



IN THE CIRCUIT COURT OF OHIO COUNTY, WEST VIRGINIA

**IN RE: MINGO COUNTY
COAL SLURRY LITIGATION**

CIVIL ACTION NO. 10-C-5000

THIS DOCUMENT APPLIES TO ALL CASES

ORDER GOVERNING MEDIATION AND MEDIATION STATEMENTS

Pursuant to Trial Court Rule 26.08(b), Mediation of all cases in the Mingo County Coal Slurry Litigation shall be conducted on **November 15, 16 and 17, 2010**, at the Charleston Civic Center, 200 Civic Center Drive, Charleston, West Virginia 25301, and shall continue from day to day thereafter at the sole discretion of the Resolution Judges.

Mediation shall begin at 10:00 a.m. on November 15.

Mediation shall be conducted by The Honorable Derek C. Swope, assigned by the Mass Litigation Panel as Lead Resolution Judge in the Mingo County Coal Slurry Litigation, with the assistance of The Honorable Alan D. Moats, also assigned by the Panel as a Resolution Judge in the Mingo County Coal Slurry Litigation.

Mediation shall be conducted in accordance with the following procedures:

PRE-MEDIATION CONFERENCE CALL

1. Liaison Counsel for the parties shall schedule a conference call with the Resolution Judges at **11:00 a.m. on November 3, 2010**, to discuss any outstanding issues related to the mediation.

REQUIRED PARTICIPANTS

2. The following persons are required to attend the mediation **in person**:

(a) each individual plaintiff (age 18 and older) who will be required to sign in and provide proof of identification;

(b) lead trial counsel for plaintiffs;

- (c) lead trial counsel and the corporate representative for each named defendant;
- (d) lead trial counsel and the corporate representative for each third-party plaintiff; and
- (e) lead trial counsel and the corporate representative for each named third-party defendant.

FAILURE OF ANY PERSON REQUIRED TO ATTEND MEDIATION IN PERSON SHALL SUBJECT THAT PERSON TO SANCTIONS, UP TO AND INCLUDING THE STRIKING OF PLEADINGS AND DISMISSAL, ABSENT GOOD CAUSE SHOWN.

3. By no later than **September 10, 2010**, Liaison Counsel for defendants, third-party plaintiffs and third-party defendants shall provide to the Mass Litigation Manager the number of counsel and corporate representatives they expect will participate in the mediation on behalf of their respective parties.

4. **Each individual plaintiff (age 18 and older) must arrive at the mediation on November 15, 2010, by no later than 10:00 a.m. in order to sign in and produce proof of identification.**

5. Lead trial counsel and any corporate representative participating in the mediation must be familiar with the cases to be mediated and must have **full authority** to act on behalf of the party or parties they represent, including full authority to negotiate a resolution of the cases and to respond to developments during the mediation process.

INFORMED CONSENT

6. Lead trial counsel for plaintiffs must obtain plaintiffs' informed consent to any settlement reached. If an aggregate settlement is reached and the terms of the aggregate

settlement do not determine individual amounts to be distributed to each client, detailed disclosures are required. For example, if a lump sum is offered in an aggregate settlement and the plaintiffs' attorney is involved in dividing the settlement sum, the plaintiffs' attorney must, before obtaining the client's consent to the settlement, disclose to each client the number of his or her clients participating, specifics of each client's claim relevant to the settlement, and the method of dividing the lump sum. In addition, the attorney must disclose prior to obtaining the client's consent, the total attorney fees and costs to be paid, payments to be made other than to clients, to their attorneys and for costs, the method by which the costs are to be apportioned among the clients and ultimately the amount each client receives.

7. If an aggregate settlement is reached, plaintiffs' counsel will be required to provide to the Lead Resolution Judge and the Lead Presiding Judge documentation showing the client is informed of and agrees to the attorney's method of allocation and distribution of settlement proceeds; documentation showing an accounting of the individual client's settlement allocation and distribution; and documentation showing authorization by the client to enter into the proposed settlement.

CONFIDENTIALITY

8. **The contents of the mediation statements and the mediation discussions, including any resolution or settlement shall remain confidential, shall not be used in the present litigation nor any other litigation (whether presently pending or filed in the future), and shall not be construed as nor constitute an admission. Breach of this provision shall subject the violator to sanctions.**

MEDIATION STATEMENTS

9. Mediation statements containing all of the information required by ¶ 12 shall be delivered to the offices of Lead Resolution Judge Derek C. Swope, Resolution Judge Alan D. Moats and Mass Litigation Manager Kimberley R. Fields for receipt by no later than **November 1, 2010**. Mediation Statements shall either be hand delivered or delivered by Federal Express, UPS or any other express mail service with tracking capability.

