

**IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

FRASURE CREEK MINING, LLC,
a West Virginia limited liability company,

Plaintiff,

v.

Civil Action No. 20-C-142
Presiding Judge: Jennifer P. Dent
Resolution Judge: Shawn D. Niles

POCAHONTAS LAND, LLC,
a Virginia limited liability company, and
POCAHONTAS SURFACE INTERESTS, LLC,
a Virginia limited liability company,

Defendants.

SCHEDULING ORDER

This matter came on this 18th day of May 2021 for a scheduling conference via Microsoft Teams. Stephen E. Hastings, Esq. appeared for Plaintiff, Frasure Creek Mining, LLC, and J. Mark Adkins, Esq. appeared for Defendants Pocahontas Land, LLC and Pocahontas Surface Interests, LLC.

The following schedule is ORDERED by the Court in the above-styled civil action; and shall not be modified except by leave of Court.

1. **TRIAL DATE: December 13, 2021 at 9:00 a.m. in the Fayette County Courthouse,
Judge Blake's Courtroom,
100 N. Court Street, Suite 4**

 X Jury Trial Requested Bench Trial Requested

Continuance motions must be heard prior to the pre-trial conference or they will not be considered. Trial is anticipated to last three (3) to four (4) trial days.

2. **PRE-TRIAL CONFERENCE DATE: November 29, 2021, at 1:15 p.m. in the
Fayette County Courthouse, Judge
Blake's Courtroom, 100 N. Court Street,
Suite 4**

The Court may reschedule the Pretrial Conference/Settlement Conference to allow for additional discussions between or among parties as the Court deems necessary. The following persons shall attend in person: lead trial counsel for each represented party, as well as every party in the case, including the designated corporate representative who will be attending the trial, any unrepresented parties, and any other individuals, such as insurance adjusters, who have full authority to settle the case for each party. These individuals must have full authority to settle the case for the amount of the last demand or offer made by the other side.

3. PRE-TRIAL CONFERENCE MEMORANDA

All parties are **ORDERED** to exchange and deliver their respective **PRE-TRIAL CONFERENCE MEMORANDA** to the Judge's Chambers **NO LATER THAN TEN (10) BUSINESS DAYS BEFORE** the conference. **FAILURE TO COMPLY MAY RESULT IN CONTINUANCE OF TRIAL OR MONETARY SANCTIONS BEING IMPOSED.** Said memoranda are to contain at a minimum, the following:

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|--------------------------|---|
| 1. Statement of the Case | 7. Pending Motions |
| 2. Issues of Fact | 8. Motions <i>in Limine</i> |
| 3. Issues of Law | 9. All Proposed Instructions of Law |
| 4. Proposed Stipulations | (Disk as well as hard copy shall be provided to the Court.) |
| 5. Schedule of Exhibits | 10. Proposed Voir Dire |
| 6. List of Witnesses | |

Parties are to confer and provide a joint instruction charge to the Court. Each party shall submit to the Court and Circuit Clerk and exchange among counsel, a list containing proposed witnesses and exhibits, proposed jury instructions or substantive theories of recovery or defense on damages and on evidentiary matters pertinent to the case, together with applicable statutory and case authority, special interrogatories, verdict forms, and all proposed voir dire questions requested by counsel for submission to the jury, no later than ten (10) business days prior to the Pretrial Conference. Witnesses shall be identified as to whether they will be called in the parties' case-in-chief or as rebuttal witnesses. All exhibits shall be appropriately pre-marked in sequence. Exhibit markers may be secured from the court reporter. All exhibits should be indexed for easy reference and each exhibit should be individually tabbed. Counsel should have his or her own copy of each exhibit and should furnish opposing counsel with a copy of each exhibit by the aforesaid date. Hard copy duplicate originals shall be delivered to the office of the Presiding Judge as well as an electronic copy compatible with Microsoft Word via email at Alison.Burke@courtswv.gov, with a courtesy copy to Samantha.Clarkson@courtswv.gov, Tessa.Bowers@courtswv.gov, and Business.Court@courtswv.gov.

Any objections to the proposed jury instructions, special interrogatories, verdict forms, or voir dire of the other parties shall be filed in writing with the Clerk of this Court within seven (7) days thereafter. Counsel shall submit a copy of any objections with the office of the Presiding Judge via the methods described above.

The Court reserves the right to refuse any proposed instructions or objections to the instructions that are not submitted in compliance with the previous paragraphs.

Parties shall also file with the office of the Presiding Judge any interrogatories, answers thereto, depositions, etc., specifying the appropriate portions thereof that parties intend to offer in this case no later than ten (10) business days prior to the Pretrial Conference. Any objections to the introduction of any of the foregoing shall be filed, in writing with the office of the Presiding Judge, no later than five (5) business days prior to the Pretrial Conference. Any objections not filed by that date shall be deemed waived. This paragraph is not to apply to discovery materials that will be used at trial solely in cross-examination or for impeachment purposes.

