

## TRIAL AGREEMENTS\*

1. The parties will ask the court to dispense with the requirement of a final Pretrial Order and instead exchange witness and exhibit lists, deposition designations, and proposed jury instructions as agreed to below. The parties will also ask the Court to permit whatever they have agreed to herein.
2. Real live witness lists will be exchanged on \_\_\_\_\_. Any witness who appears on a party's live witness list whom the other side has not deposed, can be deposed before the final pretrial
3. The length of the trial (excluding openings and closings) will be \_\_\_ days and that time will be split equally. Each party will get \_\_\_ to open and \_\_\_ to close.
4. The list of witnesses to be called by deposition will be exchanged 48 hours before the trial commences. Actual deposition designations will be provided 48 hours before a party intends to read or play a deposition. The opposition then has 24 hours to object and counter-designate, and the originally designating party has 4 hours to object to any counter-designations. The deposition may be used as soon as the Court rules on the objections.

5. Deposition counter-designations will be counted against the designator's time. Counter-designations for optional completeness will be played during the "direct examination" portion of the video playback. All counter-designations will be played in full after the "direct examination" portion of the video playback is completed.
6. We will agree on the in limine orders contained in Exh. A plus a briefing schedule for contested limine motions
7. We will exchange lists of exhibits (with each exhibit entitled simply Trial Exhibit and numbered sequentially as in the deposition transcripts) on \_\_\_ that will be limited to exhibits we in good faith intend to show to the jury during trial. The deadlines for exchanging exhibit objections and a time for lead counsel to meet and confer on them are as follows: \_\_\_\_\_
8. All un-objected-to trial exhibits listed on the exhibit lists at the time the trial begins are deemed admitted when mentioned by any party during trial
9. All exhibits produced by a party are presumed to be authentic. All exhibits produced by the following third-parties are also presumed to be authentic:

\_\_\_\_\_ If

nevertheless an authenticity objection is made pursuant to para. 7 above, the party seeking to admit the exhibit is entitled to take expedited telephonic depositions to authenticate the exhibit before or during trial.

10. The parties will ask the court to administer a questionnaire to the venire and to provide the completed questionnaires to counsel as early as possible. The parties will exchange proposed jury questionnaires on \_\_\_\_\_ and try to reach agreement before the final pretrial conference
11. An agreed juror notebook containing a glossary, cast of characters, chronology and any key documents
12. The jurors can take notes and can use their own notes during deliberations. When each witness takes the stand, the party calling that witness will provide each juror with a lined sheet of looseleaf paper with a photo and the name and title of the witness, suitable for taking notes on and placing in the juror notebook.
13. Jurors can direct, through the judge, questions to each witness before he or she leaves the stand. Attached as Exhibit B is a protocol of doing this.
14. The parties shall notify opposing parties of the order in which they plan to call live witnesses each Friday by 5pm for the following week. The

parties shall further notify opposing parties 36 hours before any particular witness is called live

15. Demonstratives (i.e., charts, power point slides, models and the like, that do not go back into the jury room) need not be listed on the parties Trial Exhibit lists. Those to be used on direct examination, opening or closing will be provided to opposing counsel before the session (morning or afternoon) in which they will be used.
16. The parties will (a) exchange proposed preliminary and final jury instructions on \_\_\_\_\_ and \_\_\_\_\_, respectively; (b) ask the Court to give preliminary substantive instructions; and (c) try to reach agreement on preliminary instructions before the trial begins and on final instructions before the court sets a charge conference. If a pattern instruction is available, it will be used.
17. The parties will ask the court to instruct the jury before rather than after final arguments.
18. The parties will ask the Court to provide each juror with a copy of the instructions and verdict form.
19. The parties will jointly request real-time reporting
20. The parties will share any courtroom audio-visual equipment and will provide each other

electronic versions of whatever they display immediately after the display

21. Each side will be allowed \_\_\_\_ minutes of interim argument that can be used in increments no greater than \_\_\_ minutes when no witness is on the stand.

\*These Trial Agreements have been suggested by Stephen D. Susman of Susman Godfrey, Paul C. Sanders of Cravath, Swaine & Moore and Fred Bartlit of Bartlit Beck Herman Palenchar & Scott

# **EXHIBIT A**

## AGREED MOTION IN LIMINE

1. Privileged communications.

The intent or understanding of any parties' counsel, and the content of any attorney-client privileged or confidential communications, or lack thereof. FED. R. EVID. 501; TEX. R. EVID. 503. (Oral or written communications between any third party and counsel for one of the parties, which are non-privileged and non-confidential, may be inquired into, subject to objection on relevancy or other ground.)

Counsel shall refrain from asking questions that may tend to require an attorney or witness to divulge a client confidential or privileged communication, or which may tend to require an attorney or witness to have to object to answering on such grounds. FED. R. EVID. 403.

2. Questions about trial preparation.

Questions about how counsel prepared witnesses who they represent for their trial testimony.

3. References to the filing of a motion in limine.

Reference to the filing of any Motion in Limine by any party because such references are inherently prejudicial in that they suggest or infer that a party sought to prohibit proof or that the Court has excluded proof of matters damaging to a party's case. FED. R. EVID. 401-403.

4. Exclusion of evidence.

Any reference in any manner by counsel or any witness that suggests, by argument or otherwise, that a party sought to exclude from evidence or proof any matters bearing on the issues in this cause or the rights of the parties to this suit. FED. R. EVID. 401-403.