10. **Mediation statements are confidential.** Mediation statements shall state on their face “**CONFIDENTIAL MEDIATION STATEMENT**” and shall be placed in envelopes marked “**CONFIDENTIAL MEDIATION STATEMENT.**” Mediation statements **shall not** be filed with the Clerk’s office, **shall not** be exchanged among the parties or counsel (unless the parties or counsel so desire), **shall not** be provided to the Presiding Judges, and **shall not** become part of the record in this matter. **Mediation statements shall not be electronically filed and served since they are not part of the Court record.**

11. Mediation statements may be in memorandum or letter form. They must be double-spaced, in no less than 12-point font, and be no longer than **fifteen (15) pages**.

12. Mediation statements **must** contain the following information:

a) **Contact information:** all lead trial counsel participating in the mediation shall provide: (1) a direct dial telephone work number; (2) a cell phone and/or home telephone number; and (3) an electronic mail address where lead trial counsel can be reached.

b) **Parties:** identify the party/parties represented, describe their relationship, if any, to each other, and by whom each party is represented, including the identity of all representatives who will be participating on behalf of a party/parties during the mediation.

b) **Factual and Procedural History of the Case:** provide a brief summary of the factual and procedural history of the case, including a statement of the essential facts of the litigation, clearly indicating which material facts are not in dispute and which material facts remain in dispute. Plaintiffs shall provide their theories of liability and a one-page itemization of damages claimed, both liquidated and special, for each plaintiff. Defendants shall provide their theories of defense and their position as to the damages claimed by plaintiffs. The one-page itemization of damages claimed by each plaintiff shall be provided to defendants by no later than **October 1, 2010**.

c) **Critical Deposition Testimony:** provide the deposition synopsis of any critical fact witness or expert witness, or in the alternative, a summary of the testimony of such fact witness or expert witness.

d) **Summary of Applicable Law:** provide a brief summary of the applicable law, including statutes, cases and standards.

e) **Strengths and Weaknesses of the Case:** provide an **honest** discussion of the strengths **and** weaknesses of the party's claims and/or defenses, the likelihood of a verdict in favor of the party, an opinion as to the probable verdict range, and an opinion as to the range of settlement value.

f) **Settlement Efforts:** provide a **brief** discussion of prior settlement negotiations and discussions between the parties, including any outstanding demand

made by the plaintiffs to settle the litigation, any response by the defendants to that demand, and an assessment as to why settlement has not been reached.

g) **Settlement Proposal**: provide the party's proposed term(s) of settlement, including any proposed terms that may be non-monetary, as well as any suggestions regarding how the Resolution Judges may assist the parties in reaching a resolution.

h) **Fees and Costs**: list separately (i) attorneys' fees and costs incurred to date; (ii) other fees and costs incurred to date; (iii) a good faith estimate of additional attorneys' fees and costs to be incurred if this matter is not settled; and (iv) a good faith estimate of additional other fees and costs to be incurred if this matter is not settled.

i) **Other Settlements**: if applicable, plaintiff's counsel shall provide the gross settlement amount of any other settlements on behalf of a plaintiff whose case is being mediated.

j) **Other Matters**: in addition to the required topics described above, and provided that the mediation statement complies with the page limit stated above, counsel are encouraged to address any other matters they believe may be of assistance to the Resolution Judges.

EXHIBITS TO MEDIATION STATEMENT

13. While counsel may submit documents that will assist the Resolution Judges in understanding the issues and resolving the litigation as exhibits to the mediation statement, counsel is cautioned to limit exhibits to only those documents counsel believes will be crucial to resolution of the litigation.

MEMORIALIZATION OF SETTLEMENT

14. If the parties reach a resolution of their dispute, the Resolution Judges will have a court reporter available to record the terms of any settlement reached by the parties.

EX PARTE CONTACTS

15. Before, during and after the scheduled mediation, the Resolution Judges may find it necessary and useful to communicate with one or more parties outside the presence of the other party or parties.

OBLIGATION OF GOOD FAITH PARTICIPATION

16. The required participants shall attend the entire mediation in person and shall be available and accessible throughout the mediation process. No party may be compelled by this Order, the Mass Litigation Panel, or The Resolution Judges to settle a case involuntarily or against the party's judgment. However, the Resolution Judges expect the parties' full and good faith cooperation with the mediation process, and expect the participants to be prepared to participate fully, openly and knowledgeably in a mutual effort to examine and resolve issues. The Resolution Judges encourage all participants to keep an open mind in order to reassess their previous positions and to find creative means for resolving the dispute.

IMPOSITION OF SANCTIONS

17. **All counsel are reminded of their obligations to read and comply with this Order.** To avoid the imposition of sanctions, counsel shall advise the Resolution Judges immediately of any problems regarding compliance with this Order.

ENTER: August 31, 2010

/s/ Derek C. Swope
Lead Resolution Judge,
Mingo County Coal Slurry Litigation