

1
2
3 **IN THE SUPREME COURT OF THE STATE OF NEVADA**

4 Electronically Filed
5 Apr 07 2015 09:40 a.m.
6 Tracie K. Lindeman
Clerk of Supreme Court

7 MB AMERICA, INC., A NEVADA
8 CORPORATION,

Case No.: 66860

9 Appellant,

10 vs.

11 ALASKA PACIFIC LEASING
12 COMPANY, A ALASKA BUSINESS
13 CORPORATION,

14 Respondent.

15 _____/
16 MB AMERICA, INC., A NEVADA
17 CORPORATION,

Case No.: 67329

18 Appellant,

19 vs.

20 ALASKA PACIFIC LEASING
21 COMPANY, A ALASKA BUSINESS
22 CORPORATION,

23 Respondent.

24 **APPELLANT'S APPENDIX**

25 **VOLUME 1**

26 **Appellant's Counsel:**

27 Michael E. Sullivan, Esq.
28 Mark G. Simons, Esq.
Therese M. Shanks, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, Nevada 89503
(775) 329-3151

Respondent's Counsel

Holly S. Parker, Esq.
Laxalt & Nomura, Ltd.
9600 Gateway Drive
Reno, Nevada 89521
(775) 322-1170

TABLE OF CONTENTS

<u>DOCUMENT</u>	<u>DATE</u>	<u>NOS.</u>	<u>VOL.</u>
Acceptance of Service	07/18/14	AA0014	1
Answer and Affirmative Defenses to Complaint for Declaratory Relief	08/15/14	AA0015-AA0023	1
Complaint for Declaratory Relief (Exemption From Arbitration NAR 3 Declaratory Relief Sought)	06/06/14	AA0001-AA0010	1
Defendant Alaska Pacific Leasing Company's Motion for Attorneys' Fees	11/18/14	AA0188-AA0202	2
Defendant Alaska Pacific Leasing Company's Motion for Summary Judgment	09/15/14	AA0024-AA0119	1
Defendant's Motion for Limited Reconsideration of the Court's January 13, 2015 Order	01/22/15	AA0260-AA0276	2
Defendant's Reply in Support of Motion for Attorneys' Fees	12/22/14	AA0234-AA0245	2
Defendant's Reply in Support of Motion for Summary Judgment	10/03/14	AA0153-AA0159	1
Defendant's Verified Memorandum of Costs	10/29/14	AA0174-AA0184	2
MB America, Inc.'s Opposition To Defendant Alaska Pacific Leasing Company's Motion for Attorneys' Fees	12/10/14	AA0205-AA0233	2

DOCUMENT	DATE	NOS.	VOL.
MB America, Inc.'s Opposition To Defendant's Motion for Limited Reconsideration of the Court's January 13, 2015 Order	01/30/15	AA0277-AA0281	2
MB America, Inc.'s Opposition To Defendant's Motion for Summary Judgment	09/26/14	AA0120-AA0152	1
Notice of Entry of Order	10/23/14	AA0167-AA0173	1
Notice of Entry of Order	01/21/15	AA0253-AA0259	2
Order	01/13/15	AA0249-AA0252	2
Order Denying Reconsideration	03/12/15	AA0291-AA0293	2
Order Granting Summary Judgment	10/22/14	AA0163-AA0166	1
Plaintiff MB America, Inc.'s Motion to Retax Costs	11/03/14	AA0185-AA0187	2
Reply in Support of Defendant's Motion for Limited Reconsideration of the Court's January 13, 2015 Order	02/05/15	AA0282-AA0287	2
Request for Submission	10/06/14	AA0160-AA0162	1
Request for Submission	11/25/14	AA0203-AA0204	2
Request for Submission	12/22/14	AA0246-AA0248	2
Request for Submission	02/05/15	AA0288-AA0290	2
Summons	07/17/14	AA0011-AA0013	1

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

_____ by placing an original of true copy thereof in a sealed envelope, with
sufficient postage affixed thereto, in the United States mail at Reno, Nevada,
addressed to:

DATED this 7th day of April, 2015.

Merna Meier
MERNA MEIER

1 **\$1425**
2 Michael E. Sullivan, Esq. (SBN 5142)
3 **ROBISON, BELAUSTEGUI, SHARP & LOW**
4 A Professional Corporation
5 71 Washington Street
6 Reno, Nevada 89503
7 Telephone: (775) 329-3151
8 *Attorneys for Plaintiff MB America, Inc.*

9
10 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12 MB AMERICA, INC., a Nevada
13 corporation,

Case No.: CV14-0122

14 Plaintiff,

Dept. No.: 8

15 v.

**COMPLAINT FOR DECLARATORY
RELIEF**

16 ALASKA PACIFIC LEASING COMPANY,
17 a Alaska business corporation; and DOES
18 I through X, inclusive,

**(Exemption From Arbitration NAR 3
Declaratory Relief Sought)**

19 Defendants.
20 _____/

21 For its Complaint, Plaintiff alleges as follows:

22 **PARTIES**

23 1. Plaintiff MB AMERICA, INC. ("Plaintiff") is a Nevada corporation licensed
24 to conduct business in the State of Nevada.

25 2. Defendant ALASKA PACIFIC LEASING COMPANY ("Defendant") is an
26 Alaska business corporation.

27 3. DOES I through X, inclusive, are fictitious names of Defendants who are
28 the agents representative and/or employees of the named Defendant who are equally
responsible for MB America's claims as alleged herein, in either a representative
capacity or by virtue of independent actions or omissions. When the true names and
identities of these DOE Defendants are ascertained, Plaintiff will seek leave to amend
this Complaint to insert their true names and identities.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

5. On information and belief, Defendant is an Alaska business based out of Anchorage, Alaska.

7. On or about December 16, 2013, Plaintiff terminated the Agreement.

9. Nevada is the proper jurisdiction for any controversy of any type. Defendant will not comply with ¶13 of the Agreement; accordingly, Plaintiff seeks court-ordered mediation.

FIRST CLAIM FOR RELIEF

11. Plaintiff incorporates the allegations contained in paragraphs 1 through 10 of this Complaint as though set forth fully herein.

Robison, Belaustegui,
Sharp & Low
71 Washington St.
Reno, NV 89503
(775) 329-3151

1 declaratory judgment from this Court pursuant to NRCP 57 and NRS Chapter 30 that
2 the Agreement is valid and binding on all parties to this action, and that Defendant is not
3 entitled to any relief as is claimed by Defendant.

4 13. Plaintiff has incurred legal fees and court costs associated with
5 prosecuting this action, and hereby seeks reimbursement of those costs and fees to the
6 extent allowed under Nevada law.

7 14. Venue and jurisdiction is proper in Nevada as there is a forum selection
8 clause found in the Agreement (attached here as **Exhibit "1."**) Additionally, and on
9 separate grounds, this contract was consummated in the State of Nevada, and
10 Defendant obtained the goods and services set forth in the contract in the State of
11 Nevada.

12 **SECOND CLAIM FOR RELIEF**

13 **(Specific Performance)**

14 15. Plaintiff incorporates the allegations contained in paragraphs 1 through 14
15 of this Complaint as though set forth fully herein.

16 16. Plaintiff requests this Court to order the parties to mediation as set forth in
17 the parties' Agreement.

18 WHEREFORE, Plaintiff prays for relief as follows:

19 1. For declaratory relief in the form of an order and judgment by this Court
20 finding that the Agreement is valid and enforceable, and that Plaintiff has met its
21 obligation under the terms of its Agreement, and that Defendant is not entitled to any
22 recovery under the Agreement or Nevada or Alaska law, along with any other provision
23 in said contract.

24 2. That Plaintiff be entitled to recover its costs and reasonable attorney's
25 fees incurred herein;

26 3. That this matter be referred to mediation in Nevada; and
27

28 **///**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

4. For such other and further relief as the Court deems proper.

AFFIRMATION: The undersigned does hereby affirm that this document does not contain the Social Security Number of any person.

DATED this 6th day of June, 2014.

ROBISON, BELAUSTEGUI, SHARP & LOW
A Professional Corporation
71 Washington Street
Reno, Nevada 89503

By: 
MICHAEL E. SULLIVAN, ESQ.
Attorneys for Plaintiff MB America, Inc.

j:\wpdata\mes\6916.001\p-complaint.docx

Robison, Belaustegui,
Sharp & Low
71 Washington St.
Reno, NV 89503
(775) 329-3151

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF EXHIBITS

1. Agreement dated August 20, 2013..... 4 pages

EXHIBIT 1

EXHIBIT 1



THE CRUSHING EVOLUTION

MB America, Inc.
8730 Technology Way
Reno, NV 89521
Phone 775-853-1058 - Fax 775-682-4302
www.mbamerica.com

Agreement

This Agreement is made as of the 1 day of August in the year of 2012, by and between "MB America, Inc.", a corporation incorporated under the laws of the state of Nevada, represented by Miriano Ravazzolo who has the necessary powers ("MB"), and "Alaska Pacific Leasing" a corporation incorporated under the laws of the state of Alaska, represented by Mr. David Faulk who has the necessary powers ("Dealer"), and to be administered as follows:

1. **APPOINTMENT AND ACCEPTANCE.** MB appoints Dealer as its exclusive reseller to promote the sale of the Products and Services as defined in paragraph 2 herein, and Dealer accepts the appointment and agrees to promote the sale of MB's Products as defined by this Agreement.
2. **PRODUCTS AND AREA.** The products covered by this Agreement (Products) are "crushing attachments", "screening attachments" and any other product and service manufactured and/or sold by the company "MB SpA" of Breganze, Italy ("Manufacturer") under its own brand name at the date of this agreement. Any new standard or custom Product developed or added by Manufacturer during the lifetime of this Agreement is not automatically included in the Agreement, but has to be agreed upon each time. The Area covered in this agreement is as specified in the Annex A, part I, of this Agreement.
3. **PRICES.** Dealer will purchase the Products at the prices specified in the current Price List, minus the dealer discount, and with the payment terms, as specified in the Annex A, part III, of this Agreement. Unless specifically agreed time by time, the prices are for material picked up by Dealer at one of our warehouses in the US, and do not include any transport or any other accessory cost.

The Price List, discounts and terms can be changed by MB at any moment with an advanced notice of 30 days; however, existing orders and/or proposals will be carried over at the conditions existing at the moment of their acceptance.
4. **WARRANTY AND SERVICE.** The warranty and service terms will be as defined in the Annex C. In any case, Dealer will communicate to MB the date of sale and the name and address of the purchasing entity for every Product sold, within 30 days from the sale; as well as the date of first use for Products that are used for rentals or demonstrations. Failure to do so will void any warranty on the Product, constitute significant breach of the Agreement.
5. **SALES OUTSIDE TERRITORY.** We discourage you selling New Products outside the Territory. Should you do so, you will be assessed a "servicing fee" of twenty percent (20%) of the discounted price of such New Product. The servicing fee, less an administrative assessment of 3%, will be paid to the dealer in whose Territory you sold the New Product, to compensate that dealer for providing support and for any advertising and effort spent in promoting interest in the Product. New Product for the purpose of this paragraph is product in service less than one year, except if sold at auctions.

Bucket Crushers Worldwide

AA0007

6. **RELATIONSHIP AND CONDUCT OF BUSINESS.** Dealer shall use its best efforts to promote the sale of and solicit orders for the Products and services and will conduct all its business in its own name and in such a manner as it may see fit, pay all its own expenses including all commissions, salaries, bonuses, and expenses of its own employees and sales persons and any and all taxes properly and lawfully associated with doing business as an independent entity in the assigned territory.

MB shall furnish Dealer, at no expense to Dealer, with catalogs, literature, and any other material available for the proper promotion and solicitation of orders for the Products in the assigned territory. MB can contribute to the marketing activities of Dealer, as advertising, exhibitions and the like, on a time-by-time base or as result of separate agreements.

MB can participate, at its own expense and decision, to exhibitions, conventions or conferences in any area of the country, and Dealer is not obliged to participate or contribute to said events.

Dealer shall abide by MB's terms and conditions pertaining to the sale of the Products and services, their operations, and their warranty (if any), and shall communicate same to customers. Dealer shall hold MB harmless from and shall indemnify MB for all liability, loss, costs, expenses or damages, including court costs and reasonable attorneys' fees, caused by any misrepresentation made by Dealer or its employees concerning MB's products or services.

Dealer is directly initiating and maintaining the relationship with its customer and will cooperate with the MB to solve possible disputes arising in connection with the Product.

Dealer is an independent entity and shall have sole control of the means of performing under this Agreement. Nothing in this Agreement shall be construed to constitute Dealer as a partner or employee of MB nor shall either have any authority to bind the other in any respect.

7. **BRAND PROTECTION.** Every Product sold to a final user will have to carry all the original logos, branding, identification numbers and serials as supplied by Manufacturer. Dealer will not alter, modify or hide the brand name or logos in any way. Proposals, quotes and invoices to the final users will have to clearly specify the Manufacturer's brand name.

Dealer can produce its own promotional material and/or advertising about the Product. However every document or photo will have to clearly indicate Manufacturer brand and logo, and the drafts of said promotional material or advertising will have to be submitted to MB for approval before printing and/or producing. MB has the faculty to deny the approval within 5 days from the date of receiving the drafts, at its own discretion.

8. **TERM OF AGREEMENT AND TERMINATION.** This Agreement shall be effective on the date listed on page 1 and shall continue in force for an initial term of 1 year.

This Agreement may be terminated by either party:

- (a) By written agreement mutually agreed upon to be terminated at any time; or
- (b) (But not effective during the initial term of the Agreement), for no cause upon at least 90 days' prior written notice to the other party;
- (c) By both parties in case of breach of this agreement, with 30 days written notice.
- (d) After 30 days' written notice if either party has filed or has filed against it a petition in bankruptcy (which is not dismissed within 30 days after it is filed) or after 30 days' written notice if either party has other cause.

9. **RIGHTS UPON TERMINATION.** Upon termination of this Agreement any current order will be carried on as scheduled. MB will however have the option to request a different payment term for

Bucket Crushers Worldwide

any order placed by Dealer from the moment of the notice of termination.

10. **ENTIRE AGREEMENT; MODIFICATION.** This Agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon successors and assigns. It may not be modified in any way without the written consent of an officer or owner of both parties.

11. **SURVIVABILITY OF AGREEMENT; HIERARCHY.** If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be considered deleted from this Agreement and shall not invalidate the remaining provisions of this Agreement. In case that any provision or part thereof in Annex A or Annex C would be considered contrasting with any provision or part in this Agreement, the provisions in Annex A or Annex C will prevail.

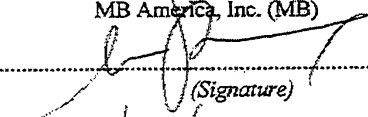
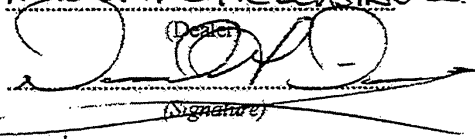
12. **APPLICABLE LAW - WAIVER.** This Agreement shall be construed according to the laws of the State of Nevada. The failure of either party to enforce, at any time or for any period of time, any provisions of this Agreement shall not be construed as a waiver of such provision or of the right of such party thereafter to enforce such provision.

13. **DISPUTES AND MEDIATION.** The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement shall be submitted to mediation between MB and Dealer with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV. Any mediation settlement by the parties shall be documented in writing. If such mediation settlement modifies the language of this Agreement, the modification shall be put in writing, signed by both parties and added to this Agreement as an attachment.

If mediation between the parties does not result in a mutual satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement in the court of law of Reno, Nevada with all reasonable attorney fees, court costs and expenses incurred by the prevailing party in such litigation to be paid by the other party.

14. **NOTICES.** All notices, demands or other communications by either party to the other shall be in writing and shall be effective upon personal delivery, or 72 hours after deposited in the United States mail, first class certified postage prepaid, or by email.

IN WITNESS WHEREOF, the officers or owners of both parties hereto have executed this Agreement to be effective on the day and year listed on page one of this Agreement written in multiple counterparts, each of which shall be considered an original.

MB America, Inc. (MB)	ALASKA PACIFIC LEASING CO., INC.
	
(Signature)	(Signature)
8/20/2012	AUGUST 17, 2012

Bucket Crushers Worldwide

AA0009

MB America, Inc
Dealer Agreement with
Alaska Pacific Leasing
9191 Old Seward Highway Unit #15
Anchorage, Alaska, 99515

Annex A

Part I – Territory

The territory will be the States of **Alaska**.

Part II - Sales Objectives:

After 120 days from the execution of this Agreement, MB will submit to Dealer a Target Sales Objective for the remaining time of the agreement, which will consider the market situation and the potentials of the line.

Part III - Discount and Payments:

The discount reserved is **36%** (thirty-six percent) on the current price list and its modifications. Dealer will pay the shipping costs from one of our warehouses to his premises.

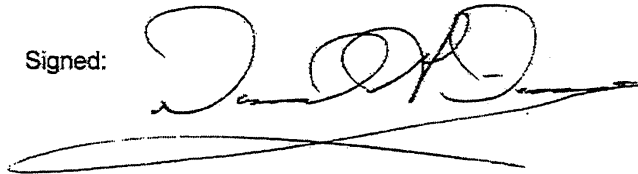
The payments will be by check or wire transfer as follows:

- 10% at the order
- final amount, including transport and any other costs, before shipping.

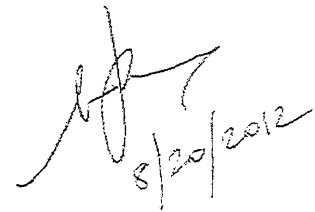
MB America will establish a maximum credit line with Dealer, which will not be exceeded at any moment.

Any delay in the payment will allow MB America to request and charge the payment of compounded interests of 1.5% monthly.

Signed:



Date: **AUGUST 17, 2012**



ORIGINAL

FILED
Electronically
2014-07-17 04:40:28 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4522769 : adegayne

1 CODE 4085

2
3
4
5 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
6 IN AND FOR THE COUNTY OF WASHOE

7 MB AMERICA, INC., a Nevada

8 corporation,

Plaintiff(s),

9 ALASKA^{VS} PACIFIC LEASING COMPANY,
10 a Alaska business corporation; and DOES,
11 I-X, inclusive, Defendant(s).

Case No. CV14-01229

Dept. No. 8

12 **SUMMONS**

13 **TO THE DEFENDANT: YOU HAVE BEEN SUED. THE COURT MAY DECIDE AGAINST YOU**
14 **WITHOUT YOUR BEING HEARD UNLESS YOU RESPOND IN WRITING WITHIN 20 DAYS.**
15 **READ THE INFORMATION BELOW VERY CAREFULLY.**

16 A civil complaint or petition has been filed by the plaintiff(s) against you for the relief as set forth in that
17 document (see complaint or petition). When service is by publication, add a brief statement of the object of the
18 action. See Nevada Rules of Civil Procedure, Rule 4(b).

The object of this action is: Declaratory Relief; Specific Performance

- 19 1. If you intend to defend this lawsuit, you must do the following within 20 days after service of
20 this summons, exclusive of the day of service:
- 21 a. File with the Clerk of the Court, whose address is shown below, a **formal written**
22 **answer** to the complaint or petition, along with the appropriate filing fees, in
23 accordance with the rules of the Court, and;
 - 24 b. Serve a copy of your answer upon the attorney or plaintiff(s) whose name and address
25 is shown below.
- 26 2. Unless you respond, a default will be entered upon application of the plaintiff(s) and this Court may
27 enter a judgment against you for the relief demanded in the complaint or petition.

28 Dated this 10 day of JUNE, 2014.

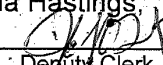
Issued on behalf of Plaintiff(s):

Name: Michael E. Sullivan, Esq.

Address: Robison, Belaustequi, Sharp & Low
71 Washington St., Reno, Nevada 89503

Phone Number: (775) 329-3151

~~HOWARD W. CONKERS~~
CLERK OF THE COURT
Joey Orduna Hastings

By: 
Deputy Clerk

Second Judicial District Court
75 Court Street
Reno, Nevada 89501

1005

IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MB AMERICA, INC., a Nevada
corporation,

Case No.: CV14-01229

Plaintiff,

Dept. No.: 8

v.

ACCEPTANCE OF SERVICE


ALASKA PACIFIC LEASING COMPANY,
a Alaska business corporation; and DOES
I through X, inclusive,

Defendants.

I, JASON J. RUEDY, ESQ., hereby accept service of the Summons and
Complaint on behalf of Defendant Alaska Pacific Leasing Company in the above-
entitled matter.

AFFIRMATION: The undersigned does hereby affirm that this document does not
contain the Social Security Number of any person.

DATED this 14th day of July, 2014.



JASON J. RUEDY
Law Offices of Royce & Brain
1407 W. 31st Avenue, 7th Floor
Anchorage, Alaska 99503
Tel: (907) 258-6792

AFFIRMATION
Pursuant to NRS 239B.030

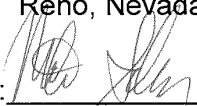
The undersigned does hereby affirm that the preceding document, **SUMMONS**
filed in Case No. CV14-01229

- ☒ Document does not contain the social security number of any person.
-OR-
☐ Document contains the social security number of a person as required
- ☐ A specific state or federal law, to wit:

(state specific state or federal law)
-or-
☐ For the administration of a public program
-or-
☐ For a application for a federal or state grant
-or-
☐ Confidential Family Court Information Sheet
(NRS 125.130, NRS 125.230 and NRS 125B.055)

DATED this 17th day of July, 2014.

ROBISON, BELAUSTEGUI, SHARP & LOW
71 Washington Street
Reno, Nevada 89503

By: 

MICHAEL E. SULLIVAN
Attorneys for MB America, Inc.

Affirmation
Revised December 15, 2006

Robison, Belaustegui,
Sharp & Low
71 Washington St.
Reno, NV 89503
(775) 329-3151

AA0013

1 **1005**

2 Michael E. Sullivan, Esq. (SBN 5142)
3 **ROBISON, BELAUSTEGUI, SHARP & LOW**
4 A Professional Corporation
5 71 Washington Street
6 Reno, Nevada 89503
7 Telephone: (775) 329-3151
8 *Attorneys for Plaintiff MB America, Inc.*

9
10 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**
12

13 MB AMERICA, INC., a Nevada
14 corporation,

Case No.: CV14-01229

15 Plaintiff,

Dept. No.: 8

16 v.

ACCEPTANCE OF SERVICE


17 ALASKA PACIFIC LEASING COMPANY,
18 a Alaska business corporation; and DOES
19 I through X, inclusive,

20 Defendants.
21 _____/

22 I, JASON J. RUEDY, ESQ., hereby accept service of the Summons and
23 Complaint on behalf of Defendant Alaska Pacific Leasing Company in the above-
24 entitled matter.

25 **AFFIRMATION:** The undersigned does hereby affirm that this document does not
26 contain the Social Security Number of any person.

27 DATED this 14th day of July, 2014.

28 

JASON J. RUEDY
Law Offices of Royce & Brain
1407 W. 31st Avenue, 7th Floor
Anchorage, Alaska 99503
Tel: (907) 258-6792

1130

HOLLY S. PARKER, ESQ.
Nevada State Bar No: 10181
MARILEE BRETERNITZ, ESQ.
Nevada State Bar No. 12563
LAXALT & NOMURA, LTD.
9600 Gateway Drive
Reno, Nevada 89521
hparker@laxalt-nomura.com
mbreternitz@laxalt-nomura.com
Telephone: (775) 322-1170
Facsimile: (775) 322-1865
Attorneys for Defendant Alaska
Pacific Leasing Company

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
IN AND FOR THE COUNTY OF WASHOE

MB AMERICA, INC., a Nevada
Corporation,

Plaintiff,

vs.

ALASKA PACIFIC LEASING COMPANY,
a Alaska business corporation; and DOES
1 THROUGH X, inclusive,

Defendants.

CASE NO: CV14-01229

DEPT. NO. 8

**ANSWER AND AFFIRMATIVE DEFENSES TO
COMPLAINT FOR DECLARATORY RELIEF**

Defendant, ALASKA PACIFIC LEASING COMPANY (sometimes hereinafter “this
answering Defendant”), by and through its counsel, LAXALT & NOMURA, LTD., hereby
offers the following answer and affirmative defenses in response to Plaintiff MB AMERICA,
INC.’s Complaint for Declaratory Relief (“Complaint”):

PARTIES

1
2 1. Answering paragraph 1 of the Complaint, this answering Defendant admits it has
3 an understanding that MB America, Inc. is a Nevada Corporation. This answering Defendant is
4 without sufficient information or knowledge to form a belief as to the truth or falsity of the
5 remaining allegations set forth in said paragraph, and on that basis denies the same.

6 2. Answering paragraph 2 of the Complaint, this answering Defendant admits the
7 allegations set forth in said paragraph.

8 3. Answering paragraph 3 of the Complaint, this answering Defendant denies the
9 allegations in said paragraph to the extent they imply liability on the part of this answering
10 Defendant. This answering Defendant is without sufficient information or knowledge to form a
11 belief as to the truth or falsity of the remaining allegations set forth in said paragraph, and on that
12 basis denies the same.
13

FACTUAL ALLEGATIONS

14
15 4. Answering paragraph 4 of the Complaint, this answering Defendant admits it has
16 an understanding that Plaintiff is a Nevada Corporation. This answering Defendant is without
17 sufficient information or knowledge to form a belief as to the truth or falsity of the remaining
18 allegations set forth in said paragraph, and on that basis denies the same.
19

20 5. Answering paragraph 5 of the Complaint, this answering Defendant admits the
21 allegations set forth in said paragraph.

22 6. Answering paragraph 6 of the Complaint, this answering Defendant states that the
23 allegations set forth in said paragraph state legal conclusions to which no response is required.
24 To the extent a response is required, this answering Defendant admits it has an understanding
25 that Exhibit "1" appears to be a copy of the distributorship agreement this answering Defendant
26 entered into with Plaintiff in August 2012 and that this answering Defendant was a "Dealer" for
27
28

1 Plaintiff's line of products under that agreement. This answering Defendant is without sufficient
2 information or knowledge to form a belief as to the truth or falsity of the remaining allegations
3 set forth in said paragraph, and on that basis denies the same.

4 7. Answering paragraph 7 of the Complaint, this answering Defendant states that the
5 allegations set forth in said paragraph state legal conclusions to which no response is required.
6 To the extent a response is required, this answering Defendant admits only that it received a
7 notice from Plaintiff dated December 16, 2013, advising that the distribution agreement would
8 end on March 18, 2014. This answering Defendant is without sufficient information or
9 knowledge to form a belief as to the truth or falsity of the remaining allegations set forth in said
10 paragraph, and on that basis denies the same.

12 8. Answering paragraph 8 of the Complaint, this answering Defendant admits it
13 purchased inventory from Plaintiff pursuant to the August 2012 distributorship agreement and
14 has requested to rescind the purchase pursuant to applicable law. This answering Defendant
15 denies each and every remaining allegation set forth in said paragraph.

17 9. Answering paragraph 9 of the Complaint, this answering Defendant states that the
18 allegations set forth in said paragraph state legal conclusions to which no response is required.
19 To the extent a response is required, this answering Defendant states that it is without sufficient
20 information or knowledge to form a belief as to the truth or falsity of the allegation that Nevada
21 is the proper jurisdiction for any controversy of this type, and therefore denies said allegation.
22 This answering Defendant denies each and every remaining allegation set forth in said
23 paragraph.

25 10. Answering paragraph 10 of the Complaint, this answering Defendant states that
26 the allegations set forth in said paragraph state legal conclusions to which no response is
27 required. To the extent a response is required, this answering Defendant admits a dispute exists
28

1 between the parties. This answering Defendant denies the allegation that it was necessary for
2 Plaintiff to file a declaratory relief action. This answering Defendant is without sufficient
3 information or knowledge to form a belief as to the truth or falsity of the remaining allegations
4 set forth in said paragraph, and on that basis denies the same.

5 **FIRST CLAIM FOR RELIEF**

6 **(Declaratory Relief Against All Defendants)**

7 11. Answering paragraph 11 of the Complaint, this answering Defendant repeats and
8 realleges its answers to paragraphs 1 through 10 as more fully set forth herein, and incorporates
9 them herein by reference.
10

11 12. Answering paragraph 12 of the Complaint, this answering Defendant admits that a
12 dispute exists between the parties. This answering Defendant denies the allegation that Plaintiff
13 has not breached the contract and the allegation that Defendant is not entitled to any relief. This
14 answering Defendant denies the allegations set forth in said paragraph to the extent they imply
15 liability on the part of this answering Defendant. This answering Defendant is without sufficient
16 information or knowledge to form a belief as to the truth or falsity of the remaining allegations
17 set forth in said paragraph, and on that basis denies the same.
18

19 13. Answering paragraph 13 of the Complaint, this answering Defendant denies the
20 allegations set forth in said paragraph to the extent they imply liability on the part of this
21 answering Defendant. This answering Defendant is without sufficient information or knowledge
22 to form a belief as to the truth or falsity of the remaining allegations set forth in said paragraph,
23 and on that basis denies the same.
24

25 14. Answering paragraph 14 of the Complaint, this answering Defendant states that
26 the allegations set forth in said paragraph state legal conclusions to which no response is
27 required. To the extent a response is required, this answering Defendant states that it is without
28

1 sufficient information or knowledge to form a belief as to the truth or falsity of the allegations set
2 forth in said paragraph, and on that basis denies the same.

3 **SECOND CLAIM FOR RELIEF**

4 **(Specific Performance)**

5 15. Answering paragraph 15 of the Complaint, this answering Defendant repeats and
6 realleges its answers to paragraphs 1 through 14 as more fully set forth herein, and incorporates
7 them herein by reference.

8 16. Answering paragraph 16 of the Complaint, this answering Defendant denies the
9 allegations set forth in said paragraph to the extent they imply liability on the part of this
10 answering Defendant. This answering Defendant is without sufficient information or knowledge
11 to form a belief as to the truth or falsity of the remaining allegations set forth in said paragraph,
12 and on that basis denies the same.
13

14 **AFFIRMATIVE DEFENSES**

15 1. Plaintiff's Complaint fails to state a claim against this answering Defendant upon
16 which relief may be granted.
17

18 2. Plaintiff failed to mitigate its alleged damages herein.

19 3. Plaintiff failed to make a proper request for mediation before filing this action and
20 is, therefore, barred from seeking any relief against this answering Defendant.

21 4. Plaintiff's claims against this answering Defendant are barred by the applicable
22 statute of limitations and/or statute of repose.
23

24 5. Plaintiff's claims herein are barred by the doctrine of laches.

25 6. Plaintiff has waived and is barred by the doctrine of estoppel from pursuing any
26 claim against this answering Defendant.

27 ///

1 7. At all times and places relevant hereto, this answering Defendant acted in good
2 faith.

3 8. This answering Defendant alleges that it acted in accordance with legal
4 obligations.

5 9. This answering Defendant affirmatively alleges and avers that at all times relevant
6 to the incidents referred to in Plaintiff's Complaint, it acted reasonably, and in reasonable
7 reliance upon information reasonably deemed to be reliable.

