



IN THE CIRCUIT COURT OF RALEIGH COUNTY, WEST VIRGINIA

IN RE: FLOAT-SINK LITIGATION CIVIL ACTION NO. 11-C-5000000

THIS DOCUMENT APPLIES TO:

Allyson Townsend

v.

Commercial Coal Testing, Inc., et al.

Civil Action No. 11-C-5200015

SECOND ORDER GOVERNING MEDIATION
AND MEDIATION STATEMENTS

On November 20, 2013, the Court amended its August 2, 2013, Case Management Order (TID 53365142) as follows:

“MEDIATION: The parties shall meet and confer in an effort to resolve this case through negotiation or mediation **before the end of February 2014.”**

NOW THEREFORE, pursuant to Trial Court Rule 26.08(b), mediation of the above-captioned case will be conducted **at 9:00 a.m. on February 26, 2014**, in the courtroom and conference rooms on the first floor of the W. Kent Carper Justice and Public Safety Complex, 301 Virginia Street, East, Charleston, West Virginia. Mediation will be conducted by Lead Resolution Judge Jay M. Hoke, with the assistance of Resolution Judge Booker T. Stephens and Resolution Judge James P. Mazzone.

PRE-MEDIATION CONFERENCE CALL

1. Liaison Counsel for the parties shall schedule a conference call with the Resolution Judges at **12:00 p.m. on February 19, 2014**, to discuss any outstanding issues related to the mediation.

REQUIRED PARTICIPANTS

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

(a) Plaintiff;

- (b) lead trial counsel for Plaintiff;
- (c) lead trial counsel for each Defendant;
- (d) the corporate representative for each Defendant; and
- (e) the insurer representative for each Defendant, if applicable.

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 **February 12, 2014**, Counsel shall submit to Mass Litigation Manager Kimberley R. Fields via electronic mail a sign in sheet containing the names of counsel, corporate representatives and, if applicable, insurer representatives who are participating in the mediation.

4. Lead trial counsel and any corporate representative or insurer representative participating in the mediation must be familiar with the case 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

5. Lead trial counsel for Plaintiff must obtain Plaintiff's informed consent to any settlement reached. 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 the client, to their attorney, and for costs, and ultimately the amount the client receives.

6. If settlement is reached, Plaintiff's counsel will be required to provide to the Presiding Judges documentation showing the client is informed of and agrees to the proposed settlement.

CONFIDENTIALITY

7. **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

8. Mediation statements containing all of the information required by Paragraph 11 shall be delivered to the offices of Lead Resolution Judge Jay M. Hoke, Resolution Judge Booker T. Stephens and Resolution Judge James P. Mazzone for receipt by no later than **February 12, 2014**. Mediation Statements shall either be hand delivered or delivered by Federal Express, UPS or any other express mail service with tracking capability.

9. **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.**

10. 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**.

11. 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 Plaintiff shall be provided to Defendants by **no later than February 5, 2014**.

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

12. 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

13. 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

14. 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

15. All 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

16. **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.

It is so **ORDERED**.

ENTER: January 23, 2014

/s/ Jay M. Hoke
Lead Resolution Judge
Float-Sink Litigation