In the event of a settlement of this civil action, if counsel desires the return of his or her proposed jury instructions, special interrogatories, answers thereto, depositions, verdict forms, or voir dire, arrangements must be made with the office of the Presiding Judge within fifteen (15) days of the entry of the Final Order, otherwise the Court will dispose of the materials by whatever means deemed most efficient and expedient.

Counsel is encouraged to meet with one another and enter into stipulations of fact in this case. Any such stipulation shall be reduced to writing, signed by all counsel of record, and filed with the Court and with opposing counsel no later than ten (10) business days prior to the Pretrial Conference.

4. SCHEDULE OF EXHIBITS

The parties shall exchange a list of all proposed exhibits (including demonstrative) and shall make the exhibits available for viewing by counsel in conformance with the instructions above. By the time of the Pretrial Conference, counsel shall have stipulated as to which exhibits shall be admitted without objection and provide a list to the Court and Clerk. The parties shall mark all exhibits by use of standard exhibit stickers and provide a list to the Court and counsel.

On the first day of trial, counsel shall tender to the office of the Presiding Judge two (2) binders of the exhibits. One binder shall be for the Court's use and the other shall be for use by the witnesses during trial. If counsel desires each juror to have a binder of exhibits to view as counsel examines witnesses, these should be prepared for presentation to each juror at the appropriate time with the Court's permission. Any objection to any proposed exhibit shall be filed, in writing, with the appropriate citations thereto and referenced proposed exhibit attached, one (1) week prior to the Pretrial Conference. A hard copy of said objection shall be filed with the office of the Presiding Judge with a courtesy electronic copy to Alison.Burke@courtswv.gov, with a courtesy copy to Samantha.Clarkson@courtswv.gov, Tessa.Bowers@courtswv.gov, and Business.Court@courtswv.gov.

Failure to comply with this paragraph may constitute a waiver of objections or may result in the Court denying the admission of the affected exhibits.

In the event of a settlement of this civil action, if counsel for the respective parties desires the return of his or her proposed exhibit binders, arrangements must be made with the Presiding

Judge within fifteen (15) days of the entry of the Final Order, otherwise the Court will dispose of the binders of proposed exhibits by whatever means deemed most efficient and expedient.

5. VIDEO DEPOSITION TO BE USED AT TRIAL

If a video deposition is to be used, all parties must be prepared to argue objections at the pre-trial conference. Thereafter, the proponent of the video deposition shall have the video edited to reflect the court's rulings. In addition, the proponent of the video deposition must have a videographer at trial.

6. EXPERTS DISCLOSED

Initial:	July 16, 2021
Rebuttal:	August 13, 2021

The party that bears the burden of proof on an issue serves the initial report.

Any party desiring to use an expert witness must furnish opposing counsel with the specialty of such expert and copies of all reports submitted by such witness, or, if no reports have been submitted, a summary of the substance of such expert's contemplated testimony, on the date of Expert Disclosure per WVRCP 26(b)(4).

The admissibility of expert testimony is subject to Rule 104(a) of the Rules of Evidence.

Co-designation or co-reliance upon experts must also specifically be made in writing on date of Expert Disclosure.

7. EXPERT EVIDENTIARY INSPECTIONS: n/a

The parties indicated this would be not applicable to the case at bar.

8. PROPERTY INSPECTIONS: n/a

The parties indicated this would be not applicable to the case at bar.

9. DISPOSITIVE MOTIONS

WVRCP 12(b) and 56 motions shall be filed by October 15, 2021. Responses and counter affidavits are due by October 25, 2021. Replies shall be due by November 5, 2021. All dispositive motions, responsive pleadings, supporting memoranda, and affidavits shall be filed with the Circuit Clerk and a hard copy shall be provided to the office of the Presiding Judge with a courtesy electronic copy to Alison.Burke@courtswv.gov, Samantha.Clarkson@courtswv.gov, Tessa.Bowers@courtswv.gov, and Business.Court@courtswv.gov. If a hearing on a dispositive motion is necessary, the undersigned will contact counsel to schedule the same.

10. AMENDMENTS, THIRD PARTY PLEADINGS,

11. **AND OTHER MATTERS NO LATER THAN:** n/a

The parties indicated this would be not applicable to the case at bar.

12. **FACT WITNESS LISTS EXCHANGED:** The Court found fact witness disclosure by the parties must be completed by June 4, 2021.

13. **FINAL WITNESS LIST EXCHANGED:** September 15, 2021

This is to be a *bona fide* list of intended trial witnesses. The Court finds all witness disclosure by the parties must be completed by this date.

14. **DISCOVERY COMPLETION DATE:** September 24, 2021

All requests must be filed at least 35 days in advance of this date so that all responses may be completed by this date. For the purposes of this Order, "completed" means that any discovery requiring a response or action shall be filed to allow sufficient time to permit such response or action by the above date. "Completed" does not mean that counsel can file a motion to compel on the above date. A motion to compel should be filed in sufficient time to allow a response before the above date.