8 10. This answering Defendant alleges that any and all actions taken by it were
9 authorized, justified, and privileged.

10 11. This answering Defendant alleges that Plaintiff is barred and estopped by the
11 equitable doctrine of unclean hands from seeking or obtaining any recovery against this
12 answering Defendant by reason of Plaintiff's Complaint.

13 12. This answering Defendant alleges that even if the contract referenced in the
14 Complaint is valid, the Complaint is barred by virtue of the terms and provisions of the contract.
15

16 13. If this answering Defendant is liable to Plaintiff, to any degree, then this
17 answering Defendant is entitled to equitable or implied indemnity from Plaintiff.

18 14. This answering Defendant alleges that the incidents referred to in the Complaint,
19 and any and all alleged damages resulting therefrom, were caused or contributed to by the acts or
20 omissions of a third party over whom this answering Defendant had no control, including but not
21 limited to, those acts or omissions of Plaintiff herein.

22 15. This dispute involves a distributorship agreement with a territory identified as the
23 State of Alaska and is therefore subject to Alaska law pursuant to AS 45.45.750(a)(5).

24 16. Pursuant to AS 45.45.710, Plaintiff must pay this answering Defendant for the
25 merchandise that was purchased from Plaintiff.
26
27
28

1 17. Plaintiff is precluded from recovering attorney's fees against this answering
2 Defendant pursuant to AS 45.45.750(a)(3) and other applicable law.

3 18. Plaintiff's requested relief, including but not limited to its claim that this
4 answering Defendant is not entitled to relief under the distributorship agreement, is premature.

5 19. This answering Defendant alleges that the Plaintiff's claims are barred by the
6 doctrine of waiver.

7 20. Plaintiff, by its own actions, made any performance under any contract impossible
8 such that it frustrated the purpose of any such contract and this answering Defendant is entitled
9 to relief.

10 21. This answering Defendant reserves the right, upon completion of its investigation
11 and discovery, to amend this Answer to allege and incorporate further affirmative defenses that
12 may become available and add such additional defenses as may be appropriate.
13

14 WHEREFORE, in answer to the Complaint for Declaratory Relief, Defendant Alaska
15 Pacific Leasing Company prays for judgment as follows:
16

17 1. That Plaintiff take nothing by way of its Complaint and that the same be
18 dismissed with prejudice;

19 2. That the Court enter a declaration and judgment that Plaintiff has not met its
20 obligations under the distributorship agreement, that Plaintiff is not entitled to relief or
21 recovery under Alaska or Nevada law or under any provision of the distributorship agreement
22 cited in the Complaint;

23 3. For a declaration and judgment that the distributorship agreement is subject to
24 the laws of the State of Alaska and that this answering Defendant be entitled to relief pursuant
25 to AS 45.45.700 *et seq.*, or, alternatively, under Nevada law;
26
27
28

1 4. That this answering Defendant be awarded a reasonable sum as and for attorney's
2 fees and costs of suit incurred herein; and

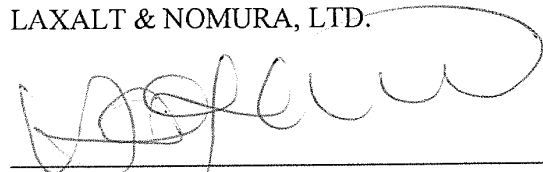
3 5. For such other and further relief as the Court may deem proper in the premises.

4 **AFFIRMATION PURSUANT TO NRS 239.B.030**

5 The preceding document does not contain the social security number of any person.

6 DATED this 15th day of August, 2014.

7 LAXALT & NOMURA, LTD.

8 

9 _____
10 HOLLY S. PARKER, ESQ.

11 Nevada State Bar No: 10181

12 MARILEE BRETERNITZ, ESQ.

13 Nevada State Bar No. 12563

14 LAXALT & NOMURA, LTD.

15 9600 Gateway Drive

16 Reno, Nevada 89521

17 hparker@laxalt-nomura.com

18 mbreternitz@laxalt-nomura.com

19 Telephone: (775) 322-1170

20 Facsimile: (775) 322-1865

21 Attorneys for Defendant Alaska

22 Pacific Leasing Company
23
24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

CERTIFICATE OF SERVICE

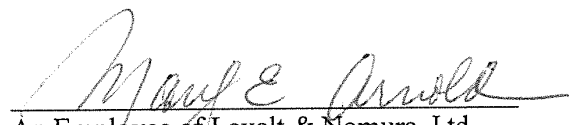
Pursuant to NRCP 5(b), I hereby certify that I am an employee of LAXALT & NOMURA, LTD., and that on the 15th day of August, 2014, I caused to be served a true and correct copy of the foregoing ANSWER TO COMPLAINT by:

☒ Mail on all parties in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.

☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals at the email addresses set for the below.

☐ (BY PERSONAL DELIVERY) by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth addressed as follows:

Michael E. Sullivan, Esq.
Robison Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503
Attorneys for Plaintiff MB America, Inc.


An Employee of Laxalt & Nomura, Ltd.

CV14-01229
MB AMERICA, INC. VS ALASKA
District Court
Washoe County
NVC
DC-09900059617-054
10 Pages
09/15/2014 04:15 PM
\$2200
MTARRE

FILED

2014 SEP 15 PM 4:15

JULY 15 2014
JULY 15 2014
JULY 15 2014

1 **\$2200**

2 **HOLLY S. PARKER, ESQ.**

3 Nevada State Bar No: 10181

4 **MARILEE BRETERNITZ, ESQ.**

5 Nevada State Bar No. 12563

6 **LAXALT & NOMURA, LTD.**

7 9600 Gateway Drive

8 Reno, Nevada 89521

9 hparker@laxalt-nomura.com

10 mbreternitz@laxalt-nomura.com

11 Telephone: (775) 322-1170

12 Facsimile: (775) 322-1865

13 Attorneys for Defendant Alaska

14 Pacific Leasing Company

15
16 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

17
18 IN AND FOR THE COUNTY OF WASHOE

19 MB AMERICA, INC., a Nevada
20 Corporation,

21 Plaintiff

22 vs.

23 ALASKA PACIFIC LEASING COMPANY,
24 a Alaska business corporation; and DOES
25 1-THROUGH X, inclusive,

26 Defendants.

CASE NO: CV14-01229

DEPT. NO. 8

27 **DEFENDANT ALASKA PACIFIC LEASING COMPANY'S MOTION**
28 **FOR SUMMARY JUDGMENT**

Defendant, ALASKA PACIFIC LEASING COMPANY ("Alaska Pacific"), by and through its counsel, Laxalt & Nomura, Ltd., hereby moves the Court for summary judgment on the claims set forth in Plaintiff's Complaint. This Motion is made based upon the following Memorandum of Points and Authorities, the exhibits attached hereto, the pleadings and papers filed herein, and any additional information the Court may wish to consider.

//

//

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff MB America, Inc. ("MB") prematurely filed this action to compel mediation
4 between the parties related to a dispute arising from a Dealership Agreement under which Alaska
5 Pacific was to sell crushing attachments and other products for MB in the State of Alaska. *See*
6 *generally* Plt. Compl., filed June 6, 2014; Exhibit 1, Agreement between MB and Alaska Pacific.

7 MB's Complaint is premature because it has not complied with the mediation provision
8 of the Agreement it seeks to enforce. The mediation provision in the Distributorship Agreement
9 requires the parties to submit any disputes or questions arising under the Agreement (including
10 disputes or questions involving the construction or application of the Agreement) to mediation
11 under the rules of the American Arbitration Association ("AAA"). According to the Agreement,
12 the parties may only seek court intervention in disputes or questions arising from the Agreement
13 if a mutually agreed upon settlement is not reached within 180 days from the date of submission
14 to mediation. MB never requested or demanded mediation of any dispute before it filed this
15 action and the parties have not attended mediation, with the AAA or otherwise. Pursuant to the
16 express terms of the Agreement, this Court lacks jurisdiction to consider any disputes or
17 questions arising thereunder until **after** such disputes or questions are submitted to mediation
18 with the AAA. Alaska Pacific never refused any request or demand for mediation by MB
19 because no such request or demand was ever made. Once this action was filed, Alaska Pacific
20 initiated its own request for mediation in accordance with the Agreement. As discussed further
21 below, no issues of material fact exist and Plaintiff's premature Complaint should be dismissed.

22 **II. LEGAL STANDARD**

23 Summary judgment is appropriate when, "after review of the record viewed in a light
24 most favorable to the non-moving party, there remain no genuine issues of material fact, and the
25 moving party is entitled to judgment as a matter of law." *Evans v. Samuels*, 119 Nev. 378, 75
26 P.3d 361, 363 (2003); NRCP 56(c). In making a motion for summary judgment, the moving
27 party must inform the court of the basis for its motion. *Celotex Corp. v. Catrett*, 477 U.S. 317,

1 323 (1986). Under the standard articulated by the Nevada Supreme Court, this means Alaska
2 Pacific meets its burden on by demonstrating Plaintiff lacks evidence to support one or more of
3 the *prima facie* elements of its claims. *NGA#2 Limited Liability Co. v. Rains*, 113 Nev. 1151,
4 1156, 946 P.2d 163, 167 (1997) (citing *Celotex*, 477 U.S. at 331). Alaska Pacific may do this by
5 presenting affirmative evidence negating an essential element of MB's claim, or by
6 demonstrating MB lacks the quality and quantity of evidence necessary to support his burden of
7 proving entitlement to enforcing the mediation provision. *Celotex*, 477 U.S. at 325.

8 Once Alaska Pacific meets its burden, MB may not rest upon the allegations set forth in
9 its pleadings. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Rather, MB "must, by
10 affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for
11 trial." *Wood v. Safeway, Inc.*, 121 Nev. 724, 732, 121 P.3d 1026, 1031 (2005). This means MB
12 must show more than "some metaphysical doubt as to the operative facts." *Id.* A nonmoving
13 party "is not entitled to build a case on the gossamer threads of whimsy, speculation, and
14 conjecture." *Id.* "A factual dispute is genuine when the evidence is such that a rational trier of
15 fact could return a verdict for the nonmoving party." *Id.* at 731, 1031 (citing *Matsushita Elec.*
16 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

17 **III. STATEMENT OF UNDISPUTED FACTS**

18 1. The Agreement attached to Plaintiffs' Complaint was entered into by MB and Alaska
19 Pacific and is the Agreement at issue in this case. Ex. 1, Agreement between MB and Alaska
20 Pacific; Ex. 2, Declaration of David Faulk, at ¶ 3.

21 2. The Agreement sets forth a mediation provision in paragraph 13, which states, "The
22 parties agree that any disputes or questions arising, hereunder, including the construction or
23 application of this Agreement shall be submitted to mediation between MB and Dealer with the
24 rules of the American Arbitration Association"¹ Ex. 1.

25
26
27 ¹ To the extent MB seeks any relief beyond enforcing mediation (e.g. issues concerning the construction or
28 application of the Agreement, a determination of the rights and obligations of the parties under the contract, or a
determination that any party has breached or not breached the contract), any such relief is also premature and barred
by the mediation provision, which requires mediation as a prerequisite to any judicial action to enforce the contract.

1 3. The Agreement further provides in paragraph 13 “[i]f mediation between the parties does
2 not result in a mutually satisfying settlement within 180 days after submission to mediation, then
3 each party will have the right to enforce the obligation of this Agreement” Ex. 1.

4 4. Procedure M-1 of the AAA Commercial Mediation Procedures provides:

5 Whenever, by stipulation or in their contract, the parties have provided for mediation or
6 conciliation of existing or future disputes under the auspices of the American Arbitration
7 Association or under these procedures, the parties and their representatives, unless
8 otherwise agreed in writing, shall be deemed to have made these procedural guidelines,
as amended and in effect as of the date of filing of a request for mediation, a part of their
agreement and designate the AAA as the administrator of their mediation.

9 Ex. 4, AAA’s Commercial Mediation Rules p. 45; Ex. 3, Affidavit of Holly S. Parker at ¶ 2.²

10 5. Procedure M-2 of the AAA Commercial Mediation Procedures, entitled “Initiation of
11 Mediation,” provides that either party to a dispute may initiate mediation under the AAA’s
12 auspices by making a request to any AAA regional office or case management centers by
13 telephone, email, regular mail, fax, or by filing a request online. Ex. 4, AAA’s Commercial
14 Mediation Rules p. 45; Ex. 3, Affidavit of Holly S. Parker at ¶ 2.

15 6. Procedure M-2 of the AAA Commercial Mediation Procedures also describes the
16 information that must be provided with a mediation request and the procedure for notifying the
17 opposing party of a mediation request. Ex. 4, AAA’s Commercial Mediation Rules p. 45; Ex. 3,
18 Affidavit of Holly S. Parker at ¶ 2.

19 7. Alaska Pacific never received any request or demand from MB to mediate any dispute
20 under the Agreement before MB filed this lawsuit and is unaware of any steps having been taken
21 by MB before commencement of this action to initiate a request for mediation with the AAA.
22 Ex. 2 at ¶ 5.

23 The straightforward terms of the Agreement require dismissal of this lawsuit until such time as the mediation period
24 has passed.

25 ² The AAA Commercial Mediation Rules are also appropriate for judicial notice because they are capable of
26 accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See NRS
27 47.130; *Century Satellite, Inc. v. EchoStar Satellite, L.L.C.*, 395 F. Supp. 2d 487, 493 (S.D. Tex. 2005) (“The Court
takes judicial notice that the AAA’s Commercial Arbitration Rules allow for the appointment of arbitrators in accord
with a method specified by agreement of the parties. See R-12, Commercial Arbitration Rules and Mediation
Procedures (July 1, 2003), available at <http://www.adr.org/sp.asp?id=22440> (last visited June 16, 2005).”)

1 8. The parties have not attended mediation related to this matter. Ex. 2 at ¶¶ 5-6.

2 9. Alaska Pacific filed a request for mediation with the AAA on September 4, 2014. Ex. 2
3 at ¶¶ 7-8; Ex. 5, AAA Mediation Request.

4 **IV. LEGAL ARGUMENT**

5 MB's Complaint is premature and summary judgment should be granted in favor of
6 Alaska Pacific. The purpose of MB's Complaint is to compel the parties to attend mediation.
7 Plaintiff's Complaint ¶¶ 9, 16. There is no evidence that Alaska Pacific has refused any request
8 or demand by MB to mediate because no such request or demand was ever made before MB
9 filed this litigation. See Ex. 2 at ¶ 5. The evidence demonstrates that MB has not complied with
10 the mediation provision it is requesting this Court to enforce. There is no basis to compel Alaska
11 Pacific to do something that MB never even requested before filing this action. Alaska Pacific
12 made its own request for mediation with AAA and the 180 day period for mediation has not
13 passed, per the terms of the Agreement; therefore, this action is premature and should be
14 dismissed.

15 The Agreement provides, in relevant part:

16 **13. DISPUTES AND MEDIATION.** The parties agree that any disputes or questions
17 arising hereunder, including the construction or application of this Agreement shall be
18 submitted to mediation between MB and Dealer with the rules of the American
19 Arbitration Association, of which any hearing or meeting should be conducted in Reno,
20 NV. Any mediation settlement by the parties shall be documented in writing. If such
21 mediation settlement modifies the language of this Agreement, the modification shall be
22 put in writing, signed by both parties and added to this Agreement as an attachment.

23 If mediation between the parties does not result in a mutual satisfying settlement within
24 180 days after submission to mediation, then each party will have the right to enforce the
25 obligations of this Agreement in the court of law of Reno, Nevada with all reasonable
26 attorney fees, court costs and expenses incurred by the prevailing party in such litigation
27 to be paid by the other party.

28 Ex. 1.

29 The Agreement references and incorporates the AAA's mediation rules to resolve
30 disputes or questions concerning the Agreement. Ex. 1. The AAA's Commercial Mediation
31 Procedures, Procedure M-1, states that whenever the parties in their contract have provided for

1 mediation under the “auspices of the American Arbitration Association, or under these
2 procedures, the parties . . . unless otherwise agreed to in writing, shall be **deemed to have made**
3 **these procedural guidelines**, as amended and in effect as of the date of the filing of a request for
4 mediation a **part of their agreement and designate the AAA as the administrator of their**
5 **mediation.**” (Emphasis supplied.) Ex. 4, AAA’s Commercial Mediation Rules p. 45; Ex. 3,
6 Affidavit of Holly S. Parker at ¶ 2. Simply put, MB and Alaska Pacific agreed to conduct
7 mediation under the AAA rules, so any mediation must be conducted under the AAA rules and
8 AAA is deemed to be the administrator of the mediation.
9

10 MB further seeks a declaratory judgment that Alaska Pacific is not entitled to any relief
11 under the Agreement. Plaintiff’s Complaint ¶¶ 10, 12. Pursuant to the Agreement, the Court
12 lacks jurisdiction to grant the relief requested by MB before a mediation occurs. Paragraph 13 of
13 the Agreement unequivocally requires that all disputes or questions arising out of the Agreement,
14 **including the construction or application of the Agreement itself**, be submitted to mediation
15 before either party has the right to seek judicial intervention. Ex. 1.
16

17 The undisputed facts are straightforward. The parties agreed to submit disputes and
18 questions related to their contract to mediation consistent with the AAA’s rules and only to
19 initiate a lawsuit if a mutually satisfying settlement could not be reached within 180 days of
20 submitting the matter to mediation. Ex. 1. MB filed this action without requesting mediation
21 under the terms of the Agreement, without filing a request in compliance with the AAA rules,
22 and without allowing 180 days to elapse after the parties’ dispute was submitted to mediation.
23 Ex. 2 at ¶¶ 5-8; *See also* Ex. 4, AAA’s Commercial Mediation Rules, Procedure M-2, Initiation
24 of Mediation, at p. 45 (setting forth the procedure for initiating mediation, and the information to
25 be provided with the request); Ex. 3 at ¶ 2.
26
27
28

1 This matter was only submitted to the AAA (by Alaska Pacific not MB) on September 4,
2 2014, so the 180 day time period has only just begun. The record and evidence show that MB
3 failed to follow the terms of paragraph 13 of the Agreement prior to initiating this action; thus,
4 the action is premature and should be dismissed. It is a waste of judicial resources for the Court
5 to entertain this action when the matter has already been submitted to the AAA for mediation and
6 the Agreement expressly precludes either party from seeking judicial action at this time.

7
8 **V. CONCLUSION**

9 There are no genuine issues of material fact and Alaska Pacific is entitled to judgment
10 as a matter of law in this matter because the evidence demonstrates that the parties have not
11 attended a mediation as provided for in their agreement and 180 days has not passed since the
12 parties' dispute was submitted to mediation. MB prematurely filed this action with the Court.
13 Based on the foregoing and good cause appearing, Alaska Pacific respectfully requests that the
14 Court grant summary judgment in its favor on the claims for relief asserted in MB's Complaint
15 filed on June 6, 2014. MB's Complaint should be dismissed and Alaska Pacific should be
16 awarded all of its reasonable attorney fees, court costs and expenses incurred in this
17 unnecessary action.
18

19 //

20 //

21 //

22 //

23 //

24 //

25 //

26 //

27 //

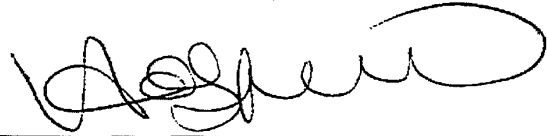
28

AFFIRMATION PURSUANT TO NRS 239.B.030

The preceding document does not contain the social security number of any person.

DATED this 15th day of September, 2014.

LAXALT & NOMURA, LTD.



HOLLY S. PARKER, ESQ.

Nevada State Bar No: 10181

MARILEE BRETERNITZ, ESQ.

Nevada State Bar No. 12563

LAXALT & NOMURA, LTD.

9600 Gateway Drive

Reno, Nevada 89521

hparker@laxalt-nomura.com

mbreternitz@laxalt-nomura.com

Telephone: (775) 322-1170

Facsimile: (775) 322-1865

Attorneys for Defendant Alaska

Pacific Leasing Company

CERTIFICATE OF SERVICE

Pursuant to NRCP 5(b), I hereby certify that I am an employee of LAXALT & NOMURA, LTD., and that on the 15th day of September, 2014, I caused to be served a true and correct copy of the foregoing **DEFENDANT ALASKA PACIFIC LEASING COMPANY'S MOTION FOR SUMMARY JUDGMENT** by:

- ☐ Mail on the parties listed below in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☒ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☐ Facsimile on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.
- ☐ Federal Express or other overnight delivery.
- ☐ Reno/Carson Messenger Service

addressed as follows:

Michael E. Sullivan, Esq.
Robison Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503
Attorneys for Plaintiff MB America, Inc.


An Employee of Laxalt & Nomura, Ltd.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INDEX OF EXHIBITS

EXHIBIT	DESCRIPTION	PAGES
1	Agreement between MB and Alaska Pacific	5
2	Declaration of David Faulk	2
3	Affidavit of Holly S. Parker	2
4	AAA's Commercial Mediation Rules	53
5	AAA Mediation Request	24

CV14-01229 DC-09900059617-065
MB AMERICA, INC. VS ALASKA P 5 Pages
District Court 09/15/2014 04:15 PM
Washoe County \$2200
EX1 MTORREC

EXHIBIT 1

EXHIBIT 1



MB America, Inc.
8730 Technology Way
Reno, NV 89521
Phone 775-833-1058 - Fax 775-882-6802
www.mbamerica.com

Agreement

This Agreement is made as of the 1 day of August in the year of 2012, by and between "MB America, Inc.", a corporation incorporated under the laws of the state of Nevada, represented by Miriano Ravazzolo who has the necessary powers ("MB"), and "Alaska Pacific Leasing" a corporation incorporated under the laws of the state of Alaska, represented by Mr. David Faulk who has the necessary powers ("Dealer"), and to be administered as follows:

1. **APPOINTMENT AND ACCEPTANCE.** MB appoints Dealer as its exclusive reseller to promote the sale of the Products and Services as defined in paragraph 2 herein, and Dealer accepts the appointment and agrees to promote the sale of MB's Products as defined by this Agreement.
2. **PRODUCTS AND AREA.** The products covered by this Agreement (Products) are "crushing attachments", "screening attachments" and any other product and service manufactured and/or sold by the company "MB SpA" of Breganze, Italy ("Manufacturer") under its own brand name at the date of this agreement. Any new standard or custom Product developed or added by Manufacturer during the lifetime of this Agreement is not automatically included in the Agreement, but has to be agreed upon each time. The Area covered in this agreement is as specified in the Annex A, part I, of this Agreement.
3. **PRICES.** Dealer will purchase the Products at the prices specified in the current Price List, minus the dealer discount, and with the payment terms, as specified in the Annex A, part III, of this Agreement. Unless specifically agreed time by time, the prices are for material picked up by Dealer at one of our warehouses in the US, and do not include any transport or any other accessory cost.
The Price List, discounts and terms can be changed by MB at any moment with an advanced notice of 30 days; however, existing orders and/or proposals will be carried over at the conditions existing at the moment of their acceptance.
4. **WARRANTY AND SERVICE.** The warranty and service terms will be as defined in the Annex C. In any case, Dealer will communicate to MB the date of sale and the name and address of the purchasing entity for every Product sold, within 30 days from the sale; as well as the date of first use for Products that are used for rentals or demonstrations. Failure to do so will void any warranty on the Product, constitute significant breach of the Agreement.
5. **SALES OUTSIDE TERRITORY.** We discourage you selling New Products outside the Territory. Should you do so, you will be assessed a "servicing fee" of twenty percent (20%) of the discounted price of such New Product. The servicing fee, less an administrative assessment of 3%, will be paid to the dealer in whose Territory you sold the New Product, to compensate that dealer for providing support and for any advertising and effort spent in promoting interest in the Product. New Product for the purpose of this paragraph is product in service less than one year, except if sold at auctions.

Bucket Crushers Worldwide

AA0035

6. **RELATIONSHIP AND CONDUCT OF BUSINESS.** Dealer shall use its best efforts to promote the sale of and solicit orders for the Products and services and will conduct all its business in its own name and in such a manner as it may see fit, pay all its own expenses including all commissions, salaries, bonuses, and expenses of its own employees and sales persons and any and all taxes properly and lawfully associated with doing business as an independent entity in the assigned territory.

MB shall furnish Dealer, at no expense to Dealer, with catalogs, literature, and any other material available for the proper promotion and solicitation of orders for the Products in the assigned territory. MB can contribute to the marketing activities of Dealer, as advertising, exhibitions and the like, on a time-by-time basis or as result of separate agreements.

MB can participate, at its own expense and decision, to exhibitions, conventions or conferences in any area of the country, and Dealer is not obliged to participate or contribute to said events.

Dealer shall abide by MB's terms and conditions pertaining to the sale of the Products and services, their operations, and their warranty (if any), and shall communicate same to customers. Dealer shall hold MB harmless from and shall indemnify MB for all liability, loss, costs, expenses or damages, including court costs and reasonable attorneys' fees, caused by any misrepresentation made by Dealer or its employees concerning MB's products or services.

Dealer is directly initiating and maintaining the relationship with its customer and will cooperate with the MB to solve possible disputes arising in connection with the Product.

Dealer is an independent entity and shall have sole control of the means of performing under this Agreement. Nothing in this Agreement shall be construed to constitute Dealer as a partner or employee of MB nor shall either have any authority to bind the other in any respect.

7. **BRAND PROTECTION.** Every Product sold to a final user will have to carry all the original logos, branding, identification numbers and serials as supplied by Manufacturer. Dealer will not alter, modify or hide the brand name or logos in any way. Proposals, quotes and invoices to the final users will have to clearly specify the Manufacturer's brand name.

Dealer can produce its own promotional material and/or advertising about the Product. However every document or photo will have to clearly indicate Manufacturer brand and logo, and the drafts of said promotional material or advertising will have to be submitted to MB for approval before printing and/or producing. MB has the faculty to deny the approval within 5 days from the date of receiving the drafts, at its own discretion.

8. **TERM OF AGREEMENT AND TERMINATION.** This Agreement shall be effective on the date listed on page 1 and shall continue in force for an initial term of 1 year.

This Agreement may be terminated by either party:

- (a) By written agreement mutually agreed upon to be terminated at any time; or
- (b) (But not effective during the initial term of the Agreement), for no cause upon at least 90 days' prior written notice to the other party;
- (c) By both parties in case of breach of this agreement, with 30 days written notice.
- (d) After 30 days' written notice if either party has filed or has filed against it a petition in bankruptcy (which is not dismissed within 30 days after it is filed) or after 30 days' written notice if either party has other cause.

9. **RIGHTS UPON TERMINATION.** Upon termination of this Agreement any current order will be carried on as scheduled. MB will however have the option to request a different payment term for

Bucket Crushers Worldwide

any order placed by Dealer from the moment of the notice of termination.

10. **ENTIRE AGREEMENT; MODIFICATION.** This Agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon successors and assigns. It may not be modified in any way without the written consent of an officer or owner of both parties.

11. **SURVIVABILITY OF AGREEMENT; HIERARCHY.** If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be considered deleted from this Agreement and shall not invalidate the remaining provisions of this Agreement. In case that any provision or part thereof in Annex A or Annex C would be considered contrasting with any provision or part in this Agreement, the provisions in Annex A or Annex C will prevail.

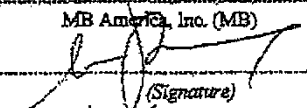
12. **APPLICABLE LAW - WAIVER.** This Agreement shall be construed according to the laws of the State of Nevada. The failure of either party to enforce, at any time or for any period of time, any provisions of this Agreement shall not be construed as a waiver of such provision or of the right of such party thereafter to enforce such provision.

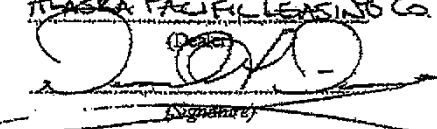
13. **DISPUTES AND MEDIATION.** The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement shall be submitted to mediation between MB and Dealer with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV. Any mediation settlement by the parties shall be documented in writing. If such mediation settlement modifies the language of this Agreement, the modification shall be put in writing, signed by both parties and added to this Agreement as an attachment.

If mediation between the parties does not result in a mutual satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement in the court of law of Reno, Nevada with all reasonable attorney fees, court costs and expenses incurred by the prevailing party in such litigation to be paid by the other party.

14. **NOTICES.** All notices, demands or other communications by either party to the other shall be in writing and shall be effective upon personal delivery, or 72 hours after deposited in the United States mail, first class certified postage prepaid, or by email.

IN WITNESS WHEREOF, the officers or owners of both parties hereto have executed this Agreement to be effective on the day and year listed on page one of this Agreement written in multiple counterparts, each of which shall be considered an original.

MB America, Inc. (MB)

(Signature)
8/20/2012

ALASKA PACIFIC LEASING CO., INC.

(Signature)
AUGUST 17, 2012

Bucket Crushers Worldwide

MB America, Inc
Dealer Agreement with
Alaska Pacific Leasing
9191 Old Seward Highway Unit #15
Anchorage, Alaska, 99515

Annex A

Part I - Territory

The territory will be the States of Alaska.

Part II - Sales Objectives:

After 120 days from the execution of this Agreement, MB will submit to Dealer a Target Sales Objective for the remaining time of the agreement, which will consider the market situation and the potentials of the line.

Part III - Discount and Payments:

The discount reserved is 36% (thirty-six percent) on the current price list and its modifications. Dealer will pay the shipping costs from one of our warehouses to his premises.

The payments will be by check or wire transfer as follows:

- 10% at the order
- final amount, including transport and any other costs, before shipping.

MB America will establish a maximum credit line with Dealer, which will not be exceeded at any moment.

Any delay in the payment will allow MB America to request and charge the payment of compounded interests of 1.5% monthly.

Signed:



Date: AUGUST 17, 2012

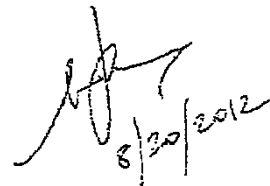


EXHIBIT 2

CV14-01229
MB AMERICA, INC. VS ALASKA P-2 Pages
District Court 09/15/2014 04:15 PM
Washoe County \$2200
EX2 MTORRFS

EXHIBIT 2

1 **DECLARATION OF DAVID FAULK**

2 I, David Faulk, hereby declare as follows:

3 1. I am over the age of 18, and I have personal knowledge of the facts alleged
4 herein and would be competent to testify thereto if called.

5 2. I am, and was at the time of the events alleged in Plaintiff MB America, Inc.'s
6 Complaint on June 6, 2014, the representative of Alaska Pacific Leasing Company.

7 3. The Agreement attached to Plaintiff's Complaint was entered into by MB
8 America, Inc. and Alaska Pacific Leasing Company.

9 4. Exhibit 1 to Alaska Pacific Leasing Company's Motion for Summary Judgment
10 is a true and correct copy of the Agreement entered into by MB America, Inc. and Alaska
11 Pacific Leasing Company.

