IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

NATIONWIDE MUTUAL INSURANCE COMPANY Petitioner v. LIBERTY MUTUAL INSURANCE COMPANY Respondent.	Civil Action No. 13-cv-12910-PBS

LIBERTY MUTUAL'S OPPOSITION TO
NATIONWIDE'S MOTION TO COMPEL ARBITRATION

Liberty Mutual Insurance Company ("Liberty Mutual") hereby opposes Nationwide Mutual Insurance Company's ("Nationwide") *Petition To Compel Arbitration* (the "Motion To Compel Arbitration").[1] Under the *Colorado River* abstention doctrine, the court should dismiss or stay this action, because exactly the same issue is currently pending before the Business Litigation Session of the Massachusetts Superior Court in an earlier-filed action. As detailed below, in June 2013, Liberty Mutual and Nationwide conducted a reinsurance arbitration on access-to-records issues. The arbitration panel issued an order in Liberty Mutual's favor, which provided prospective declaratory relief concerning access-to-records issues that applies to ***all*** of Liberty Mutual's ***future reinsurance claims*** tendered to Nationwide. The Massachusetts Superior Court entered a judgment confirming the entire arbitration order (the "Order") after concluding that Nationwide's objections to confirmation "border[ed] on the frivolous".

[1] The Federal Arbitration Act ("FAA") provides that petitions/applications to compel arbitration shall be "made and heard in the manner provided by law for the making and hearing of motions". 9 U.S.C. § 6. Accordingly, Liberty Mutual has filed an opposition -- rather than an answer -- to Nationwide's Motion To Compel Arbitration.

Unhappy with the Order, Nationwide demanded an entirely new arbitration in which it seeks a "second bite at the apple" with respect to access-to-records issues before a new and different arbitration panel -- *i.e.* arbitrators who know nothing about the record of the first, dispositive arbitration. Liberty Mutual rejected this tactically-motivated arbitration demand, because the parties had just completed an arbitration regarding the same access-to-records issues, which culminated in the Order. Liberty Mutual then filed a motion in state court -- which is pending -- to enforce the terms of the confirmed Order and judgment. Nationwide has opposed the motion by arguing that the Massachusetts Superior Court should not enforce the Order and its own judgment, and that the issue should instead be submitted again to arbitration.[2]

Accordingly, the issue before this court -- whether another, entirely redundant arbitration is appropriate -- is already pending before the Massachusetts Superior Court. In cases of parallel state court litigation, the First Circuit Court of Appeals has endorsed the dismissal or stay of federal actions for purposes of "comity" and "sound judicial administration". Bacardi Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 14-15 (1st Cir. 2013) (collecting cases and staying case under the FAA in favor of parallel state court litigation). A dismissal or stay here would also comfortably fit within the "Colorado River doctrine, where the Supreme Court held that when state and federal courts are exercising concurrent jurisdiction contemporaneously it may be appropriate in some instances for the federal court to defer to the state court." Id. at 14, *citing* Colo. River Water Conservation Dist. v. United States, 424 U.S. 800 (1976).

The Massachusetts Superior Court should have the opportunity to determine whether its *own* judgment confirming the Order controls. Under principles of federalism and judicial

[2] In what can only be described as shameless forum shopping, Nationwide chose to file its retaliatory Motion To Compel Arbitration in federal court, even though the issue was already before the Massachusetts Superior Court.

efficiency, a federal court should not swoop in to adjudicate an issue that is inherently within the province of and currently before a state court. Instead, this court should dismiss or stay this action in favor of the Massachusetts Superior Court's resolution of the issue.

In the alternative, if the court is inclined to compel a new arbitration, the court should appoint Elizabeth Thompson -- the "umpire" (or third arbitrator) in the parties' earlier access-to-records arbitration -- to serve as the umpire. Because she very recently presided over an arbitration between the same parties, concerning the same access-to-records issues, under the same contracts, Ms. Thompson is the most qualified person to serve as umpire in any new arbitration. Moreover, the appointment of Ms. Thompson would deter Nationwide from its aggressive efforts to expunge and re-write the record of its prior arbitration loss and the Order that memorializes it.

For these and other reasons detailed below, this court should dismiss or deny Nationwide's Motion To Compel Arbitration.