5. Statement of any venire person.

After the close of voir dire, reference to the statement of any venire person. FED. R. EVID. 401-403.

6. Questioning attorneys.

Any question by a witness, in front of the jury, directed to the adverse party's counsel. FED. R. EVID. 401-403.

7. Probable testimony of unavailable witnesses who will not be called by deposition.

That the probable testimony of a witness, who is absent, unavailable or not called to testify in the cause would be of a certain nature. FED. R. EVID. 401-403.

8. Any reference to any exhibit not being offered by any party.

Any reference to any exhibit not being offered by any party. FED. R. EVID. 401-403.

9. Pre-trial motions or matters.

Any pre-trial motions or matters, specifically including but not limited to summary judgment motions and the Court's rulings on such motions. FED. R. EVID. 401-403.

10. Attorney's objections.

In reading or playing videotaped depositions, any attorney's objections, comments, side bars, or responses to objections. FED. R. EVID. 401-403.

11. Settlements and settlement discussions.

Settlements entered into or discussed with any party, including a party to this lawsuit or to any other action and proceeding, as well as any and all statements made by any party in the settlement discussions during the course of those discussions. FED. R. EVID. 408.

12. Stipulating to any matter.

Any reference to the fact that counsel for any party may have declined or refused to stipulate to any matter. FED. R. EVID. 401-403.

13. References to any anyone sitting in the courtroom.

Any reference to any anyone sitting in this courtroom other than witnesses, counsel, the party's corporate representatives, or Court personnel. FED. R. EVID. 401-403.

14. Reference to other suits.

Any reference, comment, or statement by counsel, or by any witness called to testify, regarding any other suit, litigation, arbitration, or other legal or administrative proceeding. This would be irrelevant, confusing, misleading and unfairly prejudicial. FED. R. EVID. 402 & 403.

15. Alternative pleadings, theories, and requests for relief.

Any reference, comment, or statement by counsel, or any witness called to testify, regarding the fact that one party or the other may have had alternative pleadings, other theories of liability, or other requests for relief in this lawsuit than those contained in the latest pleading. Those matters are irrelevant and would be confusing, misleading and unfairly prejudicial.

16. Opinions not disclosed in expert report.

Eliciting any opinion from an expert that is not contained in that expert's written report. *See* FIRST AMENDED SCHEDULING ORDER ¶ 4 ("Any opinion or testimony not contained in the summary will not be permitted at trial.") [D.E. #43].

17. Location or size of any law firm.

Any suggestion as to where a particular lawyer or firm is from or how big it is.

18. The Wealth, Religious or Political Beliefs or Sexual Preferences of any party

Any reference to the wealth, religious or political beliefs or sexual preferences of any party.

# **EXHIBIT B**

### Questions by the Jurors During Trial

1. The court will read the attached instructions included to the jury after the jury is seated and may repeat any or all of these instructions to remind the jury of its role. These instructions explain the procedure that will be used to allow jurors to submit written questions.
2. After the parties have asked their own questions of each witness who appears and testifies, jurors will be given the opportunity to write any questions they may have for the witness on the attached juror question form.
3. To the extent possible, the court will take steps to maintain the anonymity of any juror who asks a question. The court will instruct jurors not to put their names on juror question forms. The court will provide each juror a juror question form in the jury box and ask each juror to pass the form to the bailiff at the end of the witness examination. The court will have every juror pass down his or her juror question form—even if the juror did not write a question on the form—in order to preserve anonymity.
4. Upon receipt of a written question from the jury, the court will allow the parties, outside the hearing of the jury, to make objections to the question on the record and obtain a ruling. On its own initiative or upon a party's request, the court may remove the witness from the courtroom before reviewing the question or allowing the parties to object to the question.
5. In its discretion, the court may reword the question or decide that the question should not be asked. If the court rewords the question, the court should read the reworded question and allow the parties to make objections to the reworded question on the record and obtain a ruling outside the jury's hearing.
6. If the court allows a verbatim or reworded juror question, the court may either ask the question or allow a party to ask the question of the witness. The parties will be allowed to ask any follow-up questions.
7. The court will include any completed juror question form in the record.

- Attachments: 1) Instruction on Juror Questions  
2) Juror Question Form

## **Attachment 1**

### **INSTRUCTION ON JUROR QUESTIONS**

After the parties have asked their own questions of each witness and before each witness is excused, you may submit in writing any questions you have for that witness. Any questions you submit should be about the testimony the witness has given. Your questions should not give an opinion about the case, criticize the case, or comment on the case in any way. You should not argue with the witness through a question.

I will review all your questions with the parties privately. Keep in mind that the rules of evidence or other rules of court may prevent me from allowing some questions. I will apply the same rules to your questions that I apply to the parties' questions. Some questions may be changed or rephrased, and others may not be asked at all. If a question you submitted is not asked, do not take it personally and do not assume it is important that your question is not asked.

You must treat the answers to your questions the same way you treat any other testimony. You must carefully consider all the testimony and other evidence in this case before deciding how much weight to give to particular testimony.

Remember that you are neutral fact finders and not advocates for either party. You must keep an open mind until all the evidence has been presented, the parties have finished their summations, and you have received my instructions on the law. Then, in the privacy of the jury room, you will discuss the case with the other jurors.

Any question you submit should be yours alone and not something you got from another person. That is because of my overall instruction that you must not discuss the case among yourselves or with anyone else until you have heard my final instructions on the law, and I have instructed you to begin your deliberations.