12 5. Alaska Pacific Leasing Company never received any request or demand from
13 MB America, Inc. to mediate any disputes under the Agreement before MB filed this lawsuit
14 and is unaware of any steps having been taken by MB before commencement of this action to
15 initiate a request for mediation with the American Arbitration Association.

16 6. The parties have not attended mediation related to this matter, with the
17 American Arbitration Association or otherwise.

18 7. Alaska Pacific Leasing Company filed a request for mediation with the
19 American Arbitration Association on September 4, 2014.

20 8. Exhibit 5 is a true and correct copy of Alaska Pacific Leasing Company's
21 request for mediation, dated September 4, 2014.

22 I declare under the penalty of perjury under the law of the State of Nevada that the
23 foregoing is true and correct.

24 Executed on this 12th day of September, 2014.

25 
26 DAVID FAULK
27
28

CV14-01229 DC-09900059617-057
MB AMERICA, INC. VS ALASKA P 2 Pages
District Court 09/15/2014 04:15 PM
Washoe County \$2200
EXX MTHRRFC

EXHIBIT 3

EXHIBIT 3

1 **AFFIDAVIT OF HOLLY S. PARKER IN SUPPORT OF ALASKA PACIFIC LEASING**
2 **COMPANY'S MOTION FOR SUMMARY JUDGMENT**

3 STATE OF NEVADA)
4 COUNTY OF WASHOE) ss.

5 I, Holly S. Parker, hereby affirm, under penalty of perjury, that I have personal
6 knowledge as to the facts set forth below and the assertions contained herein are true and
7 correct.

8 1. I am an attorney licensed to practice law in the State of Nevada and an attorney
9 of record for Defendant Alaska Pacific Leasing Company in Case No. CV14-01229, entitled
10 *MB America, Inc. v. Alaska Pacific Leasing Company*.

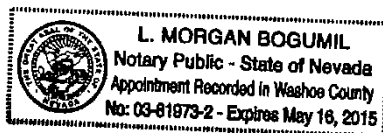
11 2. Exhibit 4 to Alaska Pacific Leasing Company's Motion for Summary Judgment
12 is a true and correct copy of the Commercial Arbitration Rules and Mediation Procedures from
13 the American Arbitration Association. Exhibit 4 includes the current applicable rules for
14 Commercial Mediation with the American Arbitration Association, as amended October 1,
15 2013. I obtained a copy of the rules from the American Arbitration Association's website.

16 FURTHER YOUR AFFIANT SAYETH NAUGHT.

17 
18 HOLLY S. PARKER, ESQ.

19 SUBSCRIBED and SWORN to before me
20 this 15 day of September, 2014. <

21 
22 NOTARY PUBLIC



CV14-01228
MB AMERICA, INC. VS ALASKA
District Court 09/15/2014 04:15 PM
Ex4 53 Pages
\$220.00
MTNAPPC

EXHIBIT 4

EXHIBIT 4

AA0043

COMMERCIAL

Commercial

Arbitration Rules and Mediation Procedures

**Including Procedures for Large, Complex
Commercial Disputes**



AMERICAN ARBITRATION ASSOCIATION®

Available online at adr.org/commercial

Rules Amended and Effective October 1, 2013

Fee Schedule Amended and Effective June 1, 2010

AA0044

Regional Vice Presidents

States: Alabama, Georgia

John M. Bishop
Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org

States: Florida

Rebecca Storrow, Ph.D.
Vice President
Phone: 954.372.4341
Email: StorrowR@adr.org

**States: Arkansas, Illinois, Iowa, Michigan,
Minnesota, Missouri, North Dakota,
South Dakota, Wisconsin**

A. Kelly Turner, Esq.
Vice President
Phone: 312.361.1116
Email: TurnerK@adr.org

**States: Arizona, Idaho, Montana, Nevada,
New Mexico, Utah**

David Cox
Vice President
Phone: 602.734.9304
Email: CoxD@adr.org

**States: Alaska, California, Hawaii, Oregon,
Washington**

Serena K. Lee, Esq.
Vice President
Phone: 415.671.4053
Email: LeeS@adr.org

**States: Delaware, District of Columbia,
Maryland, New Jersey, Pennsylvania, Virginia**

P. Jean Baker, Esq.
Vice President
Phone: 202.223.7093
Email: BakerJ@adr.org

**States: Colorado, Kansas, Nebraska, Oklahoma,
Wyoming**

Lance K. Tanaka
Vice President
Phone: 303.831.0824
Email: TanakaL@adr.org

States: Louisiana, Mississippi, Texas

Andrew Barton
Vice President
Phone: 210.998.5750
Email: BartonA@adr.org

**States: Indiana, Kentucky, North Carolina,
Ohio, South Carolina, Tennessee, West Virginia**

Michelle M. Skipper
Vice President
Phone: 704.643.8605
Email: SkipperM@adr.org

**States: Connecticut, Maine, Massachusetts,
New Hampshire, Rhode Island, Vermont**

Karen Jalkut
Vice President
Phone: 617.695.6062
Email: JalkutK@adr.org

States: New York

Jeffrey T. Zaino, Esq.
Vice President
Phone: 212.484.3224
Email: ZainoJ@adr.org

Case Management Vice Presidents and Directors

Jeffrey Garcia
Vice President
Phone: 559.490.1860
Email: GarciaJ@adr.org
Administers cases in: AK, AZ, CA, HI, ID,
MT, NM, NV, OR, UT, WA

John M. Bishop
Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org
Administers cases in: AL, DC, FL, GA, IN,
KY, MD, NC, OH, SC, TN, VA

Harry Hernandez
Director
Phone: 972.702.8222
Email: HernandezH@adr.org
Administers cases in: AR, CO, IA, IL, KS, LA,
MN, MO, MS, ND, NE, OK, SD, TX, WI, WY

Yvonne Baglini
Director
Phone: 866.293.4053
Email: BagliniY@adr.org
Administers cases in: CT, DE, MA, ME, MI,
NH, NJ, NY, PA, RI, VT, WV

Table of Contents

Important Notice	7
Introduction	7
Standard Arbitration Clause	8
Administrative Fees	8
Mediation	8
Large, Complex Cases	9
 Commercial Arbitration Rules	 10
R-1. Agreement of Parties	10
R-2. AAA and Delegation of Duties	11
R-3. National Roster of Arbitrators	11
R-4. Filing Requirements	11
R-5. Answers and Counterclaims	12
R-6. Changes of Claim	13
R-7. Jurisdiction	13
R-8. Interpretation and Application of Rules	14
R-9. Mediation	14
R-10. Administrative Conference	14
R-11. Fixing of Locale	14
R-12. Appointment from National Roster	15
R-13. Direct Appointment by a Party	16
R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties	16
R-15. Nationality of Arbitrator	16
R-16. Number of Arbitrators	17
R-17. Disclosure	17
R-18. Disqualification of Arbitrator	17
R-19. Communication with Arbitrator	18
R-20. Vacancies	18
R-21. Preliminary Hearing	18
R-22. Pre-Hearing Exchange and Production of Information	19
R-23. Enforcement Powers of the Arbitrator	19
R-24. Date, Time, and Place of Hearing	20
R-25. Attendance at Hearings	20

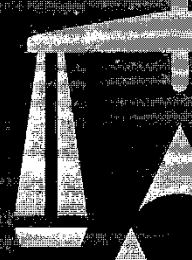
R-26. Representation	20
R-27. Oaths	21
R-28. Stenographic Record	21
R-29. Interpreters	21
R-30. Postponements	21
R-31. Arbitration in the Absence of a Party or Representative	21
R-32. Conduct of Proceedings	22
R-33. Dispositive Motions	22
R-34. Evidence	22
R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence	23
R-36. Inspection or Investigation	23
R-37. Interim Measures	23
R-38. Emergency Measures of Protection	24
R-39. Closing of Hearing	25
R-40. Reopening of Hearing	25
R-41. Waiver of Rules	25
R-42. Extensions of Time	26
R-43. Serving of Notice and Communications	26
R-44. Majority Decision	26
R-45. Time of Award	27
R-46. Form of Award	27
R-47. Scope of Award	27
R-48. Award Upon Settlement – Consent Award	27
R-49. Delivery of Award to Parties	28
R-50. Modification of Award	28
R-51. Release of Documents for Judicial Proceedings	28
R-52. Applications to Court and Exclusion of Liability	28
R-53. Administrative Fees	29
R-54. Expenses	29
R-55. Neutral Arbitrator’s Compensation	29
R-56. Deposits	29
R-57. Remedies for Nonpayment	30
R-58. Sanctions	30

Preliminary Hearing Procedures	31
P-1. General.....	31
P-2. Checklist.....	31
Expedited Procedures.....	33
E-1. Limitation on Extensions.....	33
E-2. Changes of Claim or Counterclaim	33
E-3. Serving of Notices	33
E-4. Appointment and Qualifications of Arbitrator	33
E-5. Exchange of Exhibits	34
E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission	34
E-7. Date, Time, and Place of Hearing	35
E-8. The Hearing	35
E-9. Time of Award	35
E-10. Arbitrator's Compensation	35
Procedures for Large, Complex Commercial Disputes	36
L-1. Administrative Conference	36
L-2. Arbitrators.....	36
L-3. Management of Proceedings.....	37
Administrative Fee Schedules (Standard And Flexible Fees)	38
Standard Fee Schedule.....	39
Refund Schedule for Standard Fee Schedule.....	41
Flexible Fee Schedule.....	42
Hearing Room Rental	44

Commercial Mediation Procedures	47
M-1. Agreement of Parties	47
M-2. Initiation of Mediation	47
M-3. Representation	47
M-4. Appointment of the Mediator	48
M-5. Mediator's Impartiality and Duty to Disclose	48
M-6. Vacancies	49
M-7. Duties and Responsibilities of the Mediator	49
M-8. Responsibilities of the Parties	50
M-9. Privacy	50
M-10. Confidentiality	50
M-11. No Stenographic Record	51
M-12. Termination of Mediation	51
M-13. Exclusion of Liability	51
M-14. Interpretation and Application of Procedures	51
M-15. Deposits	51
M-16. Expenses	52
M-17. Cost of the Mediation	52
Conference Room Rental	52

Commercial Arbitration Rules and Mediation Procedures

(Including Procedures for Large, Complex Commercial Disputes)



Important Notice

These rules and any amendment of them shall apply in the form in effect at the time the administrative filing requirements are met for a demand for arbitration or submission agreement received by the AAA®. To ensure that you have the most current information, see our web site at www.adr.org.

Introduction

Each year, many millions of business transactions take place. Occasionally, disagreements develop over these business transactions. Many of these disputes are resolved by arbitration, the voluntary submission of a dispute to an impartial person or persons for final and binding determination. Arbitration has proven to be an effective way to resolve these disputes privately, promptly, and economically.

The American Arbitration Association® (AAA), a not-for-profit, public service organization, offers a broad range of dispute resolution services to business executives, attorneys, individuals, trade associations, unions, management, consumers, families, communities, and all levels of government. Services are available through AAA headquarters in New York and through offices located in major cities throughout the United States. Hearings may be held at locations convenient for the parties and are not limited to cities with AAA offices. In addition, the AAA serves as a center for education and training, issues specialized publications, and conducts research on various forms of alternative dispute resolution.

Standard Arbitration Clause

The parties can provide for arbitration of future disputes by inserting the following clause into their contracts:

Any controversy or claim arising out of or relating to this contract, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules, and judgment on the award rendered by the arbitrator(s) may be entered in any court having jurisdiction thereof.

Arbitration of existing disputes may be accomplished by use of the following:

We, the undersigned parties, hereby agree to submit to arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules the following Controversy: (describe briefly). We further agree that the above controversy be submitted to (one) (three) arbitrator(s). We further agree that we will faithfully observe this agreement and the rules, that we will abide by and perform any award rendered by the arbitrator(s), and that a judgment of any court having jurisdiction may be entered on the award.

The services of the AAA are generally concluded with the transmittal of the award. Although there is voluntary compliance with the majority of awards, judgment on the award can be entered in a court having appropriate jurisdiction if necessary.

Administrative Fees

The AAA charges a filing fee based on the amount of the claim or counterclaim. This fee information, which is included with these rules, allows the parties to exercise control over their administrative fees. The fees cover AAA administrative services; they do not cover arbitrator compensation or expenses, if any, reporting services, or any post-award charges incurred by the parties in enforcing the award.

Mediation

Subject to the right of any party to opt out, in cases where a claim or counterclaim exceeds \$75,000, the rules provide that the parties shall mediate their dispute upon the administration of the arbitration or at any time when the arbitration is pending. In mediation, the neutral mediator assists the parties in reaching a settlement but does not have the authority to make a binding decision or award. Mediation is administered by the AAA in accordance with its Commercial

Mediation Procedures. There is no additional filing fee where parties to a pending arbitration attempt to mediate their dispute under the AAA's auspices.

Although these rules include a mediation procedure that will apply to many cases, parties may still want to incorporate mediation into their contractual dispute settlement process. Parties can do so by inserting the following mediation clause into their contract in conjunction with a standard arbitration provision:

If a dispute arises out of or relates to this contract, or the breach thereof, and if the dispute cannot be settled through negotiation, the parties agree first to try in good faith to settle the dispute by mediation administered by the American Arbitration Association under its Commercial Mediation Procedures before resorting to arbitration, litigation, or some other dispute resolution procedure.

If the parties want to use a mediator to resolve an existing dispute, they can enter into the following submission agreement:

The parties hereby submit the following dispute to mediation administered by the American Arbitration Association under its Commercial Mediation Procedures. (The clause may also provide for the qualifications of the mediator(s), method of payment, locale of meetings, and any other item of concern to the parties.)

Large, Complex Cases

Unless the parties agree otherwise, the procedures for Large, Complex Commercial Disputes, which appear in this pamphlet, will be applied to all cases administered by the AAA under the Commercial Arbitration Rules in which the disclosed claim or counterclaim of any party is at least \$500,000 exclusive of claimed interest, arbitration fees and costs. The key features of these procedures include:

- > A highly qualified, trained Roster of Neutrals;
- > A mandatory preliminary hearing with the arbitrators, which may be conducted by teleconference;
- > Broad arbitrator authority to order and control the exchange of information, including depositions;
- > A presumption that hearings will proceed on a consecutive or block basis.

Commercial Arbitration Rules

R-1. Agreement of Parties*+

(a) The parties shall be deemed to have made these rules a part of their arbitration agreement whenever they have provided for arbitration by the American Arbitration Association (hereinafter AAA) under its Commercial Arbitration Rules or for arbitration by the AAA of a domestic commercial dispute without specifying particular rules. These rules and any amendment of them shall apply in the form in effect at the time the administrative requirements are met for a Demand for Arbitration or Submission Agreement received by the AAA. Any disputes regarding which AAA rules shall apply shall be decided by the AAA. The parties, by written agreement, may vary the procedures set forth in these rules. After appointment of the arbitrator, such modifications may be made only with the consent of the arbitrator.

(b) Unless the parties or the AAA determines otherwise, the Expedited Procedures shall apply in any case in which no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest, attorneys' fees, and arbitration fees and costs.

Parties may also agree to use these procedures in larger cases. Unless the parties agree otherwise, these procedures will not apply in cases involving more than two parties. The Expedited Procedures shall be applied as described in Sections E-1 through E-10 of these rules, in addition to any other portion of these rules that is not in conflict with the Expedited Procedures.

(c) Unless the parties agree otherwise, the Procedures for Large, Complex Commercial Disputes shall apply to all cases in which the disclosed claim or counterclaim of any party is at least \$500,000 or more, exclusive of claimed interest, attorneys' fees, arbitration fees and costs. Parties may also agree to use the procedures in cases involving claims or counterclaims under \$500,000, or in nonmonetary cases. The Procedures for Large, Complex Commercial Disputes shall be applied as described in Sections L-1 through L-3 of these rules, in addition to any other portion of these rules that is not in conflict with the Procedures for Large, Complex Commercial Disputes.

(d) Parties may, by agreement, apply the Expedited Procedures, the Procedures for Large, Complex Commercial Disputes, or the Procedures for the Resolution of Disputes through Document Submission (Rule E-6) to any dispute.

(e) All other cases shall be administered in accordance with Sections R-1 through R-58 of these rules.

** The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the supplementary procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.*

+ A dispute arising out of an employer promulgated plan will be administered under the AAA's Employment Arbitration Rules and Mediation Procedures.

R-2. AAA and Delegation of Duties

When parties agree to arbitrate under these rules, or when they provide for arbitration by the AAA and an arbitration is initiated under these rules, they thereby authorize the AAA to administer the arbitration. The authority and duties of the AAA are prescribed in the agreement of the parties and in these rules, and may be carried out through such of the AAA's representatives as it may direct. The AAA may, in its discretion, assign the administration of an arbitration to any of its offices. Arbitrations administered under these rules shall only be administered by the AAA or by an individual or organization authorized by the AAA to do so.

R-3. National Roster of Arbitrators

The AAA shall establish and maintain a National Roster of Arbitrators ("National Roster") and shall appoint arbitrators as provided in these rules. The term "arbitrator" in these rules refers to the arbitration panel, constituted for a particular case, whether composed of one or more arbitrators, or to an individual arbitrator, as the context requires.

R-4. Filing Requirements

- (a)** Arbitration under an arbitration provision in a contract shall be initiated by the initiating party ("claimant") filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of the applicable arbitration agreement from the parties' contract which provides for arbitration.
- (b)** Arbitration pursuant to a court order shall be initiated by the initiating party filing with the AAA a Demand for Arbitration, the administrative filing fee, and a copy of any applicable arbitration agreement from the parties' contract which provides for arbitration.
 - i.** The filing party shall include a copy of the court order.
 - ii.** The filing fee must be paid before a matter is considered properly filed. If the court order directs that a specific party is responsible for the filing fee, it is the responsibility of the filing party to either make such payment to the AAA and seek reimbursement as directed in the court order or to make other such arrangements so that the filing fee is submitted to the AAA with the Demand.
 - iii.** The party filing the Demand with the AAA is the claimant and the opposing party is the respondent regardless of which party initiated the court action. Parties may request that the arbitrator alter the order of proceedings if necessary pursuant to R-32.
- (c)** It is the responsibility of the filing party to ensure that any conditions precedent to the filing of a case are met prior to filing for an arbitration, as well as any time requirements associated with the filing. Any dispute regarding whether a condition precedent has been met may be raised to the arbitrator for determination.

- (d) Parties to any existing dispute who have not previously agreed to use these rules may commence an arbitration under these rules by filing a written submission agreement and the administrative filing fee. To the extent that the parties' submission agreement contains any variances from these rules, such variances should be clearly stated in the Submission Agreement.
- (e) Information to be included with any arbitration filing includes:
 - i. the name of each party;
 - ii. the address for each party, including telephone and fax numbers and e-mail addresses;
 - iii. if applicable, the names, addresses, telephone and fax numbers, and e-mail addresses of any known representative for each party;
 - iv. a statement setting forth the nature of the claim including the relief sought and the amount involved; and
 - v. the locale requested if the arbitration agreement does not specify one.
- (f) The initiating party may file or submit a dispute to the AAA in the following manner:
 - i. through AAA WebFile, located at **www.adr.org**; or
 - ii. by filing the complete Demand or Submission with any AAA office, regardless of the intended locale of hearing.
- (g) The filing party shall simultaneously provide a copy of the Demand and any supporting documents to the opposing party.
- (h) The AAA shall provide notice to the parties (or their representatives if so named) of the receipt of a Demand or Submission when the administrative filing requirements have been satisfied. The date on which the filing requirements are satisfied shall establish the date of filing the dispute for administration. However, all disputes in connection with the AAA's determination of the date of filing may be decided by the arbitrator.
- (i) If the filing does not satisfy the filing requirements set forth above, the AAA shall acknowledge to all named parties receipt of the incomplete filing and inform the parties of the filing deficiencies. If the deficiencies are not cured by the date specified by the AAA, the filing may be returned to the initiating party.

R-5. Answers and Counterclaims

- (a) A respondent may file an answering statement with the AAA within 14 calendar days after notice of the filing of the Demand is sent by the AAA. The respondent shall, at the time of any such filing, send a copy of any answering statement to the claimant and to all other parties to the arbitration. If no answering statement is filed within the stated time, the respondent will be deemed to deny the claim. Failure to file an answering statement shall not operate to delay the arbitration.

- (b) A respondent may file a counterclaim at any time after notice of the filing of the Demand is sent by the AAA, subject to the limitations set forth in Rule R-6. The respondent shall send a copy of the counterclaim to the claimant and all other parties to the arbitration. If a counterclaim is asserted, it shall include a statement setting forth the nature of the counterclaim including the relief sought and the amount involved. The filing fee as specified in the applicable AAA Fee Schedule must be paid at the time of the filing of any counterclaim.
- (c) If the respondent alleges that a different arbitration provision is controlling, the matter will be administered in accordance with the arbitration provision submitted by the initiating party subject to a final determination by the arbitrator.
- (d) If the counterclaim does not meet the requirements for filing a claim and the deficiency is not cured by the date specified by the AAA, it may be returned to the filing party.

R-6. Changes of Claim

- (a) A party may at any time prior to the close of the hearing or by the date established by the arbitrator increase or decrease the amount of its claim or counterclaim. Written notice of the change of claim amount must be provided to the AAA and all parties. If the change of claim amount results in an increase in administrative fee, the balance of the fee is due before the change of claim amount may be accepted by the arbitrator.
- (b) Any new or different claim or counterclaim, as opposed to an increase or decrease in the amount of a pending claim or counterclaim, shall be made in writing and filed with the AAA, and a copy shall be provided to the other party, who shall have a period of 14 calendar days from the date of such transmittal within which to file an answer to the proposed change of claim or counterclaim with the AAA. After the arbitrator is appointed, however, no new or different claim may be submitted except with the arbitrator's consent.

R-7. Jurisdiction

- (a) The arbitrator shall have the power to rule on his or her own *jurisdiction*, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim.
- (b) The arbitrator shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part. Such an arbitration clause shall be treated as an *agreement independent* of the other terms of the contract. A decision by the arbitrator that the contract is null and void shall not for that reason alone render invalid the arbitration clause.
- (c) A party must object to the jurisdiction of the arbitrator or to the arbitrability of a claim or counterclaim no later than the filing of the answering statement to the claim or counterclaim that gives rise to the objection. The arbitrator may rule on such objections as a preliminary matter or as part of the final award.

R-8. Interpretation and Application of Rules

The arbitrator shall interpret and apply these rules insofar as they relate to the arbitrator's powers and duties. When there is more than one arbitrator and a difference arises among them concerning the meaning or application of these rules, it shall be decided by a majority vote. If that is not possible, either an arbitrator or a party may refer the question to the AAA for final decision. All other rules shall be interpreted and applied by the AAA.

R-9. Mediation

In all cases where a claim or counterclaim exceeds \$75,000, upon the AAA's administration of the arbitration or at any time while the arbitration is pending, the parties shall mediate their dispute pursuant to the applicable provisions of the AAA's Commercial Mediation Procedures, or as otherwise agreed by the parties. Absent an agreement of the parties to the contrary, the mediation shall take place concurrently with the arbitration and shall not serve to delay the arbitration proceedings. However, any party to an arbitration may unilaterally opt out of this rule upon notification to the AAA and the other parties to the arbitration. The parties shall confirm the completion of any mediation or any decision to opt out of this rule to the AAA. Unless agreed to by all parties and the mediator, the mediator shall not be appointed as an arbitrator to the case.

R-10. Administrative Conference

At the request of any party or upon the AAA's own initiative, the AAA may conduct an administrative conference, in person or by telephone, with the parties and/or their representatives. The conference may address such issues as arbitrator selection, mediation of the dispute, potential exchange of information, a timetable for hearings, and any other administrative matters.

R-11. Fixing of Locale

The parties may mutually agree on the locale where the arbitration is to be held. Any disputes regarding the locale that are to be decided by the AAA must be submitted to the AAA and all other parties within 14 calendar days from the date of the AAA's initiation of the case or the date established by the AAA. Disputes regarding locale shall be determined in the following manner:

- (a) When the parties' arbitration agreement is silent with respect to locale, and if the parties disagree as to the locale, the AAA may initially determine the place of

arbitration, subject to the power of the arbitrator after appointment, to make a final determination on the locale.

- (b) When the parties' arbitration agreement requires a specific locale, absent the parties' agreement to change it, or a determination by the arbitrator upon appointment that applicable law requires a different locale, the locale shall be that specified in the arbitration agreement.
- (c) If the reference to a locale in the arbitration agreement is ambiguous, and the parties are unable to agree to a specific locale, the AAA shall determine the locale, subject to the power of the arbitrator to finally determine the locale.

The arbitrator, at the arbitrator's sole discretion, shall have the authority to conduct special hearings for document production purposes or otherwise at other locations if reasonably necessary and beneficial to the process.

R-12. Appointment from National Roster

If the parties have not appointed an arbitrator and have not provided any other method of appointment, the arbitrator shall be appointed in the following manner:

- (a) The AAA shall send simultaneously to each party to the dispute an identical list of 10 (unless the AAA decides that a different number is appropriate) names of persons chosen from the National Roster. The parties are encouraged to agree to an arbitrator from the submitted list and to advise the AAA of their agreement.
- (b) If the parties are unable to agree upon an arbitrator, each party to the dispute shall have 14 calendar days from the transmittal date in which to strike names objected to, number the remaining names in order of preference, and return the list to the AAA. The parties are not required to exchange selection lists. If a party does not return the list within the time specified, all persons named therein shall be deemed acceptable to that party. From among the persons who have been approved on both lists, and in accordance with the designated order of mutual preference, the AAA shall invite the acceptance of an arbitrator to serve. If the parties fail to agree on any of the persons named, or if acceptable arbitrators are unable to act, or if for any other reason the appointment cannot be made from the submitted lists, the AAA shall have the power to make the appointment from among other members of the National Roster without the submission of additional lists.
- (c) Unless the parties agree otherwise, when there are two or more claimants or two or more respondents, the AAA may appoint all the arbitrators.

R-13. Direct Appointment by a Party

- (a) If the agreement of the parties names an arbitrator or specifies a method of appointing an arbitrator, that designation or method shall be followed. The notice of appointment, with the name and address of the arbitrator, shall be filed with the AAA by the appointing party. Upon the request of any appointing party, the AAA shall submit a list of members of the National Roster from which the party may, if it so desires, make the appointment.
- (b) Where the parties have agreed that each party is to name one arbitrator, the arbitrators so named must meet the standards of Section R-18 with respect to impartiality and independence unless the parties have specifically agreed pursuant to Section R-18(b) that the party-appointed arbitrators are to be non-neutral and need not meet those standards.
- (c) If the agreement specifies a period of time within which an arbitrator shall be appointed and any party fails to make the appointment within that period, the AAA shall make the appointment.
- (d) If no period of time is specified in the agreement, the AAA shall notify the party to make the appointment. If within 14 calendar days after such notice has been sent, an arbitrator has not been appointed by a party, the AAA shall make the appointment.

R-14. Appointment of Chairperson by Party-Appointed Arbitrators or Parties

- (a) If, pursuant to Section R-13, either the parties have directly appointed arbitrators, or the arbitrators have been appointed by the AAA, and the parties have authorized them to appoint a chairperson within a specified time and no appointment is made within that time or any agreed extension, the AAA may appoint the chairperson.
- (b) If no period of time is specified for appointment of the chairperson, and the party-appointed arbitrators or the parties do not make the appointment within 14 calendar days from the date of the appointment of the last party-appointed arbitrator, the AAA may appoint the chairperson.
- (c) If the parties have agreed that their party-appointed arbitrators shall appoint the chairperson from the National Roster, the AAA shall furnish to the party-appointed arbitrators, in the manner provided in Section R-12, a list selected from the National Roster, and the appointment of the chairperson shall be made as provided in that Section.

R-15. Nationality of Arbitrator

Where the parties are nationals of different countries, the AAA, at the request of any party or on its own initiative, may appoint as arbitrator a national of a country other than that of any of the parties. The request must be made before the time set for the appointment of the arbitrator as agreed by the parties or set by these rules.

R-16. Number of Arbitrators

- (a) If the arbitration agreement does not specify the number of arbitrators, the dispute shall be heard and determined by one arbitrator, unless the AAA, in its discretion, directs that three arbitrators be appointed. A party may request three arbitrators in the Demand or Answer, which request the AAA will consider in exercising its discretion regarding the number of arbitrators appointed to the dispute.
- (b) Any request for a change in the number of arbitrators as a result of an increase or decrease in the amount of a claim or a new or different claim must be made to the AAA and other parties to the arbitration no later than seven calendar days after receipt of the R-6 required notice of change of claim amount. If the parties are unable to agree with respect to the request for a change in the number of arbitrators, the AAA shall make that determination.

R-17. Disclosure

- (a) Any person appointed or to be appointed as an arbitrator, as well as the parties and their representatives, shall disclose to the AAA any circumstance likely to give rise to justifiable doubt as to the arbitrator's impartiality or independence, including any bias or any financial or personal interest in the result of the arbitration or any past or present relationship with the parties or their representatives. Such obligation shall remain in effect throughout the arbitration. Failure on the part of a party or a representative to comply with the requirements of this rule may result in the waiver of the right to object to an arbitrator in accordance with Rule R-41.
- (b) Upon receipt of such information from the arbitrator or another source, the AAA shall communicate the information to the parties and, if it deems it appropriate to do so, to the arbitrator and others.
- (c) Disclosure of information pursuant to this Section R-17 is not an indication that the arbitrator considers that the disclosed circumstance is likely to affect impartiality or independence.

R-18. Disqualification of Arbitrator

- (a) Any arbitrator shall be impartial and independent and shall perform his or her duties with diligence and in good faith, and shall be subject to disqualification for:
 - i. partiality or lack of independence,
 - ii. inability or refusal to perform his or her duties with diligence and in good faith, and
 - iii. any grounds for disqualification provided by applicable law.
- (b) The parties may agree in writing, however, that arbitrators directly appointed by a party pursuant to Section R-13 shall be non-neutral, in which case such arbitrators need not be impartial or independent and shall not be subject to disqualification for partiality or lack of independence.

- (c) Upon objection of a party to the continued service of an arbitrator, or on its own initiative, the AAA shall determine whether the arbitrator should be disqualified under the grounds set out above, and shall inform the parties of its decision, which decision shall be conclusive.

R-19. Communication with Arbitrator

- (a) No party and no one acting on behalf of any party shall communicate ex parte with an arbitrator or a candidate for arbitrator concerning the arbitration, except that a party, or someone acting on behalf of a party, may communicate ex parte with a candidate for direct appointment pursuant to R-13 in order to advise the candidate of the general nature of the controversy and of the anticipated proceedings and to discuss the candidate's qualifications, availability, or independence in relation to the parties or to discuss the suitability of candidates for selection as a third arbitrator where the parties or party-designated arbitrators are to participate in that selection.
- (b) Section R-19(a) does not apply to arbitrators directly appointed by the parties who, pursuant to Section R-18(b), the parties have agreed in writing are non-neutral. Where the parties have so agreed under Section R-18(b), the AAA shall as an administrative practice suggest to the parties that they agree further that Section R-19(a) should nonetheless apply prospectively.
- (c) In the course of administering an arbitration, the AAA may initiate communications with each party or anyone acting on behalf of the parties either jointly or individually.
- (d) As set forth in R-43, unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.