I. Background.

Nationwide seeks to arbitrate the previously-decided question whether its failure to pay Liberty Mutual's valid reinsurance billings can be excused by alleging that Liberty Mutual failed to provide access to records. This issue, however, has (as noted) *already* been adjudicated in Liberty Mutual's favor. In mid-2013, Liberty Mutual and Nationwide conducted an arbitration that resolved this precise dispute -- now and in the future, by the terms of the Order (the "Access-To-Records Arbitration"). Liberty Mutual initiated that arbitration to address and eliminate Nationwide's habitual refusals to take any coverage position concerning Liberty Mutual's reinsurance claims and to prevent Nationwide from misusing demands to access records as a pretext to avoid coverage determinations, while holding Liberty Mutual's money.

On June 26, 2013, an arbitration panel chaired by Elizabeth Thompson issued a "Final Order On Contract Interpretation" (the "Order", attached as Ex. A to this Opposition and to the accompanying affidavit of Cynthia R. Koehler). Although Nationwide pretends that Order applies to only one claim -- they refer to it surreptitiously as the "Houdaille Award" -- the Order actually contains express and expansive ***prospective*** declaratory relief that governs the *entire relationship* between the parties under the reinsurance treaties (the "Treaties"). For the avoidance of any doubt, the Order manifestly goes far beyond the single Houdaille claim and into the future.[3]

More specifically, Paragraph 1 of the Order broadly states that the "'Access to Records' provision of the Treaties and the 'Claims Against Reinsurers' provisions... create independent rights and obligations" and the "[e]xercise of rights under the Access to Records provision of the Treaties is not a pre-condition to [Nationwide's] payment obligations". *Order*, at ¶ 1. In addition, the Order requires that "[b]illings of ***future claims*** under the Treaties shall be paid, paid subject to a reservation of rights or denied within 60 days of [Nationwide's] receipt of billing and status packages". *Order*, at ¶ 3 (emphasis supplied).

Nationwide, however, refused to comply with the Order at the first opportunity. At the time the Order was issued, Nationwide had failed to pay or take any coverage position with respect to a number of reinsurance billings Liberty Mutual had submitted to Nationwide, including billings related to Plastics Engineering Company, Rogers Corporation, Lone Star Industries, Inc., Hoyt Manufacturing Company, and John H. Hampshire, Inc., and Airco, Inc. / The BOC Group, Inc. (the "Billings"). *Koehler Aff.*, ¶ 4. Accordingly, in July 2013, Liberty Mutual resubmitted these Billings to Nationwide. *Id.* In each such submission, Liberty Mutual

[3] The prospective, declaratory nature of the Order is no accident, because both sides requested this form of relief.

reminded Nationwide that it was required under the Order to pay or deny each such claim within 60 days. *Id.*, ¶ 4.

Nationwide refused to pay, deny or take any coverage position with respect to these Billings within 60 days (or at any other time). *Koehler Aff.*, ¶ 5. Instead, on September 11, 2013 -- just days before the 60-day deadlines expired -- Nationwide purported to demand an entirely new arbitration against Liberty Mutual, in connection with a (non-existent) dispute "regarding the rights and obligations provided by the ACCESS TO COMPANY'S RECORDS article, as it appears in the Treaties, in regard to" the Billings. *Koehler Aff.*, Ex. B. In response, Liberty Mutual rejected the new arbitration demand because the parties had recently concluded the Access-To-Records Arbitration that resulted in the Order precluding Nationwide from using its long-abused "access-to-records" excuse for not paying or denying claims going forward. *Koehler Affidavit*, Ex. C.[4] Liberty Mutual moved to confirm the arbitration Order before the Massachusetts Superior Court, which Nationwide partially opposed. *See* Suffolk Superior Court, Civil Action No. 13-2727-BLS2 (the "State Court Action"). On October 29, 2013, the court issued a judgment and decision confirming the entire Order, and Judge Sanders concluded that

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[4] In reality, no dispute has ever existed regarding Nationwide's ability to access records regarding the Billings. Shortly before the evidentiary hearing in the Access-To-Records Arbitration, Nationwide forwarded to Liberty Mutual an unprecedented request to conduct an omnibus audit of documents concerning 12 different reinsurance claims, including the Billings at issue here. *Koehler Aff.*, ¶ 7 (Exs. D-E). Liberty Mutual twice responded that it would endeavor to collect and review this immense mountain of documents -- estimated by Liberty Mutual to be nearly 3 million pages of documents for potential production -- and make them available in an orderly fashion. *Id.*, ¶ 7 (Exs. F-G). Liberty Mutual also reminded Nationwide that the parties were in the middle of an arbitration concerning their respective rights and obligations under the Treaty, including access to records issues, and that the results of the arbitration would be -- as, in fact, they are -- instructive in the context of any future audits. *Id.* (Ex. G).

