properly before him and that is brought to his attention, he has no duty to comb the entire record looking for relevant evidence. *Ruben Hernandez, et al. v. Yellow Transportation, Incorporated*, ___ F.3d ___, 5th Cir. No. 09-10183, May 12, 2011).

9. **Discovery shall be completed by:** Date: _____, 2012.

The parties shall promptly confer and develop a mutually agreeable (1) discovery plan, including such depositions as the parties agree are necessary, appropriate and authorized by their arbitration agreement, and (2) Protective Order, to the extent necessary or desirable. All discovery shall be completed by the above date. The parties are admonished that traditional litigation or court-based discovery is often not helpful or productive in arbitration. Unresolved discovery disputes shall be brought to the attention of the Arbitrator as soon as practicable, but in any event sufficiently in advance of the discovery cut-off so that the dispute may be resolved and any permitted discovery completed by the cut-off. Please monitor these deadlines – a late-filed Motion to Compel or discovery dispute normally is not sufficient cause to postpone a hearing. A party's failure to diligently pursue or monitor discovery will not justify the granting of a continuance.

10. **Court Reporter at Hearing?** To be determined.

Either party may indicate a desire for a Court Reporter and transcript, which shall then be the Official Record in this matter. The Arbitrator encourages the availability of an Official Record in instances where the parties desire a Reasoned Award. Counsel shall advise the Arbitrator of desire for, and if so, the arrangements for and the identity of the Court Reporter, before _____, 2012.

11. **Form of Award:**

The arbitration agreement requires a Reasoned Award with brief findings of fact and conclusions of law.

12. **Conduct of evidentiary hearing:**

Per *Employment Arbitration Rules*. Hearing procedures also include:

a) ***Cross Designation of Deposition Excerpts*** – To the extent that any party has designated (contemporaneous with the exchange of exhibits) excerpts of any deposition to be used at trial, at least two days before the hearing commences, the other party(ies) shall serve the designating party those portions of a deposition they desire to cross-designate.

b) ***First Day's Witnesses*** – At least two days before the hearing commences, Claimant shall serve Respondent and fax to the Arbitrator a list of witnesses expected to testify at the first day of hearing in the order in which each is expected to testify. If Claimant reasonably believes that his or her case-in-chief will be completed by 3:30 p.m. on the first day of hearing, Claimant shall so advise Respondent, who shall then serve Claimant and fax to the Arbitrator a list of witnesses Respondent expects to testify at the first day of hearing and the order that each is expected to testify.

c) ***Beginning of Hearing*** – On the first day of hearing, each party shall submit to the Arbitrator a claim-by-claim statement of the relief such party requests that the Arbitrator award. At closing, the parties may serve and file an amended statement of relief requested if reasonably necessary. At the close of each day of hearing, the parties will advise each other and the Arbitrator of the number and order of witnesses expected to testify on the following day.

d) ***Full and Complete Hearing*** – Under the Rules and pursuant to the Arbitrator’s inherent authority to provide the parties an opportunity for a full and complete hearing, the Arbitrator has the authority to require the attendance of any witness or other person necessary to a full and complete hearing if that witness or person is employed by or under the control of a party. Further, the rules of advocacy may be modified to allow the expeditious introduction of evidence and testimony, such as by proffer, with approval of the Arbitrator and so long as a full and complete record is developed.

13. Other issues discussed:

The parties shall make full and complete FRCP Rule 26 or TRCP Rule 194 “Disclosures” on or before _____, 2012. Additionally, the parties shall cooperate in good faith in the voluntary and informal exchange of all non-privileged documents and other information relevant to the dispute or claim immediately after the entry of this order. Contemporaneous with the disclosures referenced above, they shall complete an initial exchange of all relevant, non-privileged documents, including, without limitation, copies of all documents in their possession or control ***on which they rely in support of their positions***, and names of all individuals whom they may call as witnesses at the arbitration hearing.

As they become aware of new documents or information, including experts who may be called upon to testify, the parties have a continuous obligation to provide relevant, non-privileged documents, to supplement their identification of witnesses and experts and to honor any informal agreements or understandings between the parties regarding documents or information to be exchanged.

Documents that were not previously exchanged, or witnesses and experts that were not previously identified, may not be considered by the Arbitrator at the hearing, unless agreed by the parties or upon a showing of good cause.

This submission to arbitration shall be conducted by the parties, their counsel and by the Arbitrator in accordance with the provisions of the Federal Arbitration Act, 9 U.S.C. Section 1, et. seq. (the “FAA”). This matter shall be determined under the state or federal substantive law which would be applied by a United States District Court sitting at the place of the arbitration hearing. The Arbitrator will be guided by the Federal Rules of Evidence in determining evidentiary questions.

We will discuss desire for and schedule for Post-Hearing Briefs, if any, at conclusion of the Hearing.

The Arbitrator’s “cancellation/postponement policy” shall be in effect, per his bio sheet on file with the Association, upon issuance of the Notice of Hearing. Accordingly, if this dispute is resolved by settlement at any time, the parties are directed to promptly notify the Arbitrator.

An additional Arbitration Management Conference (telephonic preliminary hearing, initiated by the Arbitrator) will be conducted at 10:00 a.m. on _____, 2012 (generally 15-30 days before the hearing).

To “file” shall mean to provide one signed original of the document to the Arbitrator and a copy to opposing counsel. To “serve” shall mean to provide one signed copy of the document to each party through opposing counsel and one copy to the Arbitrator. Filing or service may be made by hand-delivery, overnight delivery (FedEx, UPS, etc) or U.S. Mail. Filing or service by any of

these means is considered effective upon the date of deposit of the document. Service by electronic mail or by facsimile transmission is considered effective upon transmission, but only if verification of actual receipt by the addressee is provided. Upon receiving an email filing, the Arbitrator will promptly acknowledge receipt. Do not under any circumstance or for any reason send correspondence or pleadings to the Arbitrator by certified mail, return receipt requested or by either FedEx or UPS with a signature required for delivery.

Any party that has not provided a list of related entities, persons and key potential witnesses shall submit that list to the Arbitrator on or before the date set for submission of the *Specification of Claims* referenced in item 2, above.

At this time, the scope and extent of discovery shall be at counsels' discretion and judgment, subject to the terms of the arbitration agreement and reasonable limitation or expansion by the Arbitrator upon request by any party, on notice and opportunity for hearing.

All deadlines stated herein will be strictly enforced. At the same time, the parties may by mutual written agreement modify certain of the deadlines (except for the Hearing dates), but shall provide the Arbitrator with copies of such written agreement(s). Inasmuch as the parties, counsel and the Arbitrator have all, by agreement, set aside and reserved the above-specified dates for the hearing, it will be very difficult to reset the hearing once scheduled, and normally, a party representative must be involved in and be present during any such request.

Prior to requesting a hearing on any matter, the parties shall first confer through lead counsel. If the matter is not resolved, counsel shall first contact the Arbitrator's Office Manager to arrange for a conference with the Arbitrator before any moving papers are filed. If formal papers are necessary, any resulting motion shall include (i) a certificate of conference indicating the date of an actual conference, the identities of the attorneys conferring and why agreement could not be reached, and (ii) a proposed Order.

The above and foregoing shall have the effect of a Preliminary Scheduling Order, and shall continue in effect unless and until amended by subsequent order of the Arbitrator. To the extent any of the above provisions and/or dates differs from those contained in the parties' arbitration agreement/dispute resolution procedures, the parties agree to the above as modifications of same.

Dated: March ____, 2012, at San Antonio, Texas.

WILLIAM H. LEMONS, Arbitrator