R-20. Vacancies

- (a) If for any reason an arbitrator is unable or unwilling to perform the duties of the office, the AAA may, on proof satisfactory to it, declare the office vacant. Vacancies shall be filled in accordance with the applicable provisions of these rules.
- (b) In the event of a vacancy in a panel of neutral arbitrators after the hearings have commenced, the remaining arbitrator or arbitrators may continue with the hearing and determination of the controversy, unless the parties agree otherwise.
- (c) In the event of the appointment of a substitute arbitrator, the panel of arbitrators shall determine in its sole discretion whether it is necessary to repeat all or part of any prior hearings.

R-21. Preliminary Hearing

- (a) At the discretion of the arbitrator, and depending on the size and complexity of the arbitration, a preliminary hearing should be scheduled as soon as practicable after the arbitrator has been appointed. The parties should be invited to attend the preliminary hearing along with their representatives. The preliminary hearing may be conducted in person or by telephone.

- (b) At the preliminary hearing, the parties and the arbitrator should be prepared to discuss and establish a procedure for the conduct of the arbitration that is appropriate to achieve a fair, efficient, and economical resolution of the dispute. Sections P-1 and P-2 of these rules address the issues to be considered at the preliminary hearing.

R-22. Pre-Hearing Exchange and Production of Information

- (a) *Authority of arbitrator.* The arbitrator shall manage any necessary exchange of information among the parties with a view to achieving an efficient and economical resolution of the dispute, while at the same time promoting equality of treatment and safeguarding each party's opportunity to fairly present its claims and defenses.
- (b) *Documents.* The arbitrator may, on application of a party or on the arbitrator's own initiative:
 - i. require the parties to exchange documents in their possession or custody on which they intend to rely;
 - ii. require the parties to update their exchanges of the documents on which they intend to rely as such documents become known to them;
 - iii. require the parties, in response to reasonable document requests, to make available to the other party documents, in the responding party's possession or custody, not otherwise readily available to the party seeking the documents, reasonably believed by the party seeking the documents to exist and to be relevant and material to the outcome of disputed issues; and
 - iv. require the parties, when documents to be exchanged or produced are maintained in electronic form, to make such documents available in the form most convenient and economical for the party in possession of such documents, unless the arbitrator determines that there is good cause for requiring the documents to be produced in a different form. The parties should attempt to agree in advance upon, and the arbitrator may determine, reasonable search parameters to balance the need for production of electronically stored documents relevant and material to the outcome of disputed issues against the cost of locating and producing them.

R-23. Enforcement Powers of the Arbitrator

The arbitrator shall have the authority to issue any orders necessary to enforce the provisions of rules R-21 and R-22 and to otherwise achieve a fair, efficient and economical resolution of the case, including, without limitation:

- (a) conditioning any exchange or production of confidential documents and information, and the admission of confidential evidence at the hearing, on appropriate orders to preserve such confidentiality;
- (b) imposing reasonable search parameters for electronic and other documents if the parties are unable to agree;

- (c) allocating costs of producing documentation, including electronically stored documentation;
- (d) in the case of willful non-compliance with any order issued by the arbitrator, drawing adverse inferences, excluding evidence and other submissions, and/or making special allocations of costs or an interim award of costs arising from such non-compliance; and
- (e) issuing any other enforcement orders which the arbitrator is empowered to issue under applicable law.

R-24. Date, Time, and Place of Hearing

The arbitrator shall set the date, time, and place for each hearing. The parties shall respond to requests for hearing dates in a timely manner, be cooperative in scheduling the earliest practicable date, and adhere to the established hearing schedule. The AAA shall send a notice of hearing to the parties at least 10 calendar days in advance of the hearing date, unless otherwise agreed by the parties.

R-25. Attendance at Hearings

The arbitrator and the AAA shall maintain the privacy of the hearings unless the law provides to the contrary. Any person having a direct interest in the arbitration is entitled to attend hearings. The arbitrator shall otherwise have the power to require the exclusion of any witness, other than a party or other essential person, during the testimony of any other witness. It shall be discretionary with the arbitrator to determine the propriety of the attendance of any other person.

R-26. Representation

Any party may participate without representation (pro se), or by counsel or any other representative of the party's choosing, unless such choice is prohibited by applicable law. A party intending to be so represented shall notify the other party and the AAA of the name, telephone number and address, and email address if available, of the representative at least seven calendar days prior to the date set for the hearing at which that person is first to appear. When such a representative initiates an arbitration or responds for a party, notice is deemed to have been given.

R-27. Oaths

Before proceeding with the first hearing, each arbitrator may take an oath of office and, if required by law, shall do so. The arbitrator may require witnesses to testify under oath administered by any duly qualified person and, if it is required by law or requested by any party, shall do so.

R-28. Stenographic Record

- (a) Any party desiring a stenographic record shall make arrangements directly with a stenographer and shall notify the other parties of these arrangements at least three calendar days in advance of the hearing. The requesting party or parties shall pay the cost of the record.
- (b) No other means of recording the proceedings will be permitted absent the agreement of the parties or per the direction of the arbitrator.
- (c) If the transcript or any other recording is agreed by the parties or determined by the arbitrator to be the official record of the proceeding, it must be provided to the arbitrator and made available to the other parties for inspection, at a date, time, and place determined by the arbitrator.
- (d) The arbitrator may resolve any disputes with regard to apportionment of the costs of the stenographic record or other recording.

R-29. Interpreters

Any party wishing an interpreter shall make all arrangements directly with the interpreter and shall assume the costs of the service.

R-30. Postponements

The arbitrator may postpone any hearing upon agreement of the parties, upon request of a party for good cause shown, or upon the arbitrator's own initiative.

R-31. Arbitration in the Absence of a Party or Representative

Unless the law provides to the contrary, the arbitration may proceed in the absence of any party or representative who, after due notice, fails to be present or fails to obtain a postponement. An award shall not be made solely on the default of a party. The arbitrator shall require the party who is present to submit such evidence as the arbitrator may require for the making of an award.

R-32. Conduct of Proceedings

- (a) The claimant shall present evidence to support its claim. The respondent shall then present evidence to support its defense. Witnesses for each party shall also submit to questions from the arbitrator and the adverse party. The arbitrator has the discretion to vary this procedure, provided that the parties are treated with equality and that each party has the right to be heard and is given a fair opportunity to present its case.
- (b) The arbitrator, exercising his or her discretion, shall conduct the proceedings with a view to expediting the resolution of the dispute and may direct the order of proof, bifurcate proceedings and direct the parties to focus their presentations on issues the decision of which could dispose of all or part of the case.
- (c) When deemed appropriate, the arbitrator may also allow for the presentation of evidence by alternative means including video conferencing, internet communication, telephonic conferences and means other than an in-person presentation. Such alternative means must afford a full opportunity for all parties to present any evidence that the arbitrator deems material and relevant to the resolution of the dispute and, when involving witnesses, provide an opportunity for cross-examination.
- (d) The parties may agree to waive oral hearings in any case and may also agree to utilize the Procedures for Resolution of Disputes Through Document Submission, found in Rule E-6.

R-33. Dispositive Motions

The arbitrator may allow the filing of and make rulings upon a dispositive motion only if the arbitrator determines that the moving party has shown that the motion is likely to succeed and dispose of or narrow the issues in the case.

R-34. Evidence

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

R-35. Evidence by Written Statements and Post-Hearing Filing of Documents or Other Evidence

- (a) At a date agreed upon by the parties or ordered by the arbitrator, the parties shall give written notice for any witness or expert witness who has provided a written witness statement to appear in person at the arbitration hearing for examination. If such notice is given, and the witness fails to appear, the arbitrator may disregard the written witness statement and/or expert report of the witness or make such other order as the arbitrator may consider to be just and reasonable.
- (b) If a witness whose testimony is represented by a party to be essential is unable or unwilling to testify at the hearing, either in person or through electronic or other means, either party may request that the arbitrator order the witness to appear in person for examination before the arbitrator at a time and location where the witness is willing and able to appear voluntarily or can legally be compelled to do so. Any such order may be conditioned upon payment by the requesting party of all reasonable costs associated with such examination.
- (c) If the parties agree or the arbitrator directs that documents or other evidence be submitted to the arbitrator after the hearing, the documents or other evidence shall be filed with the AAA for transmission to the arbitrator. All parties shall be afforded an opportunity to examine and respond to such documents or other evidence.

R-36. Inspection or Investigation

An arbitrator finding it necessary to make an inspection or investigation in connection with the arbitration shall direct the AAA to so advise the parties. The arbitrator shall set the date and time and the AAA shall notify the parties. Any party who so desires may be present at such an inspection or investigation. In the event that one or all parties are not present at the inspection or investigation, the arbitrator shall make an oral or written report to the parties and afford them an opportunity to comment.

R-37. Interim Measures

- (a) The arbitrator may take whatever interim measures he or she deems necessary, including injunctive relief and measures for the protection or conservation of property and disposition of perishable goods.
- (b) Such interim measures may take the form of an interim award, and the arbitrator may require security for the costs of such measures.
- (c) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with the agreement to arbitrate or a waiver of the right to arbitrate.

R-38. Emergency Measures of Protection

- (a) Unless the parties agree otherwise, the provisions of this rule shall apply to arbitrations conducted under arbitration clauses or agreements entered on or after October 1, 2013.
- (b) A party in need of emergency relief prior to the constitution of the panel shall notify the AAA and all other parties in writing of the nature of the relief sought and the reasons why such relief is required on an emergency basis. The application shall also set forth the reasons why the party is entitled to such relief. Such notice may be given by facsimile or e-mail or other reliable means, but must include a statement certifying that all other parties have been notified or an explanation of the steps taken in good faith to notify other parties.
- (c) Within one business day of receipt of notice as provided in section (b), the AAA shall appoint a single emergency arbitrator designated to rule on emergency applications. The emergency arbitrator shall immediately disclose any circumstance likely, on the basis of the facts disclosed on the application, to affect such arbitrator's impartiality or independence. Any challenge to the appointment of the emergency arbitrator must be made within one business day of the communication by the AAA to the parties of the appointment of the emergency arbitrator and the circumstances disclosed.
- (d) The emergency arbitrator shall as soon as possible, but in any event within two business days of appointment, establish a schedule for consideration of the application for emergency relief. Such a schedule shall provide a reasonable opportunity to all parties to be heard, but may provide for proceeding by telephone or video conference or on written submissions as alternatives to a formal hearing. The emergency arbitrator shall have the authority vested in the tribunal under Rule 7, including the authority to rule on her/his own jurisdiction, and shall resolve any disputes over the applicability of this Rule 38.
- (e) If after consideration the emergency arbitrator is satisfied that the party seeking the emergency relief has shown that immediate and irreparable loss or damage shall result in the absence of emergency relief, and that such party is entitled to such relief, the emergency arbitrator may enter an interim order or award granting the relief and stating the reason therefore.
- (f) Any application to modify an interim award of emergency relief must be based on changed circumstances and may be made to the emergency arbitrator until the panel is constituted; thereafter such a request shall be addressed to the panel. The emergency arbitrator shall have no further power to act after the panel is constituted unless the parties agree that the emergency arbitrator is named as a member of the panel.
- (g) Any interim award of emergency relief may be conditioned on provision by the party seeking such relief for appropriate security.
- (h) A request for interim measures addressed by a party to a judicial authority shall not be deemed incompatible with this rule, the agreement to arbitrate or a waiver of the right to arbitrate. If the AAA is directed by a judicial authority to nominate a special master to consider and report on an application for emergency relief, the AAA shall

proceed as provided in this rule and the references to the emergency arbitrator shall be read to mean the special master, except that the special master shall issue a report rather than an interim award.

- (i) The costs associated with applications for emergency relief shall initially be apportioned by the emergency arbitrator or special master, subject to the power of the tribunal to determine finally the apportionment of such costs.

R-39. Closing of Hearing

- (a) The arbitrator shall specifically inquire of all parties whether they have any further proofs to offer or witnesses to be heard. Upon receiving negative replies or if satisfied that the record is complete, the arbitrator shall declare the hearing closed.
- (b) If documents or responses are to be filed as provided in Rule R-35, or if briefs are to be filed, the hearing shall be declared closed as of the final date set by the arbitrator for the receipt of briefs. If no documents, responses, or briefs are to be filed, the arbitrator shall declare the hearings closed as of the date of the last hearing (including telephonic hearings). If the case was heard without any oral hearings, the arbitrator shall close the hearings upon the due date established for receipt of the final submission.
- (c) The time limit within which the arbitrator is required to make the award shall commence, in the absence of other agreements by the parties, upon the closing of the hearing. The AAA may extend the time limit for rendering of the award only in unusual and extreme circumstances.

R-40. Reopening of Hearing

The hearing may be reopened on the arbitrator's initiative, or by the direction of the arbitrator upon application of a party, at any time before the award is made. If reopening the hearing would prevent the making of the award within the specific time agreed to by the parties in the arbitration agreement, the matter may not be reopened unless the parties agree to an extension of time. When no specific date is fixed by agreement of the parties, the arbitrator shall have 30 calendar days from the closing of the reopened hearing within which to make an award (14 calendar days if the case is governed by the Expedited Procedures).

R-41. Waiver of Rules

Any party who proceeds with the arbitration after knowledge that any provision or requirement of these rules has not been complied with and who fails to state an objection in writing shall be deemed to have waived the right to object.

R-42. Extensions of Time

The parties may modify any period of time by mutual agreement. The AAA or the arbitrator may for good cause extend any period of time established by these rules, except the time for making the award. The AAA shall notify the parties of any extension.

R-43. Serving of Notice and Communications

- (a) Any papers, notices, or process necessary or proper for the initiation or continuation of an arbitration under these rules, for any court action in connection therewith, or for the entry of judgment on any award made under these rules may be served on a party by mail addressed to the party or its representative at the last known address or by personal service, in or outside the state where the arbitration is to be held, provided that reasonable opportunity to be heard with regard to the dispute is or has been granted to the party.
- (b) The AAA, the arbitrator and the parties may also use overnight delivery or electronic facsimile transmission (fax), or electronic (e-mail) to give the notices required by these rules. Where all parties and the arbitrator agree, notices may be transmitted by e-mail or other methods of communication.
- (c) Unless otherwise instructed by the AAA or by the arbitrator, any documents submitted by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (d) Unless otherwise instructed by the AAA or by the arbitrator, all written communications made by any party to the AAA or to the arbitrator shall simultaneously be provided to the other party or parties to the arbitration.
- (e) Failure to provide the other party with copies of communications made to the AAA or to the arbitrator may prevent the AAA or the arbitrator from acting on any requests or objections contained therein.
- (f) The AAA may direct that any oral or written communications that are sent by a party or their representative shall be sent in a particular manner. The failure of a party or their representative to do so may result in the AAA's refusal to consider the issue raised in the communication.

R-44. Majority Decision

- (a) When the panel consists of more than one arbitrator, unless required by law or by the arbitration agreement or section (b) of this rule, a majority of the arbitrators must make all decisions.
- (b) Where there is a panel of three arbitrators, absent an objection of a party or another member of the panel, the chairperson of the panel is authorized to resolve any disputes related to the exchange of information or procedural matters without the need to consult the full panel.

R-45. Time of Award

The award shall be made promptly by the arbitrator and, unless otherwise agreed by the parties or specified by law, no later than 30 calendar days from the date of closing the hearing, or, if oral hearings have been waived, from the due date set for receipt of the parties' final statements and proofs.

R-46. Form of Award

- (a) Any award shall be in writing and signed by a majority of the arbitrators. It shall be executed in the form and manner required by law.
- (b) The arbitrator need not render a reasoned award unless the parties request such an award in writing prior to appointment of the arbitrator or unless the arbitrator determines that a reasoned award is appropriate.

R-47. Scope of Award

- (a) The arbitrator may grant any remedy or relief that the arbitrator deems just and equitable and within the scope of the agreement of the parties, including, but not limited to, specific performance of a contract.
- (b) In addition to a final award, the arbitrator may make other decisions, including interim, interlocutory, or partial rulings, orders, and awards. In any interim, interlocutory, or partial award, the arbitrator may assess and apportion the fees, expenses, and compensation related to such award as the arbitrator determines is appropriate.
- (c) In the final award, the arbitrator shall assess the fees, expenses, and compensation provided in Sections R-53, R-54, and R-55. The arbitrator may apportion such fees, expenses, and compensation among the parties in such amounts as the arbitrator determines is appropriate.
- (d) The award of the arbitrator(s) may include:
 - i. interest at such rate and from such date as the arbitrator(s) may deem appropriate; and
 - ii. an award of attorneys' fees if all parties have requested such an award or it is authorized by law or their arbitration agreement.

R-48. Award Upon Settlement – Consent Award

- (a) If the parties settle their dispute during the course of the arbitration and if the parties so request, the arbitrator may set forth the terms of the settlement in a "consent award." A consent award must include an allocation of arbitration costs, including administrative fees and expenses as well as arbitrator fees and expenses.
- (b) The consent award shall not be released to the parties until all administrative fees and all arbitrator compensation have been paid in full.

R-49. Delivery of Award to Parties

Parties shall accept as notice and delivery of the award the placing of the award or a true copy thereof in the mail addressed to the parties or their representatives at their last known addresses, personal or electronic service of the award, or the filing of the award in any other manner that is permitted by law.

R-50. Modification of Award

Within 20 calendar days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided. The other parties shall be given 10 calendar days to respond to the request. The arbitrator shall dispose of the request within 20 calendar days after transmittal by the AAA to the arbitrator of the request and any response thereto.

R-51. Release of Documents for Judicial Proceedings

The AAA shall, upon the written request of a party to the arbitration, furnish to the party, at its expense, copies or certified copies of any papers in the AAA's possession that are not determined by the AAA to be privileged or confidential.

R-52. Applications to Court and Exclusion of Liability

- (a) No judicial proceeding by a party relating to the subject matter of the arbitration shall be deemed a waiver of the party's right to arbitrate.
- (b) Neither the AAA nor any arbitrator in a proceeding under these rules is a necessary or proper party in judicial proceedings relating to the arbitration.
- (c) Parties to an arbitration under these rules shall be deemed to have consented that judgment upon the arbitration award may be entered in any federal or state court having jurisdiction thereof.
- (d) Parties to an arbitration under these rules shall be deemed to have consented that neither the AAA nor any arbitrator shall be liable to any party in any action for damages or injunctive relief for any act or omission in connection with any arbitration under these rules.
- (e) Parties to an arbitration under these rules may not call the arbitrator, the AAA, or AAA employees as a witness in litigation or any other proceeding relating to the arbitration. The arbitrator, the AAA and AAA employees are not competent to testify as witnesses in any such proceeding.

R-53. Administrative Fees

As a not-for-profit organization, the AAA shall prescribe administrative fees to compensate it for the cost of providing administrative services. The fees in effect when the fee or charge is incurred shall be applicable. The filing fee shall be advanced by the party or parties making a claim or counterclaim, subject to final apportionment by the arbitrator in the award. The AAA may, in the event of extreme hardship on the part of any party, defer or reduce the administrative fees.

R-54. Expenses

The expenses of witnesses for either side shall be paid by the party producing such witnesses. All other expenses of the arbitration, including required travel and other expenses of the arbitrator, AAA representatives, and any witness and the cost of any proof produced at the direct request of the arbitrator, shall be borne equally by the parties, unless they agree otherwise or unless the arbitrator in the award assesses such expenses or any part thereof against any specified party or parties.

R-55. Neutral Arbitrator's Compensation

- (a) Arbitrators shall be compensated at a rate consistent with the arbitrator's stated rate of compensation.
- (b) If there is disagreement concerning the terms of compensation, an appropriate rate shall be established with the arbitrator by the AAA and confirmed to the parties.
- (c) Any arrangement for the compensation of a neutral arbitrator shall be made through the AAA and not directly between the parties and the arbitrator.

R-56. Deposits

- (a) The AAA may require the parties to deposit in advance of any hearings such sums of money as it deems necessary to cover the expense of the arbitration, including the arbitrator's fee, if any, and shall render an accounting to the parties and return any unexpended balance at the conclusion of the case.
- (b) Other than in cases where the arbitrator serves for a flat fee, deposit amounts requested will be based on estimates provided by the arbitrator. The arbitrator will determine the estimated amount of deposits using the information provided by the parties with respect to the complexity of each case.
- (c) Upon the request of any party, the AAA shall request from the arbitrator an itemization or explanation for the arbitrator's request for deposits.

R-57. Remedies for Nonpayment

If arbitrator compensation or administrative charges have not been paid in full, the AAA may so inform the parties in order that one of them may advance the required payment.

- (a) Upon receipt of information from the AAA that payment for administrative charges or deposits for arbitrator compensation have not been paid in full, to the extent the law allows, a party may request that the arbitrator take specific measures relating to a party's non-payment.
- (b) Such measures may include, but are not limited to, limiting a party's ability to assert or pursue their claim. In no event, however, shall a party be precluded from defending a claim or counterclaim.
- (c) The arbitrator must provide the party opposing a request for such measures with the opportunity to respond prior to making any ruling regarding the same.
- (d) In the event that the arbitrator grants any request for relief which limits any party's participation in the arbitration, the arbitrator shall require the party who is making a claim and who has made appropriate payments to submit such evidence as the arbitrator may require for the making of an award.
- (e) Upon receipt of information from the AAA that full payments have not been received, the arbitrator, on the arbitrator's own initiative or at the request of the AAA or a party, may order the suspension of the arbitration. If no arbitrator has yet been appointed, the AAA may suspend the proceedings.
- (f) If the arbitration has been suspended by either the AAA or the arbitrator and the parties have failed to make the full deposits requested within the time provided after the suspension, the arbitrator, or the AAA if an arbitrator has not been appointed, may terminate the proceedings.

R-58. Sanctions

- (a) The arbitrator may, upon a party's request, order appropriate sanctions where a party fails to comply with its obligations under these rules or with an order of the arbitrator. In the event that the arbitrator enters a sanction that limits any party's participation in the arbitration or results in an adverse determination of an issue or issues, the arbitrator shall explain that order in writing and shall require the submission of evidence and legal argument prior to making of an award. The arbitrator may not enter a default award as a sanction.
- (b) The arbitrator must provide a party that is subject to a sanction request with the opportunity to respond prior to making any determination regarding the sanctions application.

Preliminary Hearing Procedures

P-1. General

- (a) In all but the simplest cases, holding a preliminary hearing as early in the process as possible will help the parties and the arbitrator organize the proceeding in a manner that will maximize efficiency and economy, and will provide each party a fair opportunity to present its case.
- (b) Care must be taken to avoid importing procedures from court systems, as such procedures may not be appropriate to the conduct of arbitrations as an alternative form of dispute resolution that is designed to be simpler, less expensive and more expeditious.

P-2. Checklist

- (a) The following checklist suggests subjects that the parties and the arbitrator should address at the preliminary hearing, in addition to any others that the parties or the arbitrator believe to be appropriate to the particular case. The items to be addressed in a particular case will depend on the size, subject matter, and complexity of the dispute, and are subject to the discretion of the arbitrator:
 - (i) the possibility of other non-adjudicative methods of dispute resolution, including mediation pursuant to R-9;
 - (ii) whether all necessary or appropriate parties are included in the arbitration;
 - (iii) whether a party will seek a more detailed statement of claims, counterclaims or defenses;
 - (iv) whether there are any anticipated amendments to the parties' claims, counterclaims, or defenses;
 - (v) which:
 - (a) arbitration rules;
 - (b) procedural law; and
 - (c) substantive law govern the arbitration;
 - (vi) whether there are any threshold or dispositive issues that can efficiently be decided without considering the entire case, including without limitation:
 - (a) any preconditions that must be satisfied before proceeding with the arbitration;
 - (b) whether any claim or counterclaim falls outside the arbitrator's jurisdiction or is otherwise not arbitrable;
 - (c) consolidation of the claims or counterclaims with another arbitration; or
 - (d) bifurcation of the proceeding.

- (vii) whether the parties will exchange documents, including electronically stored documents, on which they intend to rely in the arbitration, and/or make written requests for production of documents within defined parameters;
 - (viii) whether to establish any additional procedures to obtain information that is relevant and material to the outcome of disputed issues;
 - (ix) how costs of any searches for requested information or documents that would result in substantial costs should be borne;
 - (x) whether any measures are required to protect confidential information;
 - (xi) whether the parties intend to present evidence from expert witnesses, and if so, whether to establish a schedule for the parties to identify their experts and exchange expert reports;
 - (xii) whether, according to a schedule set by the arbitrator, the parties will:
 - (a) identify all witnesses, the subject matter of their anticipated testimonies, exchange written witness statements, and determine whether written witness statements will replace direct testimony at the hearing;
 - (b) exchange and pre-mark documents that each party intends to submit; and
 - (c) exchange pre-hearing submissions, including exhibits;
 - (xiii) the date, time and place of the arbitration hearing;
 - (xiv) whether, at the arbitration hearing:
 - (a) testimony may be presented in person, in writing, by video conference, via the internet, telephonically, or by other reasonable means;
 - (b) there will be a stenographic transcript or other record of the proceeding and, if so, who will make arrangements to provide it;
 - (xv) whether any procedure needs to be established for the issuance of subpoenas;
 - (xvi) the identification of any ongoing, related litigation or arbitration;
 - (xvii) whether post-hearing submissions will be filed;
 - (xviii) the form of the arbitration award; and
 - (xix) any other matter the arbitrator considers appropriate or a party wishes to raise.
- (b) The arbitrator shall issue a written order memorializing decisions made and agreements reached during or following the preliminary hearing.

Expedited Procedures

E-1. Limitation on Extensions

Except in extraordinary circumstances, the AAA or the arbitrator may grant a party no more than one seven-day extension of time to respond to the Demand for Arbitration or counterclaim as provided in Section R-5.

E-2. Changes of Claim or Counterclaim

A claim or counterclaim may be increased in amount, or a new or different claim or counterclaim added, upon the agreement of the other party, or the consent of the arbitrator. After the arbitrator is appointed, however, no new or different claim or counterclaim may be submitted except with the arbitrator's consent. If an increased claim or counterclaim exceeds \$75,000, the case will be administered under the regular procedures unless all parties and the arbitrator agree that the case may continue to be processed under the Expedited Procedures.

E-3. Serving of Notices

In addition to notice provided by Section R-43, the parties shall also accept notice by telephone. Telephonic notices by the AAA shall subsequently be confirmed in writing to the parties. Should there be a failure to confirm in writing any such oral notice, the proceeding shall nevertheless be valid if notice has, in fact, been given by telephone.

E-4. Appointment and Qualifications of Arbitrator

- (a) The AAA shall simultaneously submit to each party an identical list of five proposed arbitrators drawn from its National Roster from which one arbitrator shall be appointed.
- (b) The parties are encouraged to agree to an arbitrator from this list and to advise the AAA of their agreement. If the parties are unable to agree upon an arbitrator, each party may strike two names from the list and return it to the AAA within seven days from the date of the AAA's mailing to the parties. If for any reason the appointment of an arbitrator cannot be made from the list, the AAA may make the appointment from other members of the panel without the submission of additional lists.
- (c) The parties will be given notice by the AAA of the appointment of the arbitrator, who shall be subject to disqualification for the reasons specified in Section R-18. The parties shall notify the AAA within seven calendar days of any objection to the arbitrator appointed. Any such objection shall be for cause and shall be confirmed in writing to the AAA with a copy to the other party or parties.

E-5. Exchange of Exhibits

At least two business days prior to the hearing, the parties shall exchange copies of all exhibits they intend to submit at the hearing. The arbitrator shall resolve disputes concerning the exchange of exhibits.

E-6. Proceedings on Documents and Procedures for the Resolution of Disputes Through Document Submission

Where no party's claim exceeds \$25,000, exclusive of interest, attorneys' fees and arbitration costs, and other cases in which the parties agree, the dispute shall be resolved by submission of documents, unless any party requests an oral hearing, or the arbitrator determines that an oral hearing is necessary. Where cases are resolved by submission of documents, the following procedures may be utilized at the agreement of the parties or the discretion of the arbitrator:

- (a) Within 14 calendar days of confirmation of the arbitrator's appointment, the arbitrator may convene a preliminary management hearing, via conference call, video conference, or internet, to establish a fair and equitable procedure for the submission of documents, and, if the arbitrator deems appropriate, a schedule for one or more telephonic or electronic conferences.
- (b) The arbitrator has the discretion to remove the case from the documents-only process if the arbitrator determines that an in-person hearing is necessary.
- (c) If the parties agree to in-person hearings after a previous agreement to proceed under this rule, the arbitrator shall conduct such hearings. If a party seeks to have in-person hearings after agreeing to this rule, but there is not agreement among the parties to proceed with in-person hearings, the arbitrator shall resolve the issue after the parties have been given the opportunity to provide their respective positions on the issue.
- (d) The arbitrator shall establish the date for either written submissions or a final telephonic or electronic conference. Such date shall operate to close the hearing and the time for the rendering of the award shall commence.
- (e) Unless the parties have agreed to a form of award other than that set forth in rule R-46, when the parties have agreed to resolve their dispute by this rule, the arbitrator shall render the award within 14 calendar days from the date the hearing is closed.
- (f) If the parties agree to a form of award other than that described in rule R-46, the arbitrator shall have 30 calendar days from the date the hearing is declared closed in which to render the award.
- (g) The award is subject to all other provisions of the Regular Track of these rules which pertain to awards.

E-7. Date, Time, and Place of Hearing

In cases in which a hearing is to be held, the arbitrator shall set the date, time, and place of the hearing, to be scheduled to take place within 30 calendar days of confirmation of the arbitrator's appointment. The AAA will notify the parties in advance of the hearing date.

E-8. The Hearing

- (a) Generally, the hearing shall not exceed one day. Each party shall have equal opportunity to submit its proofs and complete its case. The arbitrator shall determine the order of the hearing, and may require further submission of documents within two business days after the hearing. For good cause shown, the arbitrator may schedule additional hearings within seven business days after the initial day of hearings.
- (b) Generally, there will be no stenographic record. Any party desiring a stenographic record may arrange for one pursuant to the provisions of Section R-28.

E-9. Time of Award

Unless otherwise agreed by the parties, the award shall be rendered not later than 14 calendar days from the date of the closing of the hearing or, if oral hearings have been waived, from the due date established for the receipt of the parties' final statements and proofs.

E-10. Arbitrator's Compensation

Arbitrators will receive compensation at a rate to be suggested by the AAA regional office.

Procedures for Large, Complex Commercial Disputes

L-1. Administrative Conference

Prior to the dissemination of a list of potential arbitrators, the AAA shall, unless the parties agree otherwise, conduct an administrative conference with the parties and/or their attorneys or other representatives by conference call. The conference will take place within 14 calendar days after the commencement of the arbitration. In the event the parties are unable to agree on a mutually acceptable time for the conference, the AAA may contact the parties individually to discuss the issues contemplated herein. Such administrative conference shall be conducted for the following purposes and for such additional purposes as the parties or the AAA may deem appropriate:

- (a) to obtain additional information about the nature and magnitude of the dispute and the anticipated length of hearing and scheduling;
- (b) to discuss the views of the parties about the technical and other qualifications of the arbitrators;
- (c) to obtain conflicts statements from the parties; and
- (d) to consider, with the parties, whether mediation or other non-adjudicative methods of dispute resolution might be appropriate.