Following the issuance of the Order, Liberty Mutual began making available documents for the 12 claims that Nationwide requested to audit. *Koehler Aff.*, ¶ 8. In September 2013, Nationwide audited documents at Liberty Mutual's offices concerning the Houdaille reinsurance claim. *Id.* Liberty Mutual has also offered audit dates for additional claims in October, November and December 2013 and January 2014. *Id.*, ¶ 9 (Exs. H-J). Nationwide, however, has refused to agree to any additional audit dates. *Id.*, ¶ 9. Instead, Nationwide pretends that Liberty Mutual did not (in fact) agree to provide documents -- with respect to all of the requested claims -- in an orderly fashion and *before* Nationwide attempted to demand arbitration concerning issues already at play in the Access-To-Records Arbitration.

"Nationwide's arguments [opposing confirmation] do indeed ***border on the frivolous***". *Koehler Affidavit*, Exs. K (at p. 3, emphasis supplied), L.

Because the Massachusetts Arbitration Act provides that a judgment confirming an arbitration order can be enforced like any other judgment of the Court (M.G.L. c. 251 § 14), Liberty Mutual, served a *Motion To Enforce Confirmed Arbitration Order And Judgment* (the "Motion To Enforce") in the State Court Action on November 4, 2013. *Koehler Affidavit*, Ex. M. Liberty Mutual requested that the Massachusetts Superior Court remedy Nationwide's violations of the Order and judgment by requiring Nationwide to pay the Billings forthwith.

In response, Nationwide served an opposition in the State Court Action arguing, that the Massachusetts Superior Court should not enforce its own judgment, because the issues belonged in arbitration. *Koehler Affidavit*, Ex. N. Even though Nationwide's advanced this "arbitration defense" in state court, Nationwide chose to file its Motion To Compel Arbitration in federal court, while Liberty Mutual's Motion To Enforce remained pending before the Massachusetts Superior Court.

II. Argument.

A. The Court Should Dismiss Or Stay This Action Because The Massachusetts Superior Court Already Has Jurisdiction Over These Issues, Including Its Own Judgment.

The Court should dismiss or stay this action because the issues presented by the Motion To Compel Arbitration are already before the Massachusetts Superior Court in the first-filed State Court Action. Although Nationwide has erroneously told the Massachusetts Superior Court that the case must go to arbitration, the Massachusetts Superior Court has the authority to apply and enforce the Order and its own judgment.

The First Circuit has held that "where an arbitral award is both clearly intended to have a prospective effect and there is no colorable basis for denying the applicability of the existing award to a dispute at hand", a court should "order compliance with the award rather than require the parties to proceed anew". Derwin v. General Dynamics Corp., 719 F.2d 484, 491 (1st Cir. 1983); Boston Shipping Asso. v. International Longshoremen's Asso., 659 F.2d 1, 4 (1st Cir. 1981) (if it "is beyond argument that there is no material factual difference between the new dispute and the one decided in the prior arbitration that would justify an arbitrator's reaching a different conclusion, the new dispute is a 'like' dispute subject to enforcement under the prior award."). Because the Order and judgment unambiguously provide prospective relief concerning the issues Nationwide now seeks to re-arbitrate, the Massachusetts Superior Court can -- and it should -- determine that the parties are not required to "proceed anew" with arbitration.[5]

This court should defer to the Superior Court's decision to enforce its own judgment. Under the Colorado River doctrine, the First Circuit has upheld the stay or dismissal of cases under the FAA, because when "state and federal courts are exercising concurrent jurisdiction contemporaneously it may be appropriate in some instances for the federal court to defer to the state court." Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 14 n.17 (1st Cir. 2013) (staying application to confirm under the FAA in favor of state court action); D.A. Osguthorpe Family