L-2. Arbitrators

- (a) Large, complex commercial cases shall be heard and determined by either one or three arbitrators, as may be agreed upon by the parties. With the exception in paragraph (b) below, if the parties are unable to agree upon the number of arbitrators and a claim or counterclaim involves at least \$1,000,000, then three arbitrator(s) shall hear and determine the case. If the parties are unable to agree on the number of arbitrators and each claim and counterclaim is less than \$1,000,000, then one arbitrator shall hear and determine the case.
- (b) In cases involving the financial hardship of a party or other circumstance, the AAA at its discretion may require that only one arbitrator hear and determine the case, irrespective of the size of the claim involved in the dispute.
- (c) The AAA shall appoint arbitrator(s) as agreed by the parties. If they are unable to agree on a method of appointment, the AAA shall appoint arbitrators from the Large, Complex Commercial Case Panel, in the manner provided in the regular Commercial Arbitration Rules. Absent agreement of the parties, the arbitrator(s) shall not have served as the mediator in the mediation phase of the instant proceeding.

L-3. Management of Proceedings

- (a) The arbitrator shall take such steps as deemed necessary or desirable to avoid delay and to achieve a fair, speedy and cost-effective resolution of a Large, Complex Commercial Dispute.
- (b) As promptly as practicable after the selection of the arbitrator(s), a preliminary hearing shall be scheduled in accordance with sections P-1 and P-2 of these rules.
- (c) The parties shall exchange copies of all exhibits they intend to submit at the hearing at least 10 calendar days prior to the hearing unless the arbitrator(s) determines otherwise.
- (d) The parties and the arbitrator(s) shall address issues pertaining to the pre-hearing exchange and production of information in accordance with rule R-22 of the AAA Commercial Rules, and the arbitrator's determinations on such issues shall be included within the Scheduling and Procedure Order.
- (e) The arbitrator, or any single member of the arbitration tribunal, shall be authorized to resolve any disputes concerning the pre-hearing exchange and production of documents and information by any reasonable means within his discretion, including, without limitation, the issuance of orders set forth in rules R-22 and R-23 of the AAA Commercial Rules.
- (f) In exceptional cases, at the discretion of the arbitrator, upon good cause shown and consistent with the expedited nature of arbitration, the arbitrator may order depositions to obtain the testimony of a person who may possess information determined by the arbitrator to be relevant and material to the outcome of the case. The arbitrator may allocate the cost of taking such a deposition.
- (g) Generally, hearings will be scheduled on consecutive days or in blocks of consecutive days in order to maximize efficiency and minimize costs.

Administrative Fee Schedules (Standard And Flexible Fees)

The AAA has two administrative fee options for parties filing claims or counterclaims, the Standard Fee Schedule and Flexible Fee Schedule. The Standard Fee Schedule has a two payment schedule, and the Flexible Fee Schedule has a three payment schedule which offers lower initial filing fees, but potentially higher total administrative fees of approximately 12% to 19% for cases that proceed to a hearing. The administrative fees of the AAA are based on the amount of the claim or counterclaim. Arbitrator compensation is not included in this schedule. Unless the parties agree otherwise, arbitrator compensation and administrative fees are subject to allocation by the arbitrator in the award. In an effort to make arbitration costs reasonable for consumers, the AAA has a separate fee schedule for consumer-related disputes. Please refer to Section C-8 of the Supplementary Procedures for Consumer-Related Disputes when filing a consumer-related claim. Note that the Flexible Fee Schedule is not available on cases administered under these supplementary procedures.

The AAA applies the Supplementary Procedures for Consumer-Related Disputes to arbitration clauses in agreements between individual consumers and businesses where the business has a standardized, systematic application of arbitration clauses with customers and where the terms and conditions of the purchase of standardized, consumable goods or services are non-negotiable or primarily non-negotiable in most or all of its terms, conditions, features, or choices. The product or service must be for personal or household use. The AAA will have the discretion to apply or not to apply the Supplementary Procedures and the parties will be able to bring any disputes concerning the application or non-application to the attention of the arbitrator. Consumers are not prohibited from seeking relief in a small claims court for disputes or claims within the scope of its jurisdiction, even in consumer arbitration cases filed by the business.

Fees for incomplete or deficient filings: Where the applicable arbitration agreement does not reference the AAA, the AAA will attempt to obtain the agreement of the other parties to the dispute to have the arbitration administered by the AAA. However, where the AAA is unable to obtain the agreement of the parties to have the AAA administer the arbitration, the AAA will administratively close the case and will not proceed with the administration of the arbitration. In these cases, the AAA will return the filing fees to the filing party, less the amount specified in the fee schedule below for deficient filings.

Parties that file Demands for Arbitration that are incomplete or otherwise do not meet the filing requirements contained in these rules shall also be charged the amount specified below for deficient filings if they fail or are unable to respond to the AAA's request to correct the deficiency.

Fees for additional services: The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these rules which may be required by the parties' agreement or stipulation.

Standard Fee Schedule

An Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. A Final Fee will be incurred for all cases that proceed to their first hearing. This fee will be payable in advance at the time that the first hearing is scheduled. This fee will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

These fees will be billed in accordance with the following schedule:

AMOUNT OF CLAIM	INITIAL FILING FEE	FINAL FEE
Above \$0 to \$10,000	\$775	\$200
Above \$10,000 to \$75,000	\$975	\$300
Above \$75,000 to \$150,000	\$1,850	\$750
Above \$150,000 to \$300,000	\$2,800	\$1,250
Above \$300,000 to \$500,000	\$4,350	\$1,750
Above \$500,000 to \$1,000,000	\$6,200	\$2,500
Above \$1,000,000 to \$5,000,000	\$8,200	\$3,250
Above \$5,000,000 to \$10,000,000	\$10,200	\$4,000
Above \$10,000,000	Base fee of \$12,800 plus .01% of the amount above \$10,000,000 Fee Capped at \$65,000	\$6,000
Nonmonetary Claims ¹	\$3,350	\$1,250
Deficient Claim Filing Fee ²	\$350	
Additional Services ³		

¹ This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$10,200.

² The Deficient Claim Filing Fee shall not be charged in cases filed by a consumer in an arbitration governed by the Supplementary Procedures for the Resolution of Consumer-Related Disputes, or in cases filed by an Employee who is submitting their dispute to arbitration pursuant to an employer promulgated plan.

³ The AAA may assess additional fees where procedures or services outside the rules sections are required under the parties' agreement or by stipulation.

Fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$2,800 for the Initial Filing Fee, plus a \$1,250 Final Fee. Expedited Procedures are applied in any case where no disclosed claim or counterclaim exceeds \$75,000, exclusive of interest and arbitration costs.

Parties on cases filed under either the Flexible Fee Schedule or the Standard Fee Schedule that are held in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be administratively closed.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879.

Refund Schedule for Standard Fee Schedule

The AAA offers a refund schedule on filing fees connected with the Standard Fee Schedule. For cases with claims up to \$75,000, a minimum filing fee of \$350 will not be refunded. For all other cases, a minimum fee of \$600 will not be refunded. Subject to the minimum fee requirements, refunds will be calculated as follows:

- > 100% of the filing fee, above the minimum fee, will be refunded if the case is settled or withdrawn within five calendar days of filing.
- > 50% of the filing fee, will be refunded if the case is settled or withdrawn between six and 30 calendar days of filing.
- > 25% of the filing fee will be refunded if the case is settled or withdrawn between 31 and 60 calendar days of filing.

No refund will be made once an arbitrator has been appointed (this includes one arbitrator on a three-arbitrator panel). No refunds will be granted on awarded cases.

Note: The date of receipt of the Demand for Arbitration with the AAA will be used to calculate refunds of filing fees for both claims and counterclaims.

Flexible Fee Schedule

A non-refundable Initial Filing Fee is payable in full by a filing party when a claim, counterclaim, or additional claim is filed. Upon receipt of the Demand for Arbitration, the AAA will promptly initiate the case and notify all parties as well as establish the due date for filing of an Answer, which may include a Counterclaim. In order to proceed with the further administration of the arbitration and appointment of the arbitrator(s), the appropriate, non-refundable Proceed Fee outlined below must be paid.

If a Proceed Fee is not submitted within ninety (90) days of the filing of the Claimant's Demand for Arbitration, the Association will administratively close the file and notify all parties.

No refunds or refund schedule will apply to the Filing or Proceed Fees once received.

The Flexible Fee Schedule below also may be utilized for the filing of counterclaims. However, as with the Claimant's claim, the counterclaim will not be presented to the arbitrator until the Proceed Fee is paid.

A Final Fee will be incurred for all claims and/or counterclaims that proceed to their first hearing. This fee will be payable in advance when the first hearing is scheduled, but will be refunded at the conclusion of the case if no hearings have occurred. However, if the Association is not notified of a cancellation at least 24 hours before the time of the scheduled hearing, the Final Fee will remain due and will not be refunded.

All fees will be billed in accordance with the following schedule:

AMOUNT OF CLAIM	INITIAL FILING FEE	PROCEED FEE	FINAL FEE
Above \$0 to \$10,000	\$400	\$475	\$200
Above \$10,000 to \$75,000	\$625	\$500	\$300
Above \$75,000 to \$150,000	\$850	\$1,250	\$750
Above \$150,000 to \$300,000	\$1,000	\$2,125	\$1,250
Above to \$300,000 to \$500,000	\$1,500	\$3,400	\$1,750
Above to \$500,000 to \$1,000,000	\$2,500	\$4,500	\$2,500
Above \$1,000,000 to \$5,000,000	\$2,500	\$6,700	\$3,250
Above \$5,000,000 to \$10,000,000	\$3,500	\$8,200	\$4,000
Above \$10,000,000	\$4,500	\$10,300 plus .01% of claim amount over \$10,000,000 up to \$65,000	\$6,000
Nonmonetary ¹	\$2,000	\$2,000	\$1,250
Deficient Claim Filing Fee	\$350		
Additional Services ²			

¹This fee is applicable when a claim or counterclaim is not for a monetary amount. Where a monetary claim amount is not known, parties will be required to state a range of claims or be subject to a filing fee of \$3,500 and a proceed fee of \$8,200.

²The AAA reserves the right to assess additional administrative fees for services performed by the AAA beyond those provided for in these rules and which may be required by the parties' agreement or stipulation.

For more information, please contact your local AAA office, case management center, or our Customer Service desk at 1-800-778-7879. All fees are subject to increase if the amount of a claim or counterclaim is modified after the initial filing date. Fees are subject to decrease if the amount of a claim or counterclaim is modified before the first hearing.

The minimum fees for any case having three or more arbitrators are \$1,000 for the Initial Filing Fee; \$2,125 for the Proceed Fee; and \$1,250 for the Final Fee.

Under the Flexible Fee Schedule, a party's obligation to pay the Proceed Fee shall remain in effect regardless of any agreement of the parties to stay, postpone or otherwise modify the arbitration proceedings.

Parties that, through mutual agreement, have held their case in abeyance for one year will be assessed an annual abeyance fee of \$300. If a party refuses to pay the assessed fee, the other party or parties may pay the entire fee on behalf of all parties, otherwise the matter will be closed.

Note: The date of receipt by the AAA of the Demand for Arbitration will be used to calculate the ninety (90) day time limit for payment of the Proceed Fee.

There is no Refund Schedule in the Flexible Fee Schedule.

Hearing Room Rental

The fees described above do not cover the cost of hearing rooms, which are available on a rental basis. Check with the AAA for availability and rates.

Commercial Mediation Procedures

M-1. Agreement of Parties

Whenever, by stipulation or in their contract, the parties have provided for mediation or conciliation of existing or future disputes under the auspices of the American Arbitration Association or under these procedures, the parties and their representatives, unless agreed otherwise in writing, shall be deemed to have made these procedural guidelines, as amended and in effect as of the date of filing of a request for mediation, a part of their agreement and designate the AAA as the administrator of their mediation.

The parties by mutual agreement may vary any part of these procedures including, but not limited to, agreeing to conduct the mediation via telephone or other electronic or technical means.

M-2. Initiation of Mediation

Any party or parties to a dispute may initiate mediation under the AAA's auspices by making a request for mediation to any of the AAA's regional offices or case management centers via telephone, email, regular mail or fax. Requests for mediation may also be filed online via WebFile at **www.adr.org**.

The party initiating the mediation shall simultaneously notify the other party or parties of the request. The initiating party shall provide the following information to the AAA and the other party or parties as applicable:

- (i) A copy of the mediation provision of the parties' contract or the parties' stipulation to mediate.
- (ii) The names, regular mail addresses, email addresses, and telephone numbers of all parties to the dispute and representatives, if any, in the mediation.
- (iii) A brief statement of the nature of the dispute and the relief requested.
- (iv) Any specific qualifications the mediator should possess.

M-3. Representation

Subject to any applicable law, any party may be represented by persons of the party's choice. The names and addresses of such persons shall be communicated in writing to all parties and to the AAA.

M-4. Appointment of the Mediator

If the parties have not agreed to the appointment of a mediator and have not provided any other method of appointment, the mediator shall be appointed in the following manner:

- (i) Upon receipt of a request for mediation, the AAA will send to each party a list of mediators from the AAA's Panel of Mediators. The parties are encouraged to agree to a mediator from the submitted list and to advise the AAA of their agreement.
- (ii) If the parties are unable to agree upon a mediator, each party shall strike unacceptable names from the list, number the remaining names in order of preference, and return the list to the AAA. If a party does not return the list within the time specified, all mediators on the list shall be deemed acceptable. From among the mediators who have been mutually approved by the parties, and in accordance with the designated order of mutual preference, the AAA shall invite a mediator to serve.
- (iii) If the parties fail to agree on any of the mediators listed, or if acceptable mediators are unable to serve, or if for any other reason the appointment cannot be made from the submitted list, the AAA shall have the authority to make the appointment from among other members of the Panel of Mediators without the submission of additional lists.

M-5. Mediator's Impartiality and Duty to Disclose

AAA mediators are required to abide by the *Model Standards of Conduct for Mediators* in effect at the time a mediator is appointed to a case. Where there is a conflict between the Model Standards and any provision of these Mediation Procedures, these Mediation Procedures shall govern. The Standards require mediators to (i) decline a mediation if the mediator cannot conduct it in an impartial manner, and (ii) disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.

Prior to accepting an appointment, AAA mediators are required to make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for the mediator. AAA mediators are required to disclose any circumstance likely to create a presumption of bias or prevent a resolution of the parties' dispute within the time-frame desired by the parties. Upon receipt of such disclosures, the AAA shall immediately communicate the disclosures to the parties for their comments.

The parties may, upon receiving disclosure of actual or potential conflicts of interest of the mediator, waive such conflicts and proceed with the mediation. In the event that a party disagrees as to whether the mediator shall serve, or in the event that the mediator's conflict of interest might reasonably be viewed as undermining the integrity of the mediation, the mediator shall be replaced.

M-6. Vacancies

If any mediator shall become unwilling or unable to serve, the AAA will appoint another mediator, unless the parties agree otherwise, in accordance with section M-4.

M-7. Duties and Responsibilities of the Mediator

- (i) The mediator shall conduct the mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.
- (ii) The mediator is authorized to conduct separate or ex parte meetings and other communications with the parties and/or their representatives, before, during, and after any scheduled mediation conference. Such communications may be conducted via telephone, in writing, via email, online, in person or otherwise.
- (iii) The parties are encouraged to exchange all documents pertinent to the relief requested. The mediator may request the exchange of memoranda on issues, including the underlying interests and the history of the parties' negotiations. Information that a party wishes to keep confidential may be sent to the mediator, as necessary, in a separate communication with the mediator.
- (iv) The mediator does not have the authority to impose a settlement on the parties but will attempt to help them reach a satisfactory resolution of their dispute. Subject to the discretion of the mediator, the mediator may make oral or written recommendations for settlement to a party privately or, if the parties agree, to all parties jointly.
- (v) In the event a complete settlement of all or some issues in dispute is not achieved within the scheduled mediation session(s), the mediator may continue to communicate with the parties, for a period of time, in an ongoing effort to facilitate a complete settlement.
- (vi) The mediator is not a legal representative of any party and has no fiduciary duty to any party.

M-8. Responsibilities of the Parties

The parties shall ensure that appropriate representatives of each party, having authority to consummate a settlement, attend the mediation conference.

Prior to and during the scheduled mediation conference session(s) the parties and their representatives shall, as appropriate to each party's circumstances, exercise their best efforts to prepare for and engage in a meaningful and productive mediation.

M-9. Privacy

Mediation sessions and related mediation communications are private proceedings. The parties and their representatives may attend mediation sessions. Other persons may attend only with the permission of the parties and with the consent of the mediator.

M-10. Confidentiality

Subject to applicable law or the parties' agreement, confidential information disclosed to a mediator by the parties or by other participants (witnesses) in the course of the mediation shall not be divulged by the mediator. The mediator shall maintain the confidentiality of all information obtained in the mediation, and all records, reports, or other documents received by a mediator while serving in that capacity shall be confidential.

The mediator shall not be compelled to divulge such records or to testify in regard to the mediation in any adversary proceeding or judicial forum.

The parties shall maintain the confidentiality of the mediation and shall not rely on, or introduce as evidence in any arbitral, judicial, or other proceeding the following, unless agreed to by the parties or required by applicable law:

- (i) Views expressed or suggestions made by a party or other participant with respect to a possible settlement of the dispute;
- (ii) Admissions made by a party or other participant in the course of the mediation proceedings;
- (iii) Proposals made or views expressed by the mediator; or
- (iv) The fact that a party had or had not indicated willingness to accept a proposal for settlement made by the mediator.

M-11. No Stenographic Record

There shall be no stenographic record of the mediation process.

M-12. Termination of Mediation

The mediation shall be terminated:

- (i) By the execution of a settlement agreement by the parties; or
- (ii) By a written or verbal declaration of the mediator to the effect that further efforts at mediation would not contribute to a resolution of the parties' dispute; or
- (iii) By a written or verbal declaration of all parties to the effect that the mediation proceedings are terminated; or
- (iv) When there has been no communication between the mediator and any party or party's representative for 21 days following the conclusion of the mediation conference.

M-13. Exclusion of Liability

Neither the AAA nor any mediator is a necessary party in judicial proceedings relating to the mediation. Neither the AAA nor any mediator shall be liable to any party for any error, act or omission in connection with any mediation conducted under these procedures.

M-14. Interpretation and Application of Procedures

The mediator shall interpret and apply these procedures insofar as they relate to the mediator's duties and responsibilities. All other procedures shall be interpreted and applied by the AAA.

M-15. Deposits

Unless otherwise directed by the mediator, the AAA will require the parties to deposit in advance of the mediation conference such sums of money as it, in consultation with the mediator, deems necessary to cover the costs and expenses of the mediation and shall render an accounting to the parties and return any unexpended balance at the conclusion of the mediation.

M-16. Expenses

All expenses of the mediation, including required traveling and other expenses or charges of the mediator, shall be borne equally by the parties unless they agree otherwise. The expenses of participants for either side shall be paid by the party requesting the attendance of such participants.

M-17. Cost of the Mediation

There is no filing fee to initiate a mediation or a fee to request the AAA to invite parties to mediate.

The cost of mediation is based on the hourly mediation rate published on the mediator's AAA profile. This rate covers both mediator compensation and an allocated portion for the AAA's services. There is a four-hour minimum charge for a mediation conference. Expenses referenced in Section M-16 may also apply.

If a matter submitted for mediation is withdrawn or cancelled or results in a settlement after the agreement to mediate is filed but prior to the mediation conference the cost is \$250 plus any mediator time and charges incurred.

The parties will be billed equally for all costs unless they agree otherwise.

If you have questions about mediation costs or services visit our website at **www.adr.org** or contact your local AAA office.

Conference Room Rental

The costs described above do not include the use of AAA conference rooms. Conference rooms are available on a rental basis. Please contact your local AAA office for availability and rates.

©2013 American Arbitration Association, Inc. All rights reserved. These rules are the copyrighted property of the American Arbitration Association (AAA) and are intended to be used in conjunction with the AAA's administrative services. Any unauthorized use or modification of these rules may violate copyright laws and other applicable laws. Please contact 800.778.7879 or websitemail@adr.org for additional information.

Regional Vice Presidents

States: Alabama, Georgia

John M. Bishop
Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org

States: Florida

Rebecca Storrow, Ph.D.
Vice President
Phone: 954.372.4341
Email: StorrowR@adr.org

States: Arkansas, Illinois, Iowa, Michigan, Minnesota, Missouri, North Dakota, South Dakota, Wisconsin

A. Kelly Turner, Esq.
Vice President
Phone: 312.361.1116
Email: TurnerK@adr.org

States: Arizona, Idaho, Montana, Nevada, New Mexico, Utah

David Cox
Vice President
Phone: 602.734.9304
Email: CoxD@adr.org

States: Alaska, California, Hawaii, Oregon, Washington

Serena K. Lee, Esq.
Vice President
Phone: 415.671.4053
Email: LeeS@adr.org

States: Delaware, District of Columbia, Maryland, New Jersey, Pennsylvania, Virginia

P. Jean Baker, Esq.
Vice President
Phone: 202.223.7093
Email: BakerJ@adr.org

States: Colorado, Kansas, Nebraska, Oklahoma,

Wyoming
Lance K. Tanaka
Vice President
Phone: 303.831.0824
Email: TanakaL@adr.org

States: Louisiana, Mississippi, Texas

Andrew Barton
Vice President
Phone: 210.998.5750
Email: BartonA@adr.org

States: Indiana, Kentucky, North Carolina, Ohio, South Carolina, Tennessee, West Virginia

Michelle M. Skipper
Vice President
Phone: 704.643.8605
Email: SkipperM@adr.org

States: Connecticut, Maine, Massachusetts, New Hampshire, Rhode Island, Vermont

Karen Jalkut
Vice President
Phone: 617.695.6062
Email: JalkutK@adr.org

States: New York

Jeffrey T. Zaino, Esq.
Vice President
Phone: 212.484.3224
Email: ZainoJ@adr.org

Case Management Vice Presidents and Directors

Jeffrey Garcia

Vice President
Phone: 559.490.1860
Email: GarciaJ@adr.org
**Administers cases in: AK, AZ, CA, HI,
ID, MT, NM, NV, OR, UT, WA**

John M. Bishop

Vice President
Phone: 404.320.5150
Email: BishopJ@adr.org
**Administers cases in: AL, DC, FL, GA,
IN, KY, MD, NC, OH, SC, TN, VA**

Harry Hernandez

Director
Phone: 972.702.8222
Email: HernandezH@adr.org
**Administers cases in: AR, CO, IA, IL, KS, LA,
MN, MO, MS, ND, NE, OK, SD, TX, WI, WY**

Yvonne Baglini

Director
Phone: 866.293.4053
Email: BagliniY@adr.org
**Administers cases in: CT, DE, MA, ME, MI, NH,
NJ, NY, PA, RI, VT, WV**



AMERICAN ARBITRATION ASSOCIATION®

800.778.7879 | websitemail@adr.org | adr.org

EXHIBIT 5

CV14-01229 DC-0990055617-059
MB AMERICA, INC. VS ALASKA 24 Pages
District Court 09/15/2014 04:15 PM
Washoe County \$2200
EXR MTORRFG

EXHIBIT 5

Law Offices of
Royce & Brain

1407 W. 31st Avenue, 7th Floor
Anchorage, Alaska 99503-3678

*Raymond H. Royce**
Michael A. Brain
Jason J. Ruedy

Telephone (907) 258-6792

Facsimile (907) 276-2919

VIA FACSIMILE: 855-433-3046

* ALSO ADMITTED IN MASSACHUSETTS

September 4, 2014

American Arbitration Association
AAA Case Management Center
6795 N. Palm Avenue, 2nd Floor
Fresno, CA 93704

Re: Request for Mediation
Our File No. 2356.03

To Whom It May Concern:

This office represents Alaska Pacific Leasing Company ("APL") in connection with a dispute involving a distributorship agreement ("Agreement") APL entered into with MB America, Inc. ("MB"). A copy of the Agreement is attached hereto as Exhibit 1. Pursuant to Article 13 of the Agreement, the parties are required to submit all disputes to mediation in accordance with the rules of the American Arbitration Association ("AAA"). APL is now submitting this dispute to AAA's regional office for Alaska pursuant to AAA Commercial Mediation Procedure M-2.

Parties/Legal Representatives

The names, regular mailing addresses, email addresses, and telephone numbers of the parties to the dispute and their respective legal representatives are as follows:

1. Alaska Pacific Leasing Company
9191 Old Seward Hwy, Unit 15
Anchorage, AK 99515
Phone: (907) 349-9899
Email: dfaulk@alaska.com

APL is identified as the dealer under the Agreement and is the party initiating the mediation pursuant to the applicable AAA rules.

AA0097

2. Jason J. Ruedy
Law Offices of Royce & Brain
1407 W. 31st Ave., 7th Floor
Anchorage, AK 99503
Phone: (907) 258-6792
Email: jruedy@roycebrain.com

APL is represented in Alaska by Jason J. Ruedy of the Law Offices of Royce & Brain.

3. Holly S. Parker
Laxalt & Nomura, Ltd.
9600 Gateway Drive
Reno, NV 89521
Phone: (775) 322-1170
Email: hparker@laxalt-nomura.com

APL is represented in Nevada by Holly S. Parker of Laxalt & Nomura, Ltd.

4. MB America, Inc.
8730 Technology Way
Reno, NV 89521
Phone: (775) 853-1058
Email: max.ravazzolo@mbrusher.com

MB is identified as the distributor under the Agreement.

5. Michael E. Sullivan
Robison, Belaustegui, Sharp & Low, P.C.
71 Washington Street
Reno, NV 89503
Phone: (775) 329-3151
Email: msullivan@rbsllaw.com

MB is represented in Nevada by Michael E. Sullivan of Robison, Belaustegui, Sharp & Low, P.C.

Nature of the Dispute

APL and MB entered into the Agreement in August 2012. Pursuant to the Agreement, APL was to be the exclusive Alaska dealer of certain specialized construction equipment manufactured by MB ApS of Breganze, Italy. In January 2013, APL acquired approximately \$150,000 worth of inventory from MB pursuant to the Agreement. APL incurred additional costs shipping the inventory and retrofitting its own equipment in order that the inventory could be demonstrated for use in Alaska. Upon information and belief, MB authorized its own commissioned sales

American Arbitration Association
September 4, 2014
Page 3

person to contact certain of APL's identified Alaska customers directly in violation of the exclusivity provisions in the Agreement. In December 2013, MB notified APL that it was terminating the Agreement, effective March 18, 2014. After receiving the notice of termination, APL demanded that MB refund the money that APL paid for the inventory and take possession of same. MB refused APL's demand and instead filed a lawsuit against APL in Reno, NV to compel mediation. MB never made a demand for mediation on APL and failed to otherwise comply with the controlling AAA Commercial Mediation Procedures.

The dispute involves a distributorship agreement that expressly identifies Alaska as the subject territory. Accordingly, the Agreement and all disputes thereunder, are subject to the provisions of AS 45.45.700 *et seq.*, a copy of which is attached hereto as Exhibit 2. AS 45.45.750 precludes a distributor, such as MB, from requiring a dealer, such as APL, to apply the laws of any state other than Alaska to their distributorship agreement. Consequently, Alaska law controls this dispute irrespective of any choice of law provision in the Agreement that may indicate to the contrary.

Relief Requested

APL requests the relief to which it is legally entitled to under AS 45.45.760(b).

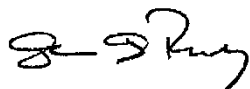
Mediator Qualifications

It is anticipated that MB will argue against application of Alaska law. Since the choice of law issue may bear a direct connection to the legal and equitable remedies available to the parties, an effective mediation will likely require that the mediator address this issue in advance of any mediation.

Should you have any questions regarding this request for mediation, please do not hesitate to contact me.

Sincerely,

ROYCE & BRAIN



Jason J. Ruedy

JJR/kek
Enclosure

cc: Alaska Pacific Leasing Company (*via electronic mail*)
Attn: David Faulk

AA0099

American Arbitration Association
September 4, 2014
Page 4

MB America, Inc. (*via electronic mail*)
c/o Michael E. Sullivan
Robison, Belaustegui, Sharp & Low, P.C.

Laxalt & Nomura, Ltd. (*via electronic mail*)
Attn: Holly S. Parker

EXHIBIT 1

[Distributorship Agreement]



MB America, Inc.
8730 Technology Way
Reno, NV 89521
Phone 775-853-1058 - Fax 775-682-4302
www.mbamerica.com

Agreement

This Agreement is made as of the 1 day of August in the year of 2012, by and between "MB America, Inc.", a corporation incorporated under the laws of the state of Nevada, represented by Miriano Ravazzolo who has the necessary powers ("MB"), and "Alaska Pacific Leasing" a corporation incorporated under the laws of the state of Alaska, represented by Mr. David Faulk who has the necessary powers ("Dealer"), and to be administered as follows:

1. **APPOINTMENT AND ACCEPTANCE.** MB appoints Dealer as its exclusive reseller to promote the sale of the Products and Services as defined in paragraph 2 herein, and Dealer accepts the appointment and agrees to promote the sale of MB's Products as defined by this Agreement.
2. **PRODUCTS AND AREA.** The products covered by this Agreement (Products) are "crushing attachments", "screening attachments" and any other product and service manufactured and/or sold by the company "MB SpA" of Breganze, Italy ("Manufacturer") under its own brand name at the date of this agreement. Any new standard or custom Product developed or added by Manufacturer during the lifetime of this Agreement is not automatically included in the Agreement, but has to be agreed upon each time. The Area covered in this agreement is as specified in the Annex A, part I, of this Agreement.
3. **PRICES.** Dealer will purchase the Products at the prices specified in the current Price List, minus the dealer discount, and with the payment terms, as specified in the Annex A, part III, of this Agreement. Unless specifically agreed time by time, the prices are for material picked up by Dealer at one of our warehouses in the US, and do not include any transport or any other accessory cost.
The Price List, discounts and terms can be changed by MB at any moment with an advanced notice of 30 days; however, existing orders and/or proposals will be carried over at the conditions existing at the moment of their acceptance.
4. **WARRANTY AND SERVICE.** The warranty and service terms will be as defined in the Annex C. In any case, Dealer will communicate to MB the date of sale and the name and address of the purchasing entity for every Product sold, within 30 days from the sale; as well as the date of first use for Products that are used for rentals or demonstrations. Failure to do so will void any warranty on the Product, constitute significant breach of the Agreement.
5. **SALES OUTSIDE TERRITORY.** We discourage you selling New Products outside the Territory. Should you do so, you will be assessed a "servicing fee" of twenty percent (20%) of the discounted price of such New Product. The servicing fee, less an administrative assessment of 3%, will be paid to the dealer in whose Territory you sold the New Product, to compensate that dealer for providing support and for any advertising and effort spent in promoting interest in the Product. New Product for the purpose of this paragraph is product in service less than one year, except if sold at auctions.