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[5] Moreover, the First Circuit has repeatedly held that a party is not entitled to seek "another bite at the apple after it submitted the relevant claims to arbitration; after the panel issued a 'full and final' arbitral award." FleetBoston Fin. Corp. v. Alt, 638 F. 3d 70, 79 (1st Cir. 2011) (defendant was not entitled to re-litigate claims that had been decided in prior arbitration proceeding). *See also* Brown v. Wheat First Sec., Inc., 257 F.3d 821, 827 (D.C. Cir. 2001) (vacating order compelling arbitration after concluding that confirmed arbitration award had preclusive effect on new arbitration claims); Bryan County v. Yates Paving & Grading Co., 281 Ga. 361 (Ga. 2006) (declining to compel arbitration, because court had authority to determine preclusive effect of earlier arbitration award); Federated Rural Elec. Ins. Exch. v. Nationwide Mut. Ins. Co., 134 F. Supp. 2d 923, 928 (S.D. Ohio 2001) (granting plaintiff declaratory relief providing that prior arbitration award was final and binding on the parties where **Nationwide** sought to re-litigate the prior award in a new arbitration).

P'ship v. Asc Utah, Inc., 705 F.3d 1223 (10th Cir. 2013) (upholding dismissal of petition to compel arbitration under the FAA in favor of overlapping state court litigation).

In the First Circuit, courts review a number of factors in forum abstention analysis, including: (a) the desirability of avoiding piecemeal litigation; (b) the order in which the forums obtained jurisdiction; (c) whether federal or state law controls; (d) the adequacy of the state forum to protect the parties' interests; and (e) the vexatious nature of the federal claim. Bacardi Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 14 n.17. Here, these factors strongly militate in favor of deference to the State Court Action:

- It makes little sense to litigate, or relitigate, the **very same issue** in this forum. The prospect of doing so provides a potent incentive to abstain. *E.g.,* Arkwright-Boston Mfrs. Mut. Ins. Co. v. City of New York, 762 F.2d 205, 212 (2d Cir. 1985) ("Maintaining virtually identical suits in two forums under [the] circumstances would waste judicial resources" and would "breed litigation on assertions of claim and issue preclusion").
- Liberty Mutual filed the State Court Action **before** Nationwide filed this retaliatory action.
- Because the key issue here is the applicability of the Massachusetts superior court's judgment to Nationwide's "new" claims, **state law** will control the decision.
- The Massachusetts Superior Court can adequately **protect** Nationwide's claims.
- Finally, federal suits -- such as this one -- that appear to have been filed "as a hedge against an unfavorable result" in state court, or simply for "**tactical reasons**," are particularly appropriate candidates for abstention under the

Colorado River doctrine. *See* Gabelli v. Sikes Corp., No 90-4904, 1990 WL 213119, at * 6 (S.D.N.Y. Dec 14, 1990) (stay appropriate where plaintiff "commenced the instant federal action as a hedge against an unfavorable result in [state] proceedings"); Weinstock v. Cleary, Gottlieb, Steen & Hamilton, 815 F. Supp. 127, 132 (S.D.N.Y. 1993) (dismissal appropriate where plaintiff "appears to have instituted this [federal] action as much for tactical reasons as for a genuine interest in obtaining relief").

Although Nationwide placed the arbitration issue before the Superior Court as part of its opposition to Liberty Mutual's Motion To Enforce, Nationwide filed its Motion To Compel Arbitration in federal court -- it was an obvious tactical decision intended to evade a repeat of the "unfavorable result" Nationwide had already suffered in the State Court Action. The Colorado River doctrine is designed, in part, to preclude this type of forum shopping, and the court should reject it here.

Separate and apart from the Colorado River doctrine, the First Circuit has upheld the stay or dismissal of cases where interests of "comity" and "sound judicial administration" favor deference to parallel state court litigation. *E.g.* Bacardí Int'l Ltd. v. V. Suárez & Co., 719 F.3d 1, 14-15 (1st Cir. 2013). Here, no court is better suited to apply the Superior Court judgment than the Superior Court. In deference to that principle, and for this independently sufficient reason, this court should dismiss or stay this action in favor of the Massachusetts Superior Court's determination.

B. In The Alternative, The Court Should Appoint Elizabeth M. Thompson To Serve As Umpire, Because She Presided Over The Access-To-Records Arbitration And Is Uniquely Qualified To Interpret Her Own Prior Order.

If the Court were inclined to compel arbitration, then the Court should appoint Elizabeth M. Thompson to serve as umpire. No one is better equipped to serve in this role, because Ms. Thompson presided over the Access-To-Records Arbitration between the *same* parties where she addressed the *same* access-to-records issues arising under the *same* reinsurance contracts. Ms. Thompson is a widely-respected reinsurance industry veteran, and she has deep experience serving as a fair and neutral arbitrator in reinsurance disputes. *See Koehler Affidavit*, Ex. O (Thompson biography).

The appointment of Ms. Thompson as umpire would also deter Nationwide from its aggressive forum-shopping efforts, and from revising the history of the prior arbitration for its own mercantile advantage. Not wanting to abide by the terms of the Order, Nationwide demanded a new arbitration; not wanting to have the Massachusetts Superior Court rule on the enforceability of the Order and judgment, Nationwide filed this action in federal court. Nationwide's goal is clear -- it seeks to avoid the Order; re-litigate its terms before a new arbitration panel that Nationwide hopes will be chaired by someone new; and re-invent the history of the arbitration Nationwide lost. The Treaties require a three-arbitrator panel. Two of the arbitrators are appointed by the parties. The parties customarily choose the third arbitrator (or umpire) through a random selection process -- such as a "coin-flip" -- from the pool of candidates nominated by the parties. Nationwide wishes to re-arbitrate the access-to-records dispute before a different umpire in order to take another bite at the core of a well-chewed apple.

The court should reject this tactical gamesmanship, which subverts the principles of fair play, and the full and final resolution of disputes in arbitration. If, however, the court is inclined

to compel arbitration, the court should appoint Elizabeth M. Thompson as umpire, in an effort to conserve resources and preclude the near-certain abuses attending Nationwide's attempts to re-write the prior arbitration and the Order that concluded it.

III. Conclusion.

For foregoing reasons, Liberty Mutual respectfully requests that the Court enter an order:

(1) dismissing, staying, or denying Nationwide's Motion To Compel Arbitration; or

(2) in the alternative, appointing Elizabeth M. Thompson to serve as the umpire in a new arbitration; and

(3) granting such other and further relief as the Court may deem just.

Respectfully submitted,

LIBERTY MUTUAL INSURANCE COMPANY,

/s/ David A. Attisani
David A. Attisani (BBO #563209)
(dattisani@choate.com)
Jean-Paul Jaillet (BBO # 647299)
(jjaillet@choate.com)
CHOATE, HALL & STEWART LLP
Two International Place, Boston, MA 02110
Tel.: (617) 248-5000

November 27, 2013

CERTIFICATE OF SERVICE

I, Jean-Paul Jaillet, hereby certify that on November 27 2013, I caused the foregoing document to be served by counsel for Nationwide via ECF.

/s/ Jean-Paul Jaillet

Exhibit A

In the Matter of the Arbitration between: Liberty Mutual Insurance Company and Liberty Mutual Fire Insurance Company, Petitioners, and Nationwide Mutual Insurance Company and National Casualty Company, Respondents.	Before: Elizabeth M. Thompson, Umpire Charles M. Foss, Arbitrator Paul Tuhy, Arbitrator

FINAL ORDER ON CONTRACT INTERPRETATION
AND
INTERIM ORDER REGARDING HOUDAILLE CLAIM

The Panel having been properly constituted and accepted by the parties, conducted a hearing in Boston, Massachusetts on June 21, 2013, and considered all of the parties' written and oral submissions, testimony, other evidence and argument.

The dispute over contract interpretation involves the parties differing views over their rights and responsibilities under two provisions of The Workmen's Compensation and General Liability Excess of Loss Reinsurance Contracts (hereinafter the "Treaties") in effect between the parties from 1972 to 1983. The disputed provisions are the "Access To Records" article of the Treaties and the "Claims Against Reinsurers" section of the Treaties' General Liability Exhibit (Treaty Exhibit A). These provisions, which are unchanged in any material respect throughout the life of the Treaties, are as follows:

> **Access To Records**
> The Reinsurers or their duly appointed representatives shall at all reasonable times, have free access to all books and records of the Company and of its agents or attorneys for the purpose of obtaining any information concerning this reinsurance or the subject matter hereof.