Bucket Crushers Worldwide

AA0102

6. **RELATIONSHIP AND CONDUCT OF BUSINESS.** Dealer shall use its best efforts to promote the sale of and solicit orders for the Products and services and will conduct all its business in its own name and in such a manner as it may see fit, pay all its own expenses including all commissions, salaries, bonuses, and expenses of its own employees and sales persons and any and all taxes properly and lawfully associated with doing business as an independent entity in the assigned territory.

MB shall furnish Dealer, at no expense to Dealer, with catalogs, literature, and any other material available for the proper promotion and solicitation of orders for the Products in the assigned territory. MB can contribute to the marketing activities of Dealer, as advertising, exhibitions and the like, on a time-by-time base or as result of separate agreements.

MB can participate, at its own expense and decision, to exhibitions, conventions or conferences in any area of the country, and Dealer is not obliged to participate or contribute to said events.

Dealer shall abide by MB's terms and conditions pertaining to the sale of the Products and services, their operations, and their warranty (if any), and shall communicate same to customers. Dealer shall hold MB harmless from and shall indemnify MB for all liability, loss, costs, expenses or damages, including court costs and reasonable attorneys' fees, caused by any misrepresentation made by Dealer or its employees concerning MB's products or services.

Dealer is directly initiating and maintaining the relationship with its customer and will cooperate with the MB to solve possible disputes arising in connection with the Product.

Dealer is an independent entity and shall have sole control of the means of performing under this Agreement. Nothing in this Agreement shall be construed to constitute Dealer as a partner or employee of MB nor shall either have any authority to bind the other in any respect.

7. **BRAND PROTECTION.** Every Product sold to a final user will have to carry all the original logos, branding, identification numbers and serials as supplied by Manufacturer. Dealer will not alter, modify or hide the brand name or logos in any way. Proposals, quotes and invoices to the final users will have to clearly specify the Manufacturer's brand name.

Dealer can produce its own promotional material and/or advertising about the Product. However every document or photo will have to clearly indicate Manufacturer brand and logo, and the drafts of said promotional material or advertising will have to be submitted to MB for approval before printing and/or producing. MB has the faculty to deny the approval within 5 days from the date of receiving the drafts, at its own discretion.

8. **TERM OF AGREEMENT AND TERMINATION.** This Agreement shall be effective on the date listed on page 1 and shall continue in force for an initial term of 1 year.

This Agreement may be terminated by either party:

- (a) By written agreement mutually agreed upon to be terminated at any time; or
- (b) (But not effective during the initial term of the Agreement), for no cause upon at least 90 days' prior written notice to the other party;
- (c) By both parties in case of breach of this agreement, with 30 days written notice.
- (d) After 30 days' written notice if either party has filed or has filed against it a petition in bankruptcy (which is not dismissed within 30 days after it is filed) or after 30 days' written notice if either party has other cause.

9. **RIGHTS UPON TERMINATION.** Upon termination of this Agreement any current order will be carried on as scheduled. MB will however have the option to request a different payment term for

Bucket Crushers Worldwide

any order placed by Dealer from the moment of the notice of termination.

10. **ENTIRE AGREEMENT; MODIFICATION.** This Agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon successors and assigns. It may not be modified in any way without the written consent of an officer or owner of both parties.

11. **SURVIVABILITY OF AGREEMENT; HIERARCHY.** If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be considered deleted from this Agreement and shall not invalidate the remaining provisions of this Agreement. In case that any provision or part thereof in Annex A or Annex C would be considered contrasting with any provision or part in this Agreement, the provisions in Annex A or Annex C will prevail.

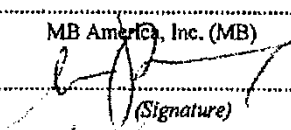
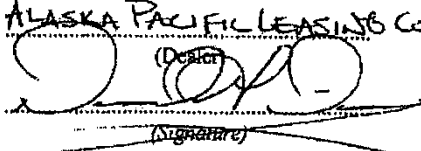
12. **APPLICABLE LAW - WAIVER.** This Agreement shall be construed according to the laws of the State of Nevada. The failure of either party to enforce, at any time or for any period of time, any provisions of this Agreement shall not be construed as a waiver of such provision or of the right of such party thereafter to enforce such provision.

13. **DISPUTES AND MEDIATION.** The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement shall be submitted to mediation between MB and Dealer with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV. Any mediation settlement by the parties shall be documented in writing. If such mediation settlement modifies the language of this Agreement, the modification shall be put in writing, signed by both parties and added to this Agreement as an attachment.

If mediation between the parties does not result in a mutual satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement in the court of law of Reno, Nevada with all reasonable attorney fees, court costs and expenses incurred by the prevailing party in such litigation to be paid by the other party.

14. **NOTICES.** All notices, demands or other communications by either party to the other shall be in writing and shall be effective upon personal delivery, or 72 hours after deposited in the United States mail, first class certified postage prepaid, or by email.

IN WITNESS WHEREOF, the officers or owners of both parties hereto have executed this Agreement to be effective on the day and year listed on page one of this Agreement written in multiple counterparts, each of which shall be considered an original.

<p>MB America, Inc. (MB)</p> <p> (Signature)</p> <p>8/20/2012</p>	<p>ALASKA PACIFIC LEASING CO., INC.</p> <p> (Signature)</p> <p>AUGUST 17, 2012</p>
--	--

Bucket Crushers Worldwide

AA0104

MB America, Inc
Dealer Agreement with
Alaska Pacific Leasing
9191 Old Seward Highway Unit #15
Anchorage, Alaska, 99515

Annex A

Part I - Territory

The territory will be the States of Alaska.

Part II - Sales Objectives:

After 120 days from the execution of this Agreement, MB will submit to Dealer a Target Sales Objective for the remaining time of the agreement, which will consider the market situation and the potentials of the line.

Part III - Discount and Payments:

The discount reserved is 36% (thirty-six percent) on the current price list and its modifications. Dealer will pay the shipping costs from one of our warehouses to his premises.

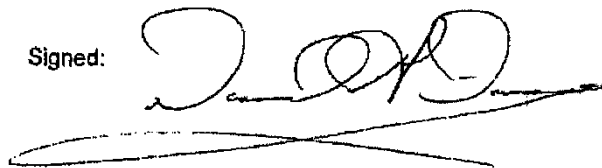
The payments will be by check or wire transfer as follows:

- 10% at the order
- final amount, including transport and any other costs, before shipping.

MB America will establish a maximum credit line with Dealer, which will not be exceeded at any moment.

Any delay in the payment will allow MB America to request and charge the payment of compounded interests of 1.5% monthly.

Signed:



Date: AUGUST 17, 2012

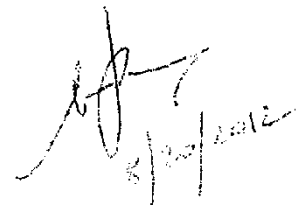


EXHIBIT 2

[AS 45.45.700 *et seq.*]

Alaska Stat. § 45.45.700

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.700. Coercion of dealer

- (a) A distributor may not coerce or attempt to coerce a dealer to perform certain acts by using duress or by threatening to terminate the distributorship agreement or another agreement between the distributor and the dealer.
- (b) In this section, "certain acts" means
- (1) the purchase or acceptance of delivery of merchandise that has not been ordered by the dealer;
 - (2) the assignment, sale, or disposal of a contract or property; or
 - (3) making an expenditure that the dealer has not contracted to make.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

NOTES APPLICABLE TO ENTIRE TITLE

REVISOR'S NOTES. --The provisions of this title were redrafted in 1986 to remove personal pronouns pursuant to § 4, ch. 58, SLA 1982 and in 1986, 1994, and 2006 to make other, minor word changes. In 1980, the provisions of the Uniform Commercial Code formerly set out in AS 45.05, were renumbered as AS 45.01 -- AS 45.09 so that the numbering now corresponds to the numbering of the official text of the Uniform Commercial Code. To determine the disposition of sections formerly numbered within AS 45.05, or to determine the prior numbering of sections now numbered within AS 45.01 -- AS 45.09, see the Table of Sections Amended, Etc., in Volume 11.

COLLATERAL REFERENCES. --Theodore Eisenberg, *Debtor-Creditor Law* (Matthew Bender).

Peter J. Bestos, *Modern UCC Litigation Forms* (Matthew Bender).

Duesenberg and King, *Sales and Bulk Transfers Under the UCC* (Matthew Bender).

Cohen, McLaughlin, and Zaretsky, *Commercial Law Report* (Matthew Bender).

Frederick M. Hart, *Forms and Procedures Under the UCC* (Matthew Bender).

Willer and Hart, *UCC Reporter-Digest* (Matthew Bender).

Zaretsky, McLaughlin, *Commercial Law and Practice Guide* (Matthew Bender).

Charles L. Knapp, *Commercial Damages: A Guide to Remedies in Business Litigation* (Matthew Bender).

Jason Ruedy

Charles K. Knapp, Commercial Damages Reporter (Matthew Bender).

Howard Ruda, Asset Based Financing: A Transactional Guide (Matthew Bender).

NOTES APPLICABLE TO ENTIRE ARTICLE

EDITOR'S NOTES. --Section 2, *ch. 15, SLA 2002* provides that AS 45.45.700 -- 45.45.790 apply "to a distributorship agreement that is entered into on or after August 1, 2002."

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Alaska Stat. § 45.45.710

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.710. Disposition of merchandise remaining upon contract termination

- (a) If a dealer maintains a stock of merchandise supplied for the dealer's resale under a distributorship agreement and if the distributor or the dealer terminates the distributorship agreement, the distributor shall, unless the dealer chooses to keep the merchandise, pay the dealer for the merchandise that was purchased from the distributor and that is held by the dealer on the date of the termination an amount equal to
- (1) the fair market value for merchandise that is unused and for which the retailer has paid the distributor, plus 100 percent of the transportation charges paid by the dealer to return the merchandise to the distributor; in this paragraph,
 - (A) "fair market value" means the amount the distributor would realize from the sale of the merchandise to another retailer using reasonable good faith efforts;
 - (B) "unused" means unopened merchandise that is still in the original factory packaging or container;
 - (2) 85 percent of the current net price, as listed in the current price list or catalog of the distributor, for repair parts, including superseded parts; and
 - (3) five percent of the current net price of repair parts to cover the handling, packing, and transportation of the repair parts back to the distributor.
- (b) Upon payment of the amounts required by (a) of this section, the title to the merchandise passes to the distributor making the payment, and the distributor is entitled to the possession of the merchandise for which the payment was made.
- (c) In (a) of this section, if a repair part is not listed in a current price list or catalog of the distributor, the current net price is the higher of the fair market value or the latest price published by the distributor for the repair part if a dealer has actual proof of the purchase of the repair part from the distributor and if the repair part was purchased within 10 years before the termination.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Jason Ruedy

AA0109

Alaska Stat. § 45.45.720

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.720. Time for payment

A distributor shall make the payments to the dealer under AS 45.45.710 not later than three months after the date the agreement is terminated. When the payment is made, the distributor shall provide the dealer with a final detailed statement of account for the merchandise.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Alaska Stat. § 45.45.730

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.730. Death or disability of dealer or holder of majority interest in dealer

Unless the distributorship agreement is continued by the personal representative, an heir, a devisee, or another successor in interest of the individual, upon the death or disability of an individual who is a dealer or holds a majority interest in a dealer, a distributor who supplied merchandise to the dealer shall repurchase from the personal representative, heir, devisee, or other successor in interest the merchandise that was purchased from the distributor and that remains when the distributorship agreement is terminated under this section. To repurchase under this section, the distributor shall pay an amount equal to the amount identified under AS 45.45.710(a) and (c), and the repurchase is subject to AS 45.45.720. In this section, "devisee," "heir," and "personal representative" have the meanings given in AS 13.06.050.

History

(§ 1 ch 15 SLA 2002)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Alaska Stat. § 45.45.740

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.740. Required purchase, reimbursement, and supplies

- (a) In addition to any purchase of merchandise required by AS 45.45.710, if a distributor terminates a distributorship agreement or makes substantial changes in the competitive situation of the distributor's dealer with regard to distribution of the merchandise or services that are the subject of the distribution agreement, the distributor shall
- (1) purchase that portion of the dealer's business directly affected by the distributorship agreement or the change, including assets and machinery, at commercially reasonable business valuations; and
 - (2) reimburse the dealer for the expenses that were necessarily incurred by the dealer
 - (A) for that portion of the dealer's business covered by the distributorship agreement; and
 - (B) during the 12 months before the termination or change.
- (b) In this section, "change" does not include making a price change that affects similarly situated dealers equally.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Alaska Stat. § 45.45.750

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.750. Prohibited terms

- (a) A distributor may not require a dealer to agree to any of the following terms in a distributorship agreement, or in another agreement that is ancillary to a distributorship agreement, as a condition of an offer, grant, or renewal of a distributorship agreement or ancillary agreement:
- (1) a requirement that the dealer waive a trial by jury in court cases involving the distributor;
 - (2) a requirement that disputes between the distributor and the dealer be submitted to arbitration or to any other binding alternate dispute resolution procedure, except authorization for the submission of a dispute to arbitration or to binding alternative dispute resolution if the distributor and dealer voluntarily agree to submit the dispute to arbitration or binding alternative dispute resolution when the dispute arises;
 - (3) a requirement that the dealer pay the attorney fees of the distributor;
 - (4) a requirement that prohibits a firearms dealer from selling firearms or related accessories, the sale of which is otherwise legal, but which the firearms distributor does not manufacture or distribute; or
 - (5) a requirement that the agreement be subject to the laws of a state other than Alaska.
- (b) The provisions of (a) of this section do not apply to an agreement where a lease or sale of real property is the main purpose of the agreement.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Alaska Stat. § 45.45.760

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.760. Civil action

- (a) A dealer may bring an action in court against a distributor if the distributor engages in activity prohibited under AS 45.45.700 -- 45.45.790.
- (b) In an action brought under (a) of this section, the dealer may obtain one or more of the following types of relief that apply to the specific action of the dealer:
 - (1) damages suffered by the dealer as a result of the activity;
 - (2) an injunction enjoining the distributor from engaging in the activity;
 - (3) a requirement that the distributor make a payment or a purchase required by AS 45.45.700 -- 45.45.790;
 - (4) any other relief determined by the court to be appropriate under the circumstances.
- (c) In this section, "activity prohibited under AS 45.45.700 -- 45.45.790" means
 - (1) coercion or attempted coercion under AS 45.45.700;
 - (2) terminating a distributorship agreement without paying the dealer as required by AS 45.45.710;
 - (3) failing to pay the dealer within the time established by AS 45.45.720;
 - (4) failing to provide the statement of account as required by AS 45.45.720;
 - (5) failing to make a repurchase payment required by AS 45.45.730;
 - (6) failing to make a purchase as required by AS 45.45.740(a)(1);
 - (7) failing to make the reimbursement required by AS 45.45.740(a)(2); or
 - (8) violating AS 45.45.750.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Notes

REVISOR'S NOTES. --

In 2002, "AS 45.45.700 -- 45.45.790" was substituted for "this chapter" in subsections (a), (b), and (c), to correct a manifest error in *ch. 15, SLA 2002*.

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Jason Ruedy

AA0114

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Jason Ruedy

AA0115

Alaska Stat. § 45.45.770

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE 11. DISTRIBUTORSHIPS

Sec. 45.45.770. Exemptions

- (a) AS 45.45.700 -- 45.45.790 do not apply to
- (1) a distributorship agreement that would be considered a franchise regulated by 15 U.S.C. 2801 -- 2841 (Petroleum Marketing Practices Act);
 - (2) a situation regulated by AS 45.50.800 -- 45.50.850;
 - (3) a distributorship agreement, including a franchise agreement, for the sale, repair, or servicing of motor vehicles that are required to be registered under AS 28.10;
 - (4) an activity or agreement by a person licensed under AS 04 if the activity or agreement is within the scope of the license or is incidental to the activity or agreement that is within the scope of the license;
 - (5) a distributorship agreement or another contract between a person licensed under AS 04 and a distributor, manufacturer, importer, supplier, or wholesaler of alcoholic beverages who is not located in this state if the subject of the agreement or contract is the distribution of alcoholic beverages to the licensed person by the distributor, manufacturer, importer, supplier, or wholesaler;
 - (6) a distributor, manufacturer, importer, supplier, or wholesaler of alcoholic beverages;
 - (7) a distributorship agreement for the sale or distribution of, or other transaction involving, cigarettes, food, drink, or a component of food or drink; in this paragraph, "cigarette" has the meaning given in AS 43.50.170;
 - (8) a manufacturer with 50 or fewer employees; or
 - (9) a marine product or motorized recreational product agreement under AS 45.27.
- (b) In (a) of this section, "alcoholic beverage" has the meaning given in AS 04.21.080.

History

(§ 1 ch 15 SLA 2002; am § 3 ch 28 SLA 2009)

Annotations

Notes

EFFECT OF AMENDMENTS. --

The 2009 amendment, effective May 26, 2009, added (a)(9), and made a related stylistic change.

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Jason Ruedy

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Jason Ruedy

AA0117

Alaska Stat. § 45.45.790

Current through the 2013 Regular Session of the Twenty-Eighth State Legislature Annotations
current through opinions posted on Lexis.com as of April 1, 2014.

Alaska Statutes > TITLE 45. TRADE AND COMMERCE > CHAPTER 45. TRADE PRACTICES > ARTICLE II. DISTRIBUTORSHIPS

Sec. 45.45.790. Definitions

In AS 45.45.700 -- 45.45.790,

- (1) "dealer" means a person who enters into a distributorship agreement and who, under the agreement, receives merchandise or services from a distributor;
- (2) "distributor" means a person who enters into a distributorship agreement and who, under the agreement, provides merchandise or services to a dealer; the term includes
 - (A) a wholesaler;
 - (B) a manufacturer;
 - (C) a person that is a parent corporation or an affiliated corporation of a person identified in (A) or (B) of this paragraph; and
 - (D) a field representative, an officer, an agent, or another direct or indirect representative of a person identified in (A), (B), or (C) of this paragraph;
- (3) "distributorship agreement" means an agreement, whether express, implied, oral, or written, between two or more persons
 - (A) by which a person receives the right to
 - (i) sell or lease merchandise or services at retail or wholesale; or
 - (ii) use a trade name, trademark, service mark, logotype, advertising, or other commercial symbol; and
 - (B) in which the parties to the agreement have a joint interest, whether equal or unequal, in the offering, selling, or leasing of the merchandise or services;
- (4) "merchandise" includes parts and accessories;
- (5) "terminate" includes failing to renew.

History

(§ 1 *ch 15 SLA 2002*)

Annotations

Research References & Practice Aids

USER NOTE:

For more generally applicable notes, see notes under the first section of this article, chapter or title.

ALASKA STATUTES

Copyright © 2014 by The State of Alaska and Matthew Bender & Company, Inc. a member of the LexisNexis Group.
All Rights Reserved.

Jason Ruedy

AA0118

HP LaserJet 3390

Fax Call Report

LAW OFFICES ROYCE&BRAIN
9072762919
Sep-4-2014 12:25PM

Job	Date	Time	Type	Identification	Duration	Pages	Result
11233	9/ 4/2014	12:15:23PM	Send	18554333046.235603	9:34	24	OK

LAW OFFICES OF ROYCE & BRAIN
1407 W. 31st Ave., 7th Floor
Anchorage, AK 99503-3678
Telephone: 907-258-6792
Fax: 907-276-2919

FAX COVER SHEET

FAX TRANSMITTED

To: American Arbitration Association
Fax Number: (855) 433-3046
From: Jason J. Ruedy
Date: September 4, 2014
Re: Our File No. 2356.03- Request for Mediation

DOCUMENTS	NUMBER OF PAGES*
Letter to American Arbitration Association	22

COMMENTS:

Original will NOT be sent via U.S. Mail.

The information contained in this facsimile message is information prepared by or on behalf of the attorney-client and is intended only for the use of the individual named above and the privileges are not waived by virtue of its having been sent by facsimile. If the person actually receiving this facsimile or any other reader of the facsimile is not the named recipient or the employee or agent responsible to deliver it to the named recipient, any use, dissemination, distribution, or copying of the communication is strictly prohibited. If you have received this communication in error, please immediately notify us by telephone and return the original message to us at the above address via U.S. Postal Service.

* NOT COUNTING COVER SHEET. IF YOU DO NOT RECEIVE ALL PAGES, PLEASE CONTACT THIS OFFICE IMMEDIATELY AT 907-258-6792.

AA0119

1 **2645**
2 Michael E. Sullivan, Esq. (SBN 5142)
3 **ROBISON, BELAUSTEGUI, SHARP & LOW**
4 A Professional Corporation
5 71 Washington Street
6 Reno, Nevada 89503
7 Telephone: (775) 329-3151
8 *Attorneys for Plaintiff MB America, Inc.*

9
10 **IN THE SECOND JUDICIAL DISTRICT FOR THE STATE OF NEVADA**
11 **IN AND FOR THE COUNTY OF WASHOE**

12 MB AMERICA, INC., a Nevada
13 corporation,

Case No.: CV14-01229

14 Plaintiff,

Dept. No.: 8

15 v.

MB AMERICA, INC.'S OPPOSITION
TO DEFENDANT'S MOTION FOR
SUMMARY JUDGMENT

16 ALASKA PACIFIC LEASING COMPANY,
17 a Alaska business corporation; and DOES
18 I through X, inclusive,

19 Defendants.
20 _____ /

21 Plaintiff MB America, Inc. by and through its counsel of record Robison,
22 Belaustegui, Sharp & Low, hereby opposes Defendant Alaska Pacific Leasing
23 Company's motion for summary judgment. This opposition is made and supported by
24 the Memorandum of Points and Authorities contained herein, the attached Affidavit of
25 Miriano Ravazzolo, the attached exhibits, and the papers and pleadings on file.

26 DATED this 26th day of September, 2014.

27 ROBISON, BELAUSTEGUI, SHARP & LOW
28 A Professional Corporation
71 Washington Street
Reno, NV 89503

By: 

MICHAEL E. SULLIVAN, ESQ.
Attorneys for Plaintiff MB America, Inc.

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Plaintiff, MB America, Inc. is a Nevada Corporation headquartered in Reno,
4 Nevada. MBA sells rock crushing machines, primarily for commercial purposes. The
5 Defendant is an Alaska business based out of Anchorage, Alaska.

6 On or about August, 2012 the Plaintiff and Defendant entered into an agreement
7 whereby the Defendant agreed to become a dealer of Plaintiff's line of products.
8 Attached as **EXHIBIT 1** is a true and correct copy of the Agreement. See Declaration of
9 Miriano Ravzzolo attached hereto as **EXHIBIT 2**. The interpretation of this Agreement
10 is what forms the basis for this this declaratory relief action. On December 16, 2013
11 Plaintiff terminated the Agreement which it had the legal right to do so under the terms
12 of the Agreement. Plaintiff filed this suit to confirm that no legal dispute exists – or
13 alternatively – to have this Court order Defendant to participate in mediation in Reno,
14 Nevada.

15 Unfortunately, the Defendant continued to harass the Plaintiff by insisting that the
16 Plaintiff refund more than \$100,000.00 for purchases of equipment that the Defendant
17 had made while it was acting as a dealer under the terms of the Agreement. Once the
18 Agreement was terminated, the Defendant threatened to sue the Plaintiff in the state of
19 Alaska if the Plaintiff did not repurchase approximately \$112,000.00 for units and
20 accessories. See June 30, 2014 correspondence from Vice-President David G. Faulk
21 to attorney Michael E. Sullivan attached as **EXHIBIT 3**. See Affidavit of Michael E.
22 Sullivan, Esq. attached hereto as **EXHIBIT 4**. Importantly, Mr. Faulk as the
23 representative of the Defendant states in unambiguous terms "We do not dispute MB
24 America's right to cancel the Agreement with good cause for failing to represent MB
25 America or in selling units and parts in inventory." Additionally, Mr. Faulk goes on to
26 state in his letter "Please note that Paragraph 13 ("Disputes and Mediation") of the
27 Agreement does not apply in this matter as we do not contest MB America's right to
28 cancel the agreement, but rather take issue with the fact that MB America acted in bad

1 faith by accepting our payment for units which we were not obligated to purchase and
2 then cancelling the Agreement less than eleven (11) months later.” See page 2 of
3 David Falk’s letter to Michael E. Sullivan attached as EXHIBIT 3.

4 Importantly and prior to filing the instant lawsuit for declaratory relief and specific
5 performance, the undersigned attorney sent a letter to Mr. Faulk dated February 27,
6 2014 in an attempt to resolve the false threats made by Mr. Faulk and his company
7 against MB America, Inc. Attached hereto as **EXHIBIT 5**. In that letter, MB America
8 makes it abundantly clear that it will not be reimbursing or repurchasing the Defendant
9 for the purchases that the Defendant made. Additionally and central to this lawsuit is
10 the fact that the Plaintiff advised Mr. Faulk that under paragraphs 12 and 13 of the
11 Agreement, any disputes or questions arising under the application of the Agreement
12 shall be submitted to mediation pursuant to the rules of the American Arbitration
13 Association and the hearing should be conducted in Reno, Nevada pursuant to Nevada
14 law. See Affidavit of Michael E. Sullivan attached hereto as EXHIBIT 4.

15 Unfortunately, this request for mediation was met by a hostile letter threatening
16 litigation. See David Falk’s letter of June 30, 2014 attached hereto as EXHIBIT 3. The
17 undersigned avers that before filing this lawsuit both he and Plaintiff’s representative
18 Miriano Ravazzolo attempted to negotiated this matter or have it referred to mediation
19 and this request was summarily rejected by the actions by the Alaska Defendant. See
20 Affidavit of Michael E. Sullivan, Esq.

21 The sole reason that this lawsuit was filed was to either confirm that there is no
22 legal dispute between these parties or alternatively to ask this Court to refer the matter
23 to non-binding mediation in Reno, Nevada using the American Arbitration Association
24 rules. See Affidavit of Michael E. Sullivan, Esq. attached hereto. There is no legal
25 obligation to use the American Arbitration Association as the mediator.

26 Plaintiff does not believe there is a legal dispute between the parties and that
27 neither party owes any legal obligation to the other pursuant to the terms of the
28 Agreement and/or the actions of the parties both before and after the Agreement was

1 signed and after the Agreement was terminated. This fact is a material fact that
2 precludes summary judgment. However, out of an abundance of caution, if there is a
3 dispute then the Defendant must set forth material facts to demonstrate what the
4 dispute is and the testimony that supports it. If such a dispute does exist i.e., the
5 Defendant
6 believes it is entitled to a refund of a purchase it made two years ago, then that matter
7 must be referred to mediation using the AAA rules. Paragraph 13 of the Agreement
8 does not mandate that the AAA be the mediator for this matter. While the Plaintiff
9 recognizes that the mediation could be with the AAA, it could equally be with some
10 other qualified entity who can use the AAA rules. A second material fact is that the
11 Defendant refused mediation. See Affidavit of Michael E. Sullivan, Esq. and Mr. Faulk's
12 letter attached as EXHIBIT 3.

13 Counsel for the Defendant has recently requested that this Court stay until the
14 entire matter can be referred to mediation. See email from Holly Parker, Esq. to Mike
15 Sullivan, Esq. dated September 9, 2014 attached hereto as **EXHIBIT 6**. The Defendant
16 is willing to stay this matter until such time as this Court selects a mediator in Reno.

17 Unfortunately while this matter was pending and the parties were trying to
18 negotiate who the mediator should be, counsel in Alaska unilaterally sent a demand for
19 mediation to the AAA in some attempt to gain a tactical advantage in this case. See
20 Exhibit 5 to Defendant's Motion for Summary Judgment. The undersigned spoke with
21 AAA representative Cathe Stewart on September 23, 2014 to confirm that AAA has not
22 accepted this mediation and that the parties' Agreement does not require AAA to be the
23 mediator. See Affidavit of Michael E. Sullivan, Esq. and email from Cathe Stewart
24 attached hereto as **EXHIBIT 7**.

25 On September 23, 2014 counsel for Plaintiff sent a letter to the AAA office
26 advising them that the Plaintiff is not agreeing with Defendant's demand that this matter
27 be sent to AAA arbitration and that the Defendant does not get to unilaterally dictate the
28 terms of an agreement that its client entered into two years ago.

1 **II. DEFENDANT FILED AN ANSWER THAT WAIVES ITS RIGHT TO ATTEMPT**
2 **TO DISMISS THIS LAWSUIT AS PREMATURE AT THIS TIME**

3 On August 15, 2014, the Defendant did not file a motion to dismiss for lack of
4 jurisdiction or for failure to demand mediation. Rather, the Defendant filed an Answer
5 and thereby waived its claim this case should be dismissed. It is critical that this Court
6 deny Defendant's Motion to Dismiss or alternatively stay this litigation until such time as
7 the Defendant can affirmatively set forth what the dispute is between the parties are
8 what facts it has to support its claim. Second, if this Court determines that there is a
9 dispute, then this Court should order the parties to mediation in Reno, Nevada with a
10 qualified mediator who shall use the AAA rules. It is certainly possible that the mediator
11 could be from the AAA organization but that would have to be by mutual stipulation. If
12 the parties cannot agree on a mediator in Reno, Nevada, then this Court should select a
13 qualified mediator as set forth in paragraph 13 of the Agreement which is purportedly at
14 issue in this case. If this Court determines that mediation is appropriate, then the Court
15 should stay the litigation of this matter so as to avoid unnecessary costs to both sides.
16 At the end of the day, the Defendant should not be allowed to dismiss a proper Nevada
17 action that requires this Court to determine the rights of the parties or alternatively refer
18 this matter to mediation in Reno, Nevada and not to some obscure venue in the state of
19 Alaska.

20 For the reasons set forth below, the Defendant, by its own admission, concede
21 that there are material issues of fact in this case and that it is the interpretation of the
22 contract that controls where and what type of mediation should occur and not the
23 unilateral actions of the Defendant. It was only because the Defendant and Mr. Faulk
24 refused mediation and threatened to file an unwarranted lawsuit in Alaska and gain
25 some sort of procedural or tactical advantage that the Plaintiff was required to file the
26 instant action declaring that no one's rights had been violated under the terms of the
27 Agreement or otherwise. If there truly is a dispute between the parties, then it must be
28 mediated in Reno, Nevada under the parties' Agreement. For the reasons set forth

1 below, it is respectfully requested that the Court deny the Defendant's Motion and
2 award the Plaintiff the attorney's fees and cost that it incurred in having to respond to
3 the motion. Alternatively, this Court should stay the matter and order the parties to
4 mediate with any qualified mediator in Reno and then advise the Court whether or not
5 the mediation was successful. If the mediation is not successful, then this Court would
6 proceed with the declaratory relief action and determine the rights of the parties.