Note: the 1978 Treaty version inserts the word "further" in front of "information"

> **Claims Against Reinsurers**
> The Company shall be the sole judge as to what claims are covered under its policies, and all loss settlements and all judgments paid by the Company, provided they are within the terms and conditions of this Exhibit, shall be unconditionally binding upon the Reinsurers and amounts falling to the share of

> Reinsurers shall be immediately due and payable by them upon reasonable evidence of the amount paid being given by the Company.
> All settlements of losses effected by the Company shall be binding upon the Reinsurers, and the Reinsurers shall be liable for their proportion thereof.
> This Exhibit A is attached to and forms part of the [Treaty].

Respondents allege that the exercise of its rights under the Access to Records Clause is a pre-condition to their "immediate" payment obligation under Section 5 of Exhibit A (See Nationwide's Response to Liberty Mutual's Opening Brief Concerning Contract Interpretation). Petitioners disagree.

Having deliberated in Boston, Massachusetts on June 22, 2013, the Panel unanimously issues the following Award and ORDERS:

1. The "Access to Records" provision of the Treaties and the "Claims Against Reinsurers" provisions of Section 5 of Exhibit A to the Treaties (hereinafter "Section 5") create independent rights and obligations. Exercise of rights under the Access to Records provision of the Treaties is not a pre-condition to Respondents' payment obligations under Section 5.

2. Petitioner's Houdaille pre-billing reports (Hearing Exhibits 4-17) and its Houdaille billing package (Hearing Exhibit 20) satisfied Petitioners' obligations under Section 5 and upon receipt of Exhibit 20 the Houdaille claim became immediately payable by Respondents.

3. Billings of future claims under the Treaties shall be paid, paid subject to a reservation of rights or denied within 60 days of Respondent's receipt of billing and status packages generally of the form and content as Hearing Exhibit 20 and Hearing Exhibits 4-17. During the 60 day period Petitioners shall make a good faith effort to respond to reasonable requests by Respondents for additional information or documents.

4. The Access to Records clause does not grant Respondents access to Petitioners' documents protected by the attorney-client privilege or the work product doctrine ("hereinafter "Confidential Material").

5. Petitioners have sole discretion to determine the extent to which access to and copies of Confidential Material will be provided. The Gardner-Denver Panel's Orders and Confidentiality and Non-Waiver Agreement only reserve to future panels the determination of whether specific documents are in fact privileged/protected.

6. The outstanding Houdaille billings of $2,944,320 shall be paid or paid subject to a reservation of rights within 20 days of the date hereof.

7. Based on the facts and circumstances of this case the Panel awards Petitioners interest on the sum of $2,944,320 at the rate of six percent (6%) simple interest from January 1, 2011 until paid by Respondents. The Panel finds that as of this date Respondents should have either denied the claim (with a statement of the substantive reasons for the denial) or paid subject to a reservation of rights based upon substantive issues and proceeded to audit the Houdaille file notwithstanding the dispute over the extent to which access to privileged documents would be allowed, copies of documents would be provided and Petitioners inappropriate attempt to prohibit the use of any provided copies in subsequent arbitration proceedings between the parties. The interest provided for herein shall be paid within 20 days of the date hereof.

8. If the payment required by Paragraph 6 is made subject to a reservation of rights, Respondents may renew their request to audit the Houdaille file and Petitioners shall allow such audit consistent with the terms of the Orders and Awards of the Gardner Denver Panel and this Panel.

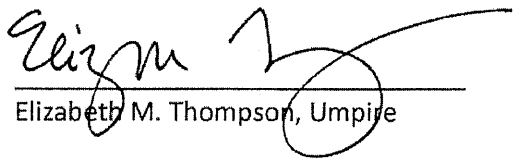
9. If the payment required by Paragraph 6 is made without a reservation of rights the parties shall so advise the Panel and the Panel's jurisdiction will terminate. If the payment is made subject to a reservation of rights, the parties shall report to the Panel within 120 days hereof whether any issues remain regarding the Houdaille claim, and, if so, propose to the Panel a schedule for resolution of the remaining issues.

10. The Panel denies Petitioners' request for attorney's fees.

11. Any other relief not specifically granted herein is denied.

Dated: June 26, 2013

FOR THE PANEL



Elizabeth M. Thompson, Umpire