7 **III. LEGAL ARGUMENT**

8 Plaintiff agrees with Defendant's standard for summary judgment under NRCP
9 56(c). Plaintiff has met its burden of demonstrating that there are material issues of fact
10 supported by exhibits, a declaration and an affidavit. Defendant's Motion must be
11 denied or stayed. Plaintiff's Complaint was not premature and summary judgment
12 should not be granted in favor of Defendant. The purpose of Plaintiff's Complaint is to
13 compel the parties to attend mediation which Defendant has refused. See page 2 of
14 David Falk's letter to Michael E. Sullivan attached as EXHIBIT 3. Plaintiff has complied
15 with the mediation provision that it is requesting this Court to enforce. See Affidavit of
16 Michael E. Sullivan attached hereto as EXHIBIT 4 and February 27, 2014 letter from
17 Michael E. Sullivan to David Faulk attached as EXHIBIT 5. The paragraph 13 of the
18 Agreement alone is the basis to compel Defendant to mediation. At no time has the
19 Plaintiff ever summarily rejected the use of AAA or any other mediator so long as the
20 mediation takes place in Reno, Nevada as required by the parties' Agreement. Ms.
21 Stewart did say that her office has actually received a request for mediation from the
22 Defendant but has not taken any action and likely would not take any action absent an
23 order from the Court or a written stipulation by the parties to use AAA as the mediator in
24 Reno, Nevada. Even though Defendant's request for mediation with AAA was done so
25 within the 180 day period for mediation it was done so without stipulation from Plaintiff
26 and as such will be ignored by AAA. See Affidavit of Michael E. Sullivan attached hereto
27 as EXHIBIT 4.

28 ///

1 **IV. CONCLUSION**

2 Because Plaintiff has demonstrated that there are materially issues of fact,
3 Defendant's Motion must be denied. Because the parties are at an impasse on where
4 the mediation should occur (if at all) this Court is requested to deny Defendant's Motion,
5 stay this case and order the parties to select a Reno mediator or the Court should select
6 a mediator and order the parties to conduct the mediation in Reno as soon as possible

7 **AFFIRMATION:** The undersigned does hereby affirm that this document does not
8 contain the Social Security Number of any person.

9 DATED this 26th day of September, 2014.

10
11 ROBISON, BELAUSTEGUI, SHARP & LOW
12 A Professional Corporation
13 71 Washington Street
14 Reno, Nevada 89503

15 By: _____
16 MICHAEL E. SULLIVAN, ESQ.
17 Attorneys for Plaintiff MB America, Inc.

18 J:\WPData\MES\6916.003\P-Opposition to MSJ.docx

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCP 5(b), I certify that I am an employee of ROBISON,
3 BELAUSTEGUI, SHARP & LOW, and that on this date I caused to be served a true
4 copy of the attached **MB AMERICA, INC.'S OPPOSITION TO DEFENDANT'S**
5 **MOTION FOR SUMMARY JUDGMENT** on all parties to this action by the method(s)
6 indicated below:
7

8 X

9 by placing an original or true copy thereof in a sealed envelope,
10 with sufficient postage affixed thereto, in the United States mail at
11 Reno, Nevada, addressed to:

12 Holly S. Parker, Esq.
13 Marilee Breternitz, Esq.
14 Laxalt & Nomura, Ltd.
15 9600 Gateway Drive
16 Reno, Nevada 89521

17 Jason J. Ruedy, Esq.
18 Law Offices of Royce & Brain
19 1407 W. 31st Avenue, 7th Floor
20 Anchorage, Alaska 99503

21 *Attorneys for Defendant Alaska Pacific Leasing Company*

22 X

23 by using the Court's CM/ECF Electronic Notification System
24 addressed to:

25 Holly S. Parker, Esq.
26 Marilee Breternitz, Esq.
27 *Attorneys for Defendant Alaska Pacific Leasing Company*

28 _____

by facsimile addressed to:

Holly S. Parker, Esq./Marilee Breternitz, Esq. – Fax # 322-1865
Attorneys for Defendant Alaska Pacific Leasing Company

by hand-delivery addressed to:

DATED this 26 day of September, 2014.



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

LIST OF EXHIBITS

<u>EXHIBIT NO.</u>	<u>DESCRIPTION</u>	<u>NO. PAGES</u>
1	Agreement	4
2	Declaration of Miriano Ravazzolo	1
3	Letter from David G. Faulk to Michael E. Sullivan dated June 30, 2014	2
4	Affidavit of Michael E. Sullivan, Esq.	3
5	Letter from Michael E. Sullivan, Esq. to David G. Faulk dated February 27, 2014	3
6	Email from Holly Parker to Mike Sullivan dated September 9, 2014	1
7	Email from Cathe Stewart to Mike Sullivan dated September 23, 2014	2

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 1

EXHIBIT 1



THE CRUSHING EVOLUTION

MB America, Inc.
8730 Technology Way
Reno, NV 89521
Phone 775-853-1058 - Fax 775-682-4302
www.mbamerica.com

Agreement

This Agreement is made as of the 1 day of August in the year of 2012, by and between "MB America, Inc.", a corporation incorporated under the laws of the state of Nevada, represented by Miriano Ravazzolo who has the necessary powers ("MB"), and "Alaska Pacific Leasing" a corporation incorporated under the laws of the state of Alaska, represented by Mr. David Faulk who has the necessary powers ("Dealer"), and to be administered as follows:

1. **APPOINTMENT AND ACCEPTANCE.** MB appoints Dealer as its exclusive reseller to promote the sale of the Products and Services as defined in paragraph 2 herein, and Dealer accepts the appointment and agrees to promote the sale of MB's Products as defined by this Agreement.
2. **PRODUCTS AND AREA.** The products covered by this Agreement (Products) are "crushing attachments", "screening attachments" and any other product and service manufactured and/or sold by the company "MB SpA" of Breganze, Italy ("Manufacturer") under its own brand name at the date of this agreement. Any new standard or custom Product developed or added by Manufacturer during the lifetime of this Agreement is not automatically included in the Agreement, but has to be agreed upon each time. The Area covered in this agreement is as specified in the Annex A, part I, of this Agreement.
3. **PRICES.** Dealer will purchase the Products at the prices specified in the current Price List, minus the dealer discount, and with the payment terms, as specified in the Annex A, part III, of this Agreement. Unless specifically agreed time by time, the prices are for material picked up by Dealer at one of our warehouses in the US, and do not include any transport or any other accessory cost.

The Price List, discounts and terms can be changed by MB at any moment with an advanced notice of 30 days; however, existing orders and/or proposals will be carried over at the conditions existing at the moment of their acceptance.
4. **WARRANTY AND SERVICE.** The warranty and service terms will be as defined in the Annex C. In any case, Dealer will communicate to MB the date of sale and the name and address of the purchasing entity for every Product sold, within 30 days from the sale; as well as the date of first use for Products that are used for rentals or demonstrations. Failure to do so will void any warranty on the Product, constitute significant breach of the Agreement.
5. **SALES OUTSIDE TERRITORY.** We discourage you selling New Products outside the Territory. Should you do so, you will be assessed a "servicing fee" of twenty percent (20%) of the discounted price of such New Product. The servicing fee, less an administrative assessment of 3%, will be paid to the dealer in whose Territory you sold the New Product, to compensate that dealer for providing support and for any advertising and effort spent in promoting interest in the Product. New Product for the purpose of this paragraph is product in service less than one year, except if sold at auctions.

Bucket Crushers Worldwide

AA0130

6. **RELATIONSHIP AND CONDUCT OF BUSINESS.** Dealer shall use its best efforts to promote the sale of and solicit orders for the Products and services and will conduct all its business in its own name and in such a manner as it may see fit, pay all its own expenses including all commissions, salaries, bonuses, and expenses of its own employees and sales persons and any and all taxes properly and lawfully associated with doing business as an independent entity in the assigned territory.

MB shall furnish Dealer, at no expense to Dealer, with catalogs, literature, and any other material available for the proper promotion and solicitation of orders for the Products in the assigned territory. MB can contribute to the marketing activities of Dealer, as advertising, exhibitions and the alike, on a time-by-time base or as result of separate agreements.

MB can participate, at its own expense and decision, to exhibitions, conventions or conferences in any area of the country, and Dealer is not obliged to participate or contribute to said events.

Dealer shall abide by MB's terms and conditions pertaining to the sale of the Products and services, their operations, and their warranty (if any), and shall communicate same to customers. Dealer shall hold MB harmless from and shall indemnify MB for all liability, loss, costs, expenses or damages, including court costs and reasonable attorneys' fees, caused by any misrepresentation made by Dealer or its employees concerning MB's products or services.

Dealer is directly initiating and maintaining the relationship with its customer and will cooperate with the MB to solve possible disputes arising in connection with the Product.

Dealer is an independent entity and shall have sole control of the means of performing under this Agreement. Nothing in this Agreement shall be construed to constitute Dealer as a partner or employee of MB nor shall either have any authority to bind the other in any respect.

7. **BRAND PROTECTION.** Every Product sold to a final user will have to carry all the original logos, branding, identification numbers and serials as supplied by Manufacturer. Dealer will not alter, modify or hide the brand name or logos in any way. Proposals, quotes and invoices to the final users will have to clearly specify the Manufacturer's brand name.

Dealer can produce its own promotional material and/or advertising about the Product. However every document or photo will have to clearly indicate Manufacturer brand and logo, and the drafts of said promotional material or advertising will have to be submitted to MB for approval before printing and/or producing. MB has the faculty to deny the approval within 5 days from the date of receiving the drafts, at its own discretion.

8. **TERM OF AGREEMENT AND TERMINATION.** This Agreement shall be effective on the date listed on page 1 and shall continue in force for an initial term of 1 year.

This Agreement may be terminated by either party:

- (a) By written agreement mutually agreed upon to be terminated at any time; or
- (b) (But not effective during the initial term of the Agreement), for no cause upon at least 90 days' prior written notice to the other party;
- (c) By both parties in case of breach of this agreement, with 30 days written notice.
- (d) After 30 days' written notice if either party has filed or has filed against it a petition in bankruptcy (which is not dismissed within 30 days after it is filed) or after 30 days' written notice if either party has other cause.

9. **RIGHTS UPON TERMINATION.** Upon termination of this Agreement any current order will be carried on as scheduled. MB will however have the option to request a different payment term for

Bucket Crushers Worldwide

any order placed by Dealer from the moment of the notice of termination.

10. **ENTIRE AGREEMENT; MODIFICATION.** This Agreement contains the entire understanding of the parties, shall supersede any other oral or written agreements, and shall be binding upon successors and assigns. It may not be modified in any way without the written consent of an officer or owner of both parties.

11. **SURVIVABILITY OF AGREEMENT; HIERARCHY.** If any provision of this Agreement is held to be invalid or unenforceable, such provision shall be considered deleted from this Agreement and shall not invalidate the remaining provisions of this Agreement. In case that any provision or part thereof in Annex A or Annex C would be considered contrasting with any provision or part in this Agreement, the provisions in Annex A or Annex C will prevail.

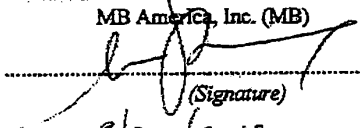
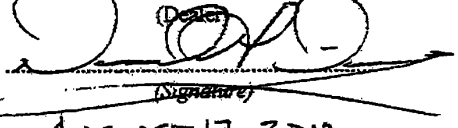
12. **APPLICABLE LAW - WAIVER.** This Agreement shall be construed according to the laws of the State of Nevada. The failure of either party to enforce, at any time or for any period of time, any provisions of this Agreement shall not be construed as a waiver of such provision or of the right of such party thereafter to enforce such provision.

13. **DISPUTES AND MEDIATION.** The parties agree that any disputes or questions arising hereunder, including the construction or application of this Agreement shall be submitted to mediation between MB and Dealer with the rules of the American Arbitration Association, of which any hearing or meeting should be conducted in Reno, NV. Any mediation settlement by the parties shall be documented in writing. If such mediation settlement modifies the language of this Agreement, the modification shall be put in writing, signed by both parties and added to this Agreement as an attachment.

If mediation between the parties does not result in a mutual satisfying settlement within 180 days after submission to mediation, then each party will have the right to enforce the obligations of this Agreement in the court of law of Reno, Nevada with all reasonable attorney fees, court costs and expenses incurred by the prevailing party in such litigation to be paid by the other party.

14. **NOTICES.** All notices, demands or other communications by either party to the other shall be in writing and shall be effective upon personal delivery, or 72 hours after deposited in the United States mail, first class certified postage prepaid, or by email.

IN WITNESS WHEREOF, the officers or owners of both parties hereto have executed this Agreement to be effective on the day and year listed on page one of this Agreement written in multiple counterparts, each of which shall be considered an original.

MB America, Inc. (MB)	ALASKA PACIFIC LEASING CO., INC.
	
(Signature)	(Signature)
8/20/2012	AUGUST 17, 2012

Bucket Crushers Worldwide

MB America, Inc
Dealer Agreement with
Alaska Pacific Leasing
9191 Old Seward Highway Unit #15
Anchorage, Alaska, 99515

Annex A

Part I - Territory

The territory will be the States of Alaska.

Part II - Sales Objectives:

After 120 days from the execution of this Agreement, MB will submit to Dealer a Target Sales Objective for the remaining time of the agreement, which will consider the market situation and the potentials of the line.

Part III - Discount and Payments:

The discount reserved is 36% (thirty-six percent) on the current price list and its modifications. Dealer will pay the shipping costs from one of our warehouses to his premises.

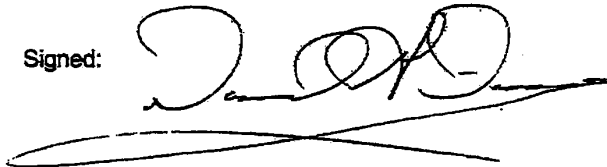
The payments will be by check or wire transfer as follows:

- 10% at the order
- final amount, including transport and any other costs, before shipping.

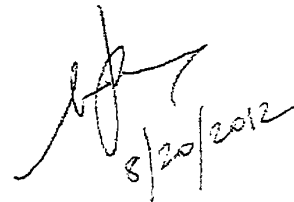
MB America will establish a maximum credit line with Dealer, which will not be exceeded at any moment.

Any delay in the payment will allow MB America to request and charge the payment of compounded interests of 1.5% monthly.

Signed:



Date: AUGUST 17, 2012



FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 2

EXHIBIT 2

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

2

3
4

5
6

7
8

9
10

11
12
13
14
15
16
17

18
19
20
21
22
23

24
25
26

27


Miriano Ravazzolo

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 3

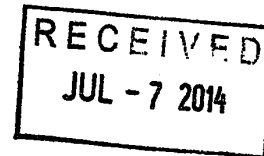
EXHIBIT 3



Certified Mail – Return Receipt Requested

June 30, 2014

Michael E. Sullivan
Robison, Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503



Re: MB America, Inc.

Dear Mr. Sullivan:

In an effort to mitigate our damages resulting from MB America's cancellation of our dealership agreement ("the Agreement"), we have recently sold one of the crusher buckets we purchased from MB America on January 23, 2014: MB BF90.3 Crusher Bucket, serial number 8045. Our net proceeds from this sale were \$55,275.00 (see enclosed sale recap). We are deducting this amount from the original amount of \$167,164.00 previously demanded from MB America in our letter dated February 6, 2014, resulting in an adjusted amount due of \$111,889.00:

Grand total for purchase of units, accessories and additional costs	\$167,164.00
Less net proceeds from sale of MB 90.3 bucket s/n 8045	<u>(55,275.00)</u>
Adjusted total	<u>\$111,889.00</u>

We have delayed pursuing legal resolution to this matter because of this pending sale, which has now been consummated. We have made every attempt to mitigate our damages and will continue to do so. Now that we have what appears to be no firm interest in the additional two attachments we purchased from MB America on January 23, 2014, we will begin pursuing legal action to collect unless full payment of \$111,889.00 is received within ten (10) days of the date of this letter, or by July 10, 2014.

Bear in mind that our general manager, David J. Faulk, notified MB America in December 2012 of our intent to purchase the two crusher buckets, one screener bucket, four plates and two hitches which MB America had consigned to our firm to sell. Within approximately thirty (30) days, on January 23, 2013 we issued full payment for these items on our check number 5432 in the amount of \$147,493.04. We decided to buy these units in order to show good faith and to form a lasting relationship with MB America, even though there was no written or verbal agreement which legally bound us to purchase these units; and even though we had no firm sale prospects from our numerous demonstrations of these units. Title remained in the name of MB America. Nowhere in the Agreement was there a stipulation that we had to buy these units or order more units without a confirmed sale to a customer.

June 30, 2014

Although we acted in good faith and purchased these units, within less than eleven (11) months we received MB America's letter notifying us of its intent to cancel the Agreement, leaving us in the position of holding these units – now with the burden of trying to sell them without being an authorized dealer.

We do not dispute MB America's right to cancel the Agreement with good cause for failing to represent MB America or in selling units and parts in inventory. However, MB America acted in bad faith by accepting payment for these units and then cancelling the Agreement shortly thereafter. The truly ethical course would be for MB America to reimburse us for our actual cash invested in inventory and outside costs incurred in demonstrating these units, as MB America had requested us to do. Please note that Paragraph 13 ("Disputes and Mediation") of the Agreement does not apply in this matter as we do not contest MB America's right to cancel the agreement, but rather take issue with the fact that MB America acted in bad faith by accepting our payment for units which we were not obligated to purchase and then cancelling the Agreement less than eleven (11) months later.

Excluding Wyoming, Alaska has the smallest population, by state, in the United States. Please forward to us an accounting by your client, by each state, of the number of units sold by the distributor for that state on a yearly basis. In addition we ask that you send us a list of all dealers for which MB America has cancelled the dealership agreement, identifying the date they became a dealer, the date the agreement was cancelled, and the sales amounts for the final year prior to the cancellation date for each cancelled dealership.

Respectfully yours,



David G. Faulk
Vice President

enclosure

cc: Jason Ruedy, Law Offices of Royce & Brain

AA0138

ITEMIZED SALE RECAP: SALE OF MB BF90.3 CRUSHER BUCKET (S/N 8045) WITH PLATE & HITCH

MB BF90.3 #8045 sale price	\$55,000.00
Plate & hitch for BF90.3 sale price	<u>6,500.00</u>
Gross sale proceeds	\$61,500.00
Sales commission @ 10% of gross sale	(6,150.00)
Deliver BF90.3 bucket to Pacific Alaska Freightways for shipment to buyer	<u>(75.00)</u>
Net sale proceeds	<u>\$55,275.00</u>

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 4

EXHIBIT 4

1 **AFFIDAVIT OF MICHAEL E. SULLIVAN, ESQ. IN SUPPORT OF MB AMERICA'S**
2 **OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT**

3 STATE OF NEVADA)
4 COUNTY OF WASHOE)

5 I, Michael E. Sullivan, swear, under the penalty of perjury, that the following
6 assertions are true of my own personal knowledge.

7 1. I am an individual currently residing in the County of Washoe, State of
8 Nevada, and I am over the age of 18.

9 2. I have personal knowledge of the facts and statements contained in this
10 affidavit, and am prepared to testify in accordance with the language set forth in the
11 affidavit.

12 3. I am a duly licensed attorney, authorized to practice in the State of
13 Nevada and am the attorney of record for MB America, Inc. a Nevada corporation.

14 4. Prior to filing the instant lawsuit for declaratory relief and an order directing
15 the parties to mediate in Reno, Nevada, I aver and state under penalty of perjury that I
16 attempted in good faith to obtain the consent of Defendant Alaska Pacific Leasing
17 Company to participate in mediation as set forth in EXHIBIT 5 (my letter dated February
18 27, 2014 sent certified mail to David Faulk, Vice President of Alaska Pacific Leasing
19 Company).

20 5. That letter specifically invited Mr. Faulk and his company to participate in a
21 mediation in Reno, Nevada. Additionally, after this letter was sent out I spoke with
22 representatives in Alaska for Pacific Leasing and advised them that Plaintiff would
23 participate in mediation but it would need to be in Reno, Nevada. Unfortunately, Alaska
24 Pacific Leasing Company and Mr. Faulk ignored those requests and instead sent
25 threatening letters indicating that the Defendant would be filing suit in Alaska.

26 6. Out of an abundance of caution and because the parties were at an
27 impasse, the instant lawsuit was filed. The instant lawsuit is not seeking monetary
28 damages but is rather attempting to confirm that there is no dispute between the parties

1 or alternatively that if such a dispute does exist then this Court needs to order the
2 parties to participate in mediation using the AAA mediation rules and the mediation
3 should take place in Reno, Nevada.

4 7. There are clearly material issues of fact set forth with the Plaintiff and
5 Defendant's position in this case. Plaintiff unequivocally requested mediation both
6 verbally and in writing from the Defendant as set forth above and the exhibits attached
7 to this Opposition. There is clearly a material issue of fact that the Defendant rejected
8 those offers to mediate in Reno and instead threatened a lawsuit. At no time since the
9 filing of this lawsuit has the Defendant ever agreed to participate in mediation in Reno,
10 Nevada even though the undersigned has requested both local Reno counsel Holly
11 Parker and the Defendant's Alaska counsel to participate in mediation in Reno.

12 8. The second and more important material issue of fact is that the Plaintiff
13 does not believe that any duties have been breached or that any money is owed to the
14 Defendant. If the Defendant believes that this is the case then they must state so which
15 would then create a material issue of fact which would thereby necessitate this Court to
16 order the parties to mediation in Reno, Nevada.

17 9. Attached as EXHIBIT 7 is a true and correct copy of the email received
18 from Cathe Stewart the Director of the Consumer ADR Operations at the American
19 Arbitration Association. Immediately upon receipt of the September 23, 2014
20 correspondence, the undersigned contacted Ms. Stewart and explained to her that the
21 parties had not stipulated to using AAA as the mediator. Ms. Stewart agreed that the
22 Agreement at issue does not require AAA to be the mediator but that AAA would be
23 willing to be the mediator if the parties stipulated to same. At no time has the Plaintiff
24 ever summarily rejected the use of AAA or any other mediator so long as the
25 mediation takes place in Reno, Nevada as required by the parties' Agreement. Ms.
26 Stewart did say that her office has actually received a request for mediation from the
27 Defendant but has not taken any action and likely would not take any action absent an
28 order from the Court or a written stipulation by the parties to use AAA as the mediator in

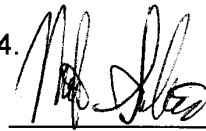
1 Reno, Nevada.

2 10. MB America is willing to stay the instant litigation until after this Court has
3 directed the parties to mediate using a qualified mediator in Reno, Nevada. If the
4 matter is not resolved through mediation, then the parties can litigate the remaining
5 issues in Reno, Nevada.

6 11. A request for exemption from the mandatory arbitration program was
7 served on the Defendant and this Court exempted this case from arbitration.

8 12. The Defendant filed an Answer and at no time ever filed a motion to
9 dismiss. Accordingly the Defendant has waived the right to dismiss this case.

10 DATED this 26th day of September, 2014.



11
12 Michael E. Sullivan, Esq.

13 SUBSCRIBED and SWORN to before
14 me this 26 day of September, 2014, by
15 Michael E. Sullivan, Esq.


16 NOTARY PUBLIC

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 5

EXHIBIT 5



ROBISON, BELLAUSTEGUI, SHARP & LOW

ATTORNEYS:

Kent R. Robison
Thomas L. Belaustegui
F. DeArmond Sharp
Keegan G. Low
Barry L. Breslow
Mark G. Simons
Michael E. Sullivan
Clayton P. Brust
Stefanie T. Sharp

Frank C. Gilmore
Michael A. Burke
Kristen L. Martini
Therese M. Shanks

February 27, 2014

VIA CERTIFIED MAIL

Return Receipt Requested

David G. Faulk, Vice President
Alaska Pacific Leasing Co., Inc.
9191 Old Seward Hwy., Unit 15
Anchorage, Alaska 99515

RE: MB America, Inc.

Dear Mr. Faulk:

My law firm was retained by MB America, Inc. to resolve the issues set forth in your December 31, 2013 and February 6, 2014 correspondence to MB America, Inc.

Pursuant to the terms of the Agreement that was signed by Alaska Pacific Leasing Co., Inc. on August 17, 2012, MB America, Inc. had the right to terminate the agreement consistent with paragraph 8. Your letter dated February 6, 2014 acknowledges this right.

Your company's position that MB America, Inc. acted fraudulently and in bad faith simply has no merit. You have not set forth any specific facts that would support your assertion. To the contrary, it was your company who did not demonstrate good faith in fulfillment of the distributor agreement. MB America, Inc. lost sales and incurred unnecessary costs as a result of your company's inability to perform under the terms of the Agreement.

Please be advised that under Nevada law, MB America, Inc. is under no obligation to repurchase any of the products or services that you received. My client disputes the factual characterizations set forth in your December 31, 2013 correspondence. My client will not be making any payments of any kind to your company.

Lastly, under paragraphs 12 and 13 of the Agreement, any disputes or questions arising under the application of the Agreement shall be submitted to mediation pursuant to the rules of the American Arbitration Association and the hearing shall be conducted in Reno, Nevada pursuant to Nevada law. Hopefully, this will not be necessary.

P 775.329.3151
F 775.329.7941

71 Washington Street
Reno, Nevada 89503

www.rbsllaw.com

AA0145



ROBISON, BELAUSTEGUI, SHARP & LOW

David G. Faulk, Vice President
Alaska Pacific Leasing Co., Inc.
February 27, 2014
Page 2

Should you have any questions or comments regarding the foregoing, please have your legal counsel contact my office at its earliest convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Michael E. Sullivan', written over a horizontal line.

Michael E. Sullivan

MES/mm

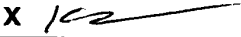

cc: Max Ravazzolo, MB America, Inc.

j:\wpdata\mes\6916.003\l-alaska pacific leasing (faulk) 02-27-14.docx

AA0146

7010 0290 0002 9372 5823

U.S. Postal Service CERTIFIED MAIL™ RECEIPT (Domestic Mail Only; No Insurance Coverage Provided)	
For delivery information visit our website at www.usps.com	
OFFICIAL USE	
Postage \$ Certified Fee Return Receipt Fee (Endorsement Required) Restricted Delivery Fee (Endorsement Required) Total Postage & Fees \$ 6.48	
Sent To: David G. Faulk, Vice President Alaska Pacific Leasing Co., Inc. 919 Old Seward Hwy Unit 15 Anchorage, AK 99515	
PS Form 3800, August 2006 See Reverse for Instructions	

SENDER: COMPLETE THIS SECTION	COMPLETE THIS SECTION ON DELIVERY
<ul style="list-style-type: none"> Complete items 1, 2, and 3. Also complete item 4 if Restricted Delivery is desired. Print your name and address on the reverse so that we can return the card to you. Attach this card to the back of the mailpiece, or on the front if space permits. 	A. Signature X  
1. Article Addressed to: David G. Faulk, Vice President Alaska Pacific Leasing Co., Inc. 919 Old Seward Hwy Unit 15 Anchorage, AK 99515	B. Received by (Printed Name) Karen Rasmussen
	C. Date of Delivery 3-3-14
	D. Is delivery address different from item 1? <input type="checkbox"/> Yes If YES, enter delivery address below: <input checked="" type="checkbox"/> No
	3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Registered <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> Insured Mail <input type="checkbox"/> C.O.D.
	4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes
2. Article Number (Transfer from service label)	
PS Form 3811, February 2004 Domestic Return Receipt 102595-02-M-1540	

AA0147

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 6

EXHIBIT 6

Mike Sullivan

From: Holly Parker <hparker@laxalt-nomura.com>
Sent: Tuesday, September 09, 2014 12:34 PM
To: Mike Sullivan
Subject: Alaska Pacific Leasing adv. MB

Mike,

I just received your notice of early case conference. I thought we might chat about how productive that would be. It seems to me now that the request for mediation has been filed with AAA, pursuing the Nevada action and discovery activities to enforce the mediation provision is costly and not very productive. I would propose staying the case conference and related events. Please let me know your thoughts on this. Alternatively, I guess I can consider a potential motion to stay, etc. Also, I have an appointment at 9:00am on September 25, so if you wish to pursue the conference, I would request that we reschedule it for anytime after 11:00am. I am out for most of this afternoon, but am free to discuss tomorrow.

Thanks.

Holly Parker
Laxalt & Nomura, Ltd.
(775) 322-1170
(775) 322-1865 (Fax)

Notice: The information in this transmittal is confidential and may be attorney privileged. If you are not the intended recipient, or the agent responsible to deliver it to the intended recipient, you must not read, use or disseminate the information. Although this email and any attachments are believed to be free of any virus or other defect that might affect any computer into which it is received and opened, it is the responsibility of the recipient to ensure it is virus free, and no responsibility is accepted by Laxalt & Nomura, Ltd. for any loss or damage arising in any way from its use. If you have received this communication in error, please immediately notify the sender at 775-322-1170 or by electronic mail (hparker@laxalt-nomura.com). Thank You.

FILED
Electronically
2014-09-26 02:36:51 PM
Joey Orduna Hastings
Clerk of the Court
Transaction # 4626328 : mfernand

EXHIBIT 7

EXHIBIT 7

Merna Meier

From: Cathe Stewart <StewartC@adr.org>
Sent: Tuesday, September 23, 2014 12:15 PM
To: Mike Sullivan
Cc: hparker@laxalt-nomura.com; JRuedy@roycebrain.com; Merna Meier; Case Filing
Subject: FW: MB America, Inc. v. Alaska Pacific Leasing Company
Attachments: L-AAA.pdf; EP-Complaint 06-06-14.pdf

Dear Mr. Sullivan,

Thank you for your email and letter, which are attached.

I have done a preliminary search for the referenced parties but I do not see them in our system.

I have copied our Case Filing Team to provide them with your correspondence. However, it does not appear as though mediation was filed with us.

Thank you,
cathe



Cathe Stewart
Director - Consumer ADR Operations

American Arbitration Association
6795 N. Palm Ave. 2nd Floor
Fresno, CA 93704
T: 559 490 1840
F: 855 433 3046
E: StewartC@adr.org

The information in this transmittal (including attachments, if any) is privileged and/or confidential and is intended only for the recipient(s) listed above. Any review, use, disclosure, distribution or copying of this transmittal is prohibited except by or on behalf of the intended recipient. If you have received this transmittal in error, please notify me immediately by reply email and destroy all copies of the transmittal. Thank you.

From: Merna Meier [mailto:MMeier@rbsllaw.com]
Sent: Tuesday, September 23, 2014 10:57 AM
To: Cathe Stewart
Cc: hparker@laxalt-nomura.com; JRuedy@roycebrain.com; Mike Sullivan
Subject: MB America, Inc. v. Alaska Pacific Leasing Company

Ms. Stewart:

Please see the attached correspondence from Mr. Sullivan dated September 23, 2014 with referenced attachment.

Thank you,

Merna Meier
Assistant to Michael E. Sullivan, Esq.
Robison, Belaustegui, Sharp & Low
71 Washington Street

Reno, Nevada 89503
(775) 329-3151

Privilege and Confidentiality Notice

The information contained in this e-mail is privileged and confidential information intended only for the named recipient. It may contain privileged and confidential matter. If you have received this e-mail in error, please delete it immediately and notify the sender. We request that you do not disclose the contents to anyone. Thank you.

3790

HOLLY S. PARKER, ESQ. (SBN 10181)
MARILEE BRETERNITZ, ESQ. (SBN 12563)
LAXALT & NOMURA, LTD.
9600 Gateway Drive
Reno, Nevada 89521
hparker@laxalt-nomura.com
mbreternitz@laxalt-nomura.com
Telephone: (775) 322-1170
Facsimile: (775) 322-1865
Attorneys for Defendant Alaska
Pacific Leasing Company

IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

IN AND FOR THE COUNTY OF WASHOE

MB AMERICA, INC., a Nevada
Corporation,

Plaintiff

vs.

ALASKA PACIFIC LEASING COMPANY,
a Alaska business corporation; and DOES
1-THROUGH X, inclusive,

Defendants.

CASE NO: CV14-01229

DEPT. NO. 8

DEFENDANT'S REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendant, ALASKA PACIFIC LEASING COMPANY ("Alaska Pacific"), by and through its counsel, Laxalt & Nomura, Ltd., hereby files this Reply in Support of its Motion for Summary Judgment. This Reply is made based upon the following Memorandum of Points and Authorities and any additional information the Court may choose to consider.

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Court should grant summary judgment in favor of Alaska Pacific because this action is premature, regardless of whether it is considered an action to enforce mediation or to seek

1 declaratory relief concerning the rights and obligations of the parties under the Agreement.¹
2 Although the Complaint is characterized as an action to enforce a mediation provision in the
3 contract, it is evident from the opposition that MB America, Inc.'s ("MB") primary motivation
4 for bringing this lawsuit is to seek a declaration from the Court that it owes no obligation to
5 Alaska Pacific under the contract. Per the terms of the Agreement, all such issues concerning the
6 construction and application of the Agreement must first be submitted to mediation.

7 MB fails to create a genuine issue of material fact that this action is ripe under the
8 Agreement. MB never made a clear request for mediation, Alaska Pacific did not decline such a
9 request, the parties have not attended mediation, and MB did not wait 180 days after submitting
10 the matter to mediation to file this action. Since MB filed this lawsuit, Alaska Pacific felt it had
11 no choice but to try to participate in mediation under the terms of the contract. These actions do
12 not constitute seeking a tactical advantage; Alaska Pacific is complying with the requirements of
13 the contract. It is MB who is refusing to participate in mediation and it is persisting with this
14 premature lawsuit in violation of the contract before the 180 day period for mediation has passed.

15 **II. ARGUMENT**

16 **A. MB fails to create a genuine issue of material fact that this lawsuit is ripe.**

17 The issue presented in Alaska Pacific's Motion is whether MB's action is premature
18 because the parties have not attended mediation or allowed 180 days to elapse after the matter
19

20 ¹ As an initial issue, Alaska Pacific's Motion for Summary Judgment is proper. MB asserts that Alaska
21 Pacific waived its right to present the arguments raised in its Motion because Alaska Pacific did not file a motion to
22 dismiss and instead filed an answer. This contention is contrary to Nevada law. *See Fritz Hansen A/S v. Eighth*
23 *Judicial Dist. Court*, 116 Nev. 650, 656, 6 P.3d 982, 985 (2000) (indicating that general and special appearances
24 have been abolished and providing that "a defendant may raise its defenses, including those relating to jurisdiction
25 and service, in a responsive pleading.") Alaska Pacific filed an answer including affirmative defenses on the issues
26 raised in its Motion. Alaska Pacific's third affirmative defense provides, "Plaintiff failed to make a proper request
27 for mediation before filing this action and is, therefore, barred from seeking any relief against this answering
28 Defendant." *Alaska Pacific Answer ("Answer")*, filed Aug. 15, 2011, at p. 5, ¶ 3. Alaska Pacific also alleged that
the Complaint is barred by the terms and provisions of the contract. *Id.* at p. 6, ¶ 12 ("This answering Defendant
alleges that even if the contract referenced in the Complaint is valid, the Complaint is barred by virtue of the terms
and provisions of the contract.") Most importantly, Alaska Pacific asserted, "Plaintiff's requested relief, including
but not limited to its claim that this answering Defendant is not entitled to relief under the distributorship agreement,
is premature." *Id.* at p. 7, ¶ 18. Alaska Pacific's affirmative defenses satisfy Nevada law to preserve the arguments
set forth in its Motion. *See Fritz Hansen A/S*, 116 Nev. at 656, 6 P.3d at 985.

1 has been submitted to mediation. In response, MB asserts no legal dispute exists between the
2 parties, that neither party owes a legal obligation to the other under the Agreement, and that the
3 parties' actions are an issue of material fact precluding the Court from granting the Motion.
4 *Opposition*, pp. 3:26-4: 2. MB further asserts that if a dispute exists, the Agreement does not
5 mandate mediation with the American Arbitration Association ("AAA").² *Id.* at p. 4:2-10. MB
6 also asserts that summary judgment is precluded because Alaska Pacific refused mediation;
7 however, it cites no evidence that it made a clear demand for mediation or that the 180 day
8 mediation period passed before MB filed this action. *Id.* at p. 1:10-12. Therefore, none of these
9 contentions raise a genuine issue of *material* fact that MB's action is ripe under the contract.

10 MB did not make a request for mediation that was rejected by Alaska Pacific; even if it
11 did, summary judgment is still appropriate because 180 days did not pass prior to the filing of
12 this action. MB indicates that its February 27, 2014 letter from counsel constituted a request for
13 mediation. *Opposition* at p. 3:4-16. In MB's February 27, 2014 letter, it cites to paragraphs 12
14 and 13 of the Agreement to indicate that disputes or questions arising under the Agreement must
15 be submitted to mediation. *Opposition* Ex. 5, at p. 1. It further states, "[h]opefully, this will not
16 be necessary." *Id.* MB sets forth no affirmative request for mediation in the letter, and Alaska
17 Pacific received no other request from MB for mediation. *Id.*; *See also Motion* at Ex. 2, ¶¶ 5-6.

18 To the extent MB relies on the June 30, 2014 letter from Alaska Pacific to argue its
19 request for mediation was rejected and this action is proper (i.e. not premature), the record
20 indicates that MB filed this action on June 6, 2014, which is 24 days prior to the date of Alaska
21 Pacific's letter. *Opposition* at Ex. 3; *Complaint*, filed June 6, 2014. This letter cannot be used to
22 show that Alaska Pacific rejected mediation prior to the initiation of this litigation, especially
23 when there was no request for mediation.

24
25 ² The interpretation of whether the Agreement requires that mediation be conducted with the AAA can be
26 addressed like any other questions arising under the Agreement—by first submitting the matter to mediation. MB's
27 contention that the Agreement can be mediated by another entity besides the AAA does not change the fact that this
28 litigation was initiated without the parties attending mediation (with the AAA or otherwise) and without the passage
of the required 180 day period. *See Opposition* at p. 3:15-20, 4: 25-28; *Motion* at Ex. 2, ¶¶ 5-6.

1 One of the reasons MB claims it filed this lawsuit was “to ask this Court to refer the
2 matter to non-binding mediation in Reno, Nevada using the American Arbitration Association
3 rules.” *Id.* at p. 3: 21-24. It was Alaska Pacific, however, that followed the procedures set forth
4 in the Agreement and filed a request for mediation with the AAA to attempt to resolve the issues
5 underlying this litigation.³ *See Motion* at Ex. 5. No judicial intervention for selection of the
6 mediator is provided for in the Agreement; all such issues should be resolved by the AAA rules
7 and the terms of the Agreement. *See Motion*, Ex. 1 at ¶ 13. MB’s request that the Court select
8 the mediator should be denied.⁴

9 MB’s Opposition confirms that this matter is premature and should not be considered by
10 the Court based on the terms of the Agreement. The fact that MB does not believe there is a
11 dispute between the parties actually favors a finding that the action is premature because any
12 construction or application of the contract (i.e. whether either party has rights or obligations
13 under the Agreement) must be submitted to mediation before a lawsuit can be filed. *See Motion*
14 Ex. 1, Agreement at ¶ 13. MB concedes, “[t]he interpretation of this Agreement is what forms
15 the basis for this [*sic*] declaratory relief action.” *Opposition* at p. 2:9-10. The mediation
16 provision requires the parties to submit disputes *or questions* arising under the Agreement,
17 *including regarding the construction or application of the Agreement*, to mediation. *Motion*, Ex.
18 1 at ¶13. The provision further provides, “[i]f mediation between the parties does not result in a
19 mutual satisfying settlement within 180 days after submission to mediation, then each party will
20

21 ³ As discussed in the Motion, pursuant to M-1 of the AAA commercial mediation procedures, when the
22 parties have adopted AAA rules in their contract (as was the case here) they shall be deemed to have made the AAA
23 procedural guidelines “a part of their agreement and *designate the AAA as the administrator of their mediation.*”
24 *Motion*; Ex. 3; Ex. 4. Alaska Pacific’s request for mediation, therefore, was made pursuant to the Agreement.
25 However, Plaintiff’s argument that this is not the only procedure for requesting mediation involves construction and
26 application of the Agreement, which must be submitted to mediation. An action cannot be filed until after the 180
27 day mediation period has passed. This action is premature and should be dismissed.

28 ⁴ MB recognizes that the AAA can be the mediator in this matter. *Opposition* at p. 4: 8-9. It is unclear why
MB has refused to participate in the AAA mediation. *See Id.* at p. 4:17-28; 6:18- 27. Alaska Pacific has not
selected a mediator for mediation with the AAA or made any unilateral decisions with respect to the mediation.
Under the AAA rules, such issues are resolved by stipulation of the parties or by the AAA if the parties cannot
agree. *Motion*, Ex. 4, AAA Commercial Mediation Procedure M-4 at p. 46.

1 have the right to enforce the obligations of this agreement in a court of law” *Id.* It is
2 undisputed that parties have not attended mediation to address the disputes and/or questions
3 arising from the Agreement. *See Opposition* at p. 3:15-20, 4: 25-28; *Motion* at Ex. 2, ¶¶ 5-6.
4 Nor did MB comply with the 180 day requirement prior to initiating this litigation.

5 On September 4, 2014, Alaska Pacific requested mediation with AAA per the contract.
6 *See Motion*, Ex. 1; Ex. 5. 180 days has not passed since submission to mediation. The
7 undisputed evidence, therefore, demonstrates this lawsuit is premature and should be dismissed.

8 **B. No additional stay should be ordered.**

9 This matter was prematurely filed and should be dismissed under the Agreement. The
10 Court should also deny MB’s request to “stay this litigation until such time as the Defendant can
11 affirmatively set forth what the dispute is between the parties [and] what facts it has to support
12 its claim.” *Opposition* at p. 5:5-8.⁵ Moreover, it is not Alaska Pacific’s burden to demonstrate a
13 dispute exists in this litigation, nor has Alaska Pacific agreed to such a stay.⁶ According to the
14 Agreement, the appropriate place for the parties to address their disputes is in mediation, which
15 Alaska Pacific has already requested. The Court has stayed the matter until it decides the instant
16 Motion. *See Order*, filed Sep. 17, 2017. No other stays are necessary or warranted.

17 **III. CONCLUSION**

18 Based on the foregoing, Alaska Pacific respectfully requests that the Court grant
19 summary judgment in its favor. All claims in MB’s Complaint should be dismissed and
20 Alaska Pacific should be awarded all of its reasonable attorney fees, court costs and expenses
21 incurred in this unnecessary action.

22
23 ⁵ Pursuant to WDCR 10(9), MB’s motion for a further stay should be denied because it is not filed as a
separate document.

24 ⁶ Alaska Pacific has not agreed to stay this case for any other purpose beyond that stated in the Stipulation
25 and Order which stayed this litigation pending resolution of the Motion for Summary Judgment issues. *Stipulation*,
26 filed Sep. 19, 2014, on file herein. The e-mail from Alaska Pacific’s counsel was sent prior to the date that it filed
its Motion to Stay and prior to the Stipulation; the email specifically questioned the appropriateness of pursuing the
27 Nevada action in light of Alaska Pacific’s request for mediation and a potential stay of fast approaching early case
events. *Opposition*, Ex. 6; *Motion to Stay*, filed Sep. 15, 2014, on file herein. These issues have been addressed by
the filing of Alaska Pacific’s Motion for Summary Judgment and the Stipulation and Order for stay pending
28 resolution of the Motion for Summary Judgment issues.

AFFIRMATION PURSUANT TO NRS 239.B.030

The preceding document does not contain the social security number of any person.

DATED this 3rd day of October, 2014.

LAXALT & NOMURA, LTD.



HOLLY S. PARKER, ESQ. (SBN 10181)
MARILEE BRETERNITZ, ESQ. (SBN 12563)
LAXALT & NOMURA, LTD.

9600 Gateway Drive
Reno, Nevada 89521

hparker@laxalt-nomura.com

mbreternitz@laxalt-nomura.com

Telephone: (775) 322-1170

Facsimile: (775) 322-1865

Attorneys for Defendant Alaska
Pacific Leasing Company

1 **CERTIFICATE OF SERVICE**

2 Pursuant to NRCp 5(b), I hereby certify that I am an employee of LAXALT &
3 NOMURA, LTD., and that on the 3rd day of October, 2014, I caused to be served a true and
4 correct copy of the foregoing ***DEFENDANT ALASKA PACIFIC LEASING COMPANY'S***
5

6 ***REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT*** by:

7 ☒ Mail on the parties listed below in said action, by placing a true copy thereof enclosed in
8 a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At
9 the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the
10 correct amount of postage and is deposited that same date in the ordinary course of
11 business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.

12 ☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex
13 system, which will electronically mail the filing to the following individuals.

14 ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the
15 address(es) at the address(es) set forth below.

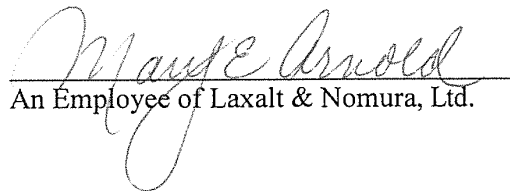
16 ☐ Facsimile on the parties in said action by causing a true copy thereof to be telecopied to
17 the number indicated after the address(es) noted below.

18 ☐ Federal Express or other overnight delivery.

19 ☐ Reno/Carson Messenger Service

20 addressed as follows:

21 Michael E. Sullivan, Esq.
22 Robison Belaustegui, Sharp & Low
23 71 Washington Street
24 Reno, NV 89503
25 ***Attorneys for Plaintiff MB America, Inc.***
26
27
28


An Employee of Laxalt & Nomura, Ltd.

1 **3860**
2 HOLLY S. PARKER, ESQ.
3 Nevada State Bar No: 10181
4 MARILEE BRETERNITZ, ESQ.
5 Nevada State Bar No. 12563
6 LAXALT & NOMURA, LTD.
7 9600 Gateway Drive
8 Reno, Nevada 89521
9 hparker@laxalt-nomura.com
10 mbreternitz@laxalt-nomura.com
11 Telephone: (775) 322-1170
12 Facsimile: (775) 322-1865
13 Attorneys for Defendant Alaska
14 Pacific Leasing Company

15 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

16 IN AND FOR THE COUNTY OF WASHOE

17 MB AMERICA, INC., a Nevada 18 Corporation 19 20 Plaintiff	CASE NO: CV14-01229 DEPT. NO. 8
21 vs. 22 ALASKA PACIFIC LEASING COMPANY, 23 a Alaska business corporation; and DOES 24 1-THROUGH X, inclusive, 25 Defendants.	<u>REQUEST FOR SUBMISSION</u>

26 It is hereby requested that Defendant Alaska Pacific Leasing Company's *Motion for*
27 *Summary Judgment* filed on September 15, 2014 be submitted to the Court for decision.

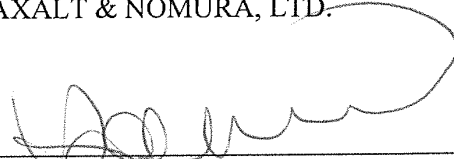
28 The undersigned attorney certifies that a copy of this request has been mailed to all
counsel of record.

AFFIRMATION PURSUANT TO NRS 239.B.030

The preceding document does not contain the social security number of any person.

DATED this 6th day of October, 2014.

LAXALT & NOMURA, LTD.



HOLLY S. PARKER, ESQ.

Nevada State Bar No: 10181

MARILEE BRETERNITZ, ESQ.

Nevada State Bar No. 12563

LAXALT & NOMURA, LTD.

9600 Gateway Drive

Reno, Nevada 89521

hparker@laxalt-nomura.com

mbreternitz@laxalt-nomura.com

Telephone: (775) 322-1170

Facsimile: (775) 322-1865

Attorneys for Defendant Alaska

Pacific Leasing Company

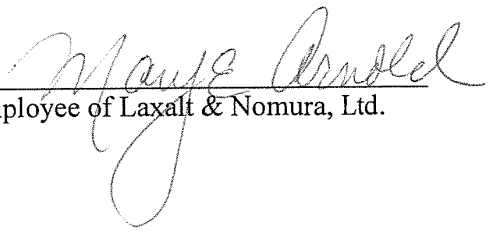
CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I hereby certify that I am an employee of LAXALT & NOMURA, LTD., and that on the 6th day of October, 2014, I caused to be served a true and correct copy of the foregoing REQUEST FOR SUBMISSION by:

- ☒ Mail on the parties listed below in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals.
- ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☐ Facsimile on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.
- ☐ Federal Express or other overnight delivery.
- ☐ Reno/Carson Messenger Service

addressed as follows:

Michael E. Sullivan, Esq.
Robison Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503
Attorneys for Plaintiff MB America, Inc.


An Employee of Laxalt & Nomura, Ltd.

1
2
3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8
9 MB AMERICA, INC., a Nevada
corporation,

Case No. CV14-01229

Dept. No. 8

10 Plaintiff,

11 vs.

12
13 ALASKA PACIFIC LEASING
COMPANY, a Alaska business
corporation; and DOES I-X, inclusive,

14 Defendant.
15 _____/

16
17 **ORDER GRANTING SUMMARY JUDGMENT**

18 Currently before the court is Defendant Alaska Pacific Leasing Company's
19 ("Alaska Pacific") *Motion for Summary Judgment*. Plaintiff MB America, Inc. ("MB
20 America") opposed the motion on September 26, 2014, and Alaska Pacific filed a
21 reply. This order follows.

22 This dispute arises from a dealership contract entered between Alaska Pacific
23 and MB America, a manufacturer of rock crushing machines. Among other clauses,
24 the contract included an arbitration clause, which stated:

25 **DISPUTES AND MEDIATION.** The parties agree that any disputes
26 or questions arising hereunder, including the construction or
27 application of this Agreement, shall be submitted to mediation
28 between MB and Dealer with the rules of the American Arbitration
Association, of which any hearing or meeting should be conducted in
Reno, NV. Any mediation or settlement by the parties shall be

1 documented in writing. If such mediation modifies the language of this
2 Agreement, the modification shall be put in writing, signed by both
parties and added to this Agreement as an attachment.

3 If mediation between the parties does not result in a mutual satisfying
4 settlement within 180 days after submission to mediation, then each
5 party will have the right to enforce the obligations of this Agreement in
6 the court of law in Reno, Nevada with all reasonable attorney fees,
court costs and expenses incurred by the prevailing party in such
litigation to be paid by the other party.

7
8 MB America filed its complaint in this case on June 6, 2014. Alaska Pacific
9 contends that the complaint was prematurely filed, as the parties in this case
10 had not yet submitted their dispute to mediation, pursuant to the contractual
arbitration clause.

11 The Nevada Supreme Court has consistently recognized Nevada's
12 strong public policy in favor of arbitration because arbitration generally
13 avoids the higher costs and longer time periods associated with traditional
14 litigation. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162.
15 "There is a strong public policy favoring contractual provisions requiring
16 arbitration as a dispute resolution mechanism. Consequently, when there is
17 an agreement to arbitrate we have said that there is a 'presumption of
18 arbitrability.'" *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990)
19 (citing *Int'l Assoc. Firefighters v. City of Las Vegas*, 104 Nev. 615, 620, 764
20 P.2d 478, 481 (1998)).

21 Arbitration clauses are enforced, however, only after an enforceable
22 agreement to arbitrate is found to exist. *Gonski v. Second Judicial District Court of*
23 *State ex rel. Washoe*, 245 P.3d 1164, 1169 (Nev. 2010). Nevertheless, a court, in its
24 discretion, may invalidate unconscionable arbitration provisions; generally, both
25 procedural and substantive unconscionability must be present in order for the court
26 to exercise its discretion to refuse to enforce an arbitration provision as
27 unconscionable. *D.R. Horton, Inc.* at 553-554, 96 P.3d 1159, 1162.
28

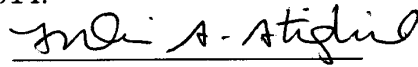
1 In this case, MB America does not allege that the arbitration clause between
2 the parties is unconscionable, or otherwise dispute the validity of the provision.
3 Rather, MB America appears to assert that arbitration is unnecessary, because it
4 only filed this action to establish that there is not a legal dispute between the
5 parties. If a dispute exists, MB America agrees that arbitration is appropriate.

6 Given the pleadings filed in this case, as well as the fact that MB America
7 filed a complaint in this court in the first instance, the court concludes that a legal
8 dispute between the parties appears to exist. The dispute also appears to arise from
9 the parties mutually agreed upon contractual obligations. As MB America does not
10 dispute the validity of the parties' contractual arbitration provision, the court
11 concludes that the parties are required to exhaust this administrative remedy
12 before submitting their dispute to this court.¹

13 Therefore, for the reasons stated above, the court ORDERS Alaska Pacific's
14 *Motion for Summary Judgment* GRANTED. Plaintiff MB America's *Complaint* is
15 DISMISSED, without prejudice.

16 **IT IS SO ORDERED.**

17 **DATED** this 22nd day of October, 2014.

18 
19 LIDIA S. STIGLICH
20 District Judge
21
22
23
24
25
26

27 _____
28 ¹The court notes that while the agreement between the parties requires that any mediator follow the
rules of the American Arbitration Association, any selected mediator need not be a member of the
American Arbitration Association.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Kathryn Rogers
KATHRYN ROGERS
Judicial Assistant

1 **2540**

2 HOLLY S. PARKER, ESQ.
3 Nevada State Bar No: 10181
4 MARILEE BRETERNITZ, ESQ.
5 Nevada State Bar No. 12563
6 LAXALT & NOMURA, LTD.
7 9600 Gateway Drive
8 Reno, Nevada 89521
9 hparker@laxalt-nomura.com
mbreternitz@laxalt-nomura.com
Telephone: (775) 322-1170
Facsimile: (775) 322-1865
Attorneys for Defendant Alaska
Pacific Leasing Company

10 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA

11 IN AND FOR THE COUNTY OF WASHOE

12
13 MB AMERICA, INC., a Nevada
14 Corporation

15 Plaintiff

16 vs.

17 ALASKA PACIFIC LEASING COMPANY,
18 a Alaska business corporation; and DOES
19 1-THROUGH X, inclusive,

20 Defendants.

CASE NO: CV14-01229

DEPT. NO. 8

NOTICE OF ENTRY OF ORDER

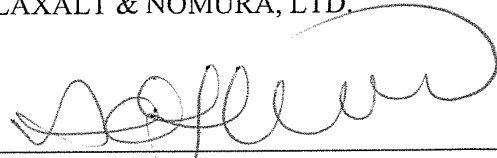
21 Please take notice that the above Court entered its Order Granting Summary Judgment on
22 October 22, 2014, a copy of said Order is attached hereto.
23
24
25
26
27
28

AFFIRMATION PURSUANT TO NRS 239.B.030

The preceding document does not contain the social security number of any person.

DATED this 23rd day of October, 2014.

LAXALT & NOMURA, LTD.



HOLLY S. PARKER, ESQ.

Nevada State Bar No: 10181

MARILEE BRETERNITZ, ESQ.

Nevada State Bar No. 12563

LAXALT & NOMURA, LTD.

9600 Gateway Drive

Reno, Nevada 89521

hparker@laxalt-nomura.com

mbreternitz@laxalt-nomura.com

Telephone: (775) 322-1170

Facsimile: (775) 322-1865

Attorneys for Defendant Alaska
Pacific Leasing Company

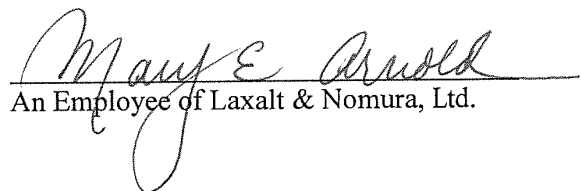
CERTIFICATE OF SERVICE

Pursuant to NRCp 5(b), I hereby certify that I am an employee of LAXALT & NOMURA, LTD., and that on the 23rd day of October, 2014, I caused to be served a true and correct copy of the foregoing NOTICE OF ENTRY OF ORDER by:

- ☒ Mail on the parties listed below in said action, by placing a true copy thereof enclosed in a sealed envelope in a designated area for outgoing mail, addressed as set forth below. At the Law Offices of Laxalt & Nomura, mail placed in that designated area is given the correct amount of postage and is deposited that same date in the ordinary course of business, in a United States mailbox in the City of Reno, County of Washoe, Nevada.
- ☒ By electronic service by filing the foregoing with the Clerk of Court using the E-Flex system, which will electronically mail the filing to the following individuals.
- ☐ Personal delivery by causing a true copy thereof to be hand delivered this date to the address(es) at the address(es) set forth below.
- ☐ Facsimile on the parties in said action by causing a true copy thereof to be telecopied to the number indicated after the address(es) noted below.
- ☐ Federal Express or other overnight delivery.
- ☐ Reno/Carson Messenger Service

addressed as follows:

Michael E. Sullivan, Esq.
Robison Belaustegui, Sharp & Low
71 Washington Street
Reno, NV 89503
Attorneys for Plaintiff MB America, Inc.


An Employee of Laxalt & Nomura, Ltd.

1
2
3
4
5
6 IN THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA
7 IN AND FOR THE COUNTY OF WASHOE

8
9 MB AMERICA, INC., a Nevada
corporation,

Case No. CV14-01229

Dept. No. 8

10 Plaintiff,

11 vs.

12
13 ALASKA PACIFIC LEASING
COMPANY, a Alaska business
corporation; and DOES I-X, inclusive,

14 Defendant.
15 _____/

16
17 **ORDER GRANTING SUMMARY JUDGMENT**

18 Currently before the court is Defendant Alaska Pacific Leasing Company's
19 ("Alaska Pacific") *Motion for Summary Judgment*. Plaintiff MB America, Inc. ("MB
20 America") opposed the motion on September 26, 2014, and Alaska Pacific filed a
21 reply. This order follows.

22 This dispute arises from a dealership contract entered between Alaska Pacific
23 and MB America, a manufacturer of rock crushing machines. Among other clauses,
24 the contract included an arbitration clause, which stated:

25 **DISPUTES AND MEDIATION.** The parties agree that any disputes
26 or questions arising hereunder, including the construction or
27 application of this Agreement, shall be submitted to mediation
28 between MB and Dealer with the rules of the American Arbitration
Association, of which any hearing or meeting should be conducted in
Reno, NV. Any mediation or settlement by the parties shall be

1 documented in writing. If such mediation modifies the language of this
2 Agreement, the modification shall be put in writing, signed by both
parties and added to this Agreement as an attachment.

3 If mediation between the parties does not result in a mutual satisfying
4 settlement within 180 days after submission to mediation, then each
5 party will have the right to enforce the obligations of this Agreement in
6 the court of law in Reno, Nevada with all reasonable attorney fees,
court costs and expenses incurred by the prevailing party in such
litigation to be paid by the other party.

7
8 MB America filed its complaint in this case on June 6, 2014. Alaska Pacific
9 contends that the complaint was prematurely filed, as the parties in this case
10 had not yet submitted their dispute to mediation, pursuant to the contractual
arbitration clause.

11 The Nevada Supreme Court has consistently recognized Nevada's
12 strong public policy in favor of arbitration because arbitration generally
13 avoids the higher costs and longer time periods associated with traditional
14 litigation. *D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162.
15 "There is a strong public policy favoring contractual provisions requiring
16 arbitration as a dispute resolution mechanism. Consequently, when there is
17 an agreement to arbitrate we have said that there is a 'presumption of
18 arbitrability.'" *Phillips v. Parker*, 106 Nev. 415, 417, 794 P.2d 716, 718 (1990)
19 (citing *Int'l Assoc. Firefighters v. City of Las Vegas*, 104 Nev. 615, 620, 764
20 P.2d 478, 481 (1998)).

21 Arbitration clauses are enforced, however, only after an enforceable
22 agreement to arbitrate is found to exist. *Gonski v. Second Judicial District Court of*
23 *State ex rel. Washoe*, 245 P.3d 1164, 1169 (Nev. 2010). Nevertheless, a court, in its
24 discretion, may invalidate unconscionable arbitration provisions; generally, both
25 procedural and substantive unconscionability must be present in order for the court
26 to exercise its discretion to refuse to enforce an arbitration provision as
27 unconscionable. *D.R. Horton, Inc.* at 553-554, 96 P.3d 1159, 1162.
28

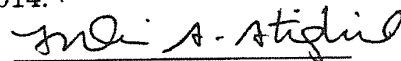
1 In this case, MB America does not allege that the arbitration clause between
2 the parties is unconscionable, or otherwise dispute the validity of the provision.
3 Rather, MB America appears to assert that arbitration is unnecessary, because it
4 only filed this action to establish that there is not a legal dispute between the
5 parties. If a dispute exists, MB America agrees that arbitration is appropriate.

6 Given the pleadings filed in this case, as well as the fact that MB America
7 filed a complaint in this court in the first instance, the court concludes that a legal
8 dispute between the parties appears to exist. The dispute also appears to arise from
9 the parties mutually agreed upon contractual obligations. As MB America does not
10 dispute the validity of the parties' contractual arbitration provision, the court
11 concludes that the parties are required to exhaust this administrative remedy
12 before submitting their dispute to this court.¹

13 Therefore, for the reasons stated above, the court ORDERS Alaska Pacific's
14 *Motion for Summary Judgment* GRANTED. Plaintiff MB America's *Complaint* is
15 DISMISSED, without prejudice.

16 IT IS SO ORDERED.

17 DATED this 22nd day of October, 2014.

18 
19 LIDIA S. STIGLICH
20 District Judge
21
22
23
24
25
26

27 _____
28 ¹The court notes that while the agreement between the parties requires that any mediator follow the
rules of the American Arbitration Association, any selected mediator need not be a member of the
American Arbitration Association.

- 1
- 2
- 3
- 4
- 5
- 6
- 7
- 8
- 9
- 10
- 11
- 12
- 13
- 14
- 15
- 16
- 17
- 18
- 19
- 20
- 21
- 22
- 23
- 24
- 25
- 26
- 27
- 28

Kathryn Rogers
KATHRYN ROGERS
Judicial Assistant