Plaintiff shall serve Defendant with final requests for admissions and/or production of documents by **August 25, 2021**. Defendant shall serve Plaintiff with final requests for admissions and/or production of documents by **August 25, 2021**.

15. **ELECTRONICALLY STORED INFORMATION DISCOVERY:**

All parties and counsel shall cooperate and work diligently to agree upon the methods and conduct for discovery of electronically stored information.

All counsel are required to be informed of and understand to a reasonable degree of their client's information management systems and electronically stored information processes including how information is stored and retrieved. An attorney's lack of knowledge will not be considered as an excuse by this Court in ruling upon a motion to compel or a motion for discovery sanctions.

A party has an obligation to take reasonable and proportional steps to preserve discoverable information in the party's possession, custody, or control. The Court may issue sanctions for spoliation, the intentional or negligent destruction, or failure to preserve relevant electronically stored information. A party may move for an order to preserve electronically stored information upon a showing that the continuing existence and integrity of the information is threatened.

All requests made pursuant to Rule 34 of West Virginia Rules of Civil Procedure shall be construed to include information contained or stored in an electronic medium, regardless of format, unless otherwise stated.

Unless otherwise agreed upon, all production of electronically stored information shall be either in hard copy form or in the form of a compact disk (CD) utilizing a format best suited for viewing the information by the requesting party and reasonably accessible to the producing party. If the parties are unable to agree upon a format, the Court will rule upon the type of format to be used for a particular category or all discovery of electronically stored information.

If any party intends to utilize an electronic search of another party's electronically stored information or if any other issue regarding electronically stored information arises between the parties, then all counsel and pro se parties shall hold a conference. The requesting party shall give reasonable notice to all parties, and all counsel and pro se parties shall be present. The conference must be held at least 40 days prior to the completion of discovery, as set by the scheduling order in this matter.

At the conference, all counsel and pro se parties shall use their best efforts to reach an agreement as to the method of search, the scope of the search, the amount of searching, and the words, terms, or phrases to be used. All counsel and pro se parties shall utilize this conference to resolve all remaining electronic discovery issues such as the allocation of discovery costs for material not readily accessible, form of production, etc.

If, during a search or otherwise, electronically stored information that contains privileged information or attorney work product is inadvertently released in whole or part, then

- a. If the information, document, or material, on its face, appears to be privileged or attorney work product, it shall be immediately returned,
- b. If notice of the inadvertent disclosure is given, it shall be returned as soon as practicable, and in no case later than 10 days.

Upon returning the privileged or attorney work product material, any person to whom it has been disclosed, must destroy any copies, notes, or information derived from the material. The filing of a motion for protective order or to compel or other similarly related motion shall not affect this order.

16. **MOTIONS *IN LIMINE***

Must be filed by **10 days before the Pre-trial Conference**, and will be ruled upon at the Pre-trial Conference. All dispositive motions, responsive pleadings, supporting memoranda, and affidavits shall be filed with the Circuit Clerk, and a hard copy shall be provided to the office of the Presiding Judge with a courtesy electronic copy to Alison.Burke@courtswv.gov, Samantha.Clarkson@courtswv.gov, Tessa.Bowers@courtswv.gov, and Business.Court@courtswv.gov.

16. **MEDIATION/ALTERNATIVE DISPUTE RESOLUTION**

The Court finds that this is an appropriate case for mediation or alternative dispute resolution. Therefore, pursuant to Rule 25 of the West Virginia Trial Court Rules, this case is referred to

mediation or other form of dispute resolution agreed to by the parties. By order of this Court, mediation or other form of dispute resolution shall be conducted by the Honorable Paul T. Farrell as Resolution Judge and shall be scheduled and occur by November 21, 2021, unless such deadline is otherwise extended by the Presiding Judge for good cause shown. The parties shall contact the Office of the Resolution Judge for the purpose of scheduling mediation/alternative dispute resolution. All counsel or pro se parties shall provide their email address to the Business Court Division Director at Carol.Miller@courts.wv.gov and the Resolution Judge via Andrea.Chambers@courts.wv.gov.

17. SANCTIONS:

In accordance with WVRCP 16(f), the Court may impose the full spectrum of sanctions authorized by the WVRCP if a party or party's counsel fails to obey this order or other orders of this Court including exclusion of evidence and granting of default for failure to comply.

18. UNLESS AUTHORIZED BY COURT ORDER, THE ABOVE DATES ARE FINAL. No additional evidence developed as a result of deviations from the above schedule will be admissible at trial unless justice requires.

19. OBJECTIONS to the above schedule must be made to the undersigned Judge within **15** days of the date of this Order or will be deemed waived.

20. It will be the responsibility of plaintiff or their counsel to notify opposing counsel and *pro se* parties of the existence of this scheduling order, if and when such counsel or *pro se* party appears of record.

21. The dates set out above do not relieve counsel or parties from timely compliance with discovery requests propounded pursuant to the West Virginia Rules of Civil Procedure.


22. ADDITIONAL JUDICIAL COMMENTS

Please do not fax to the Judge's Office. If you call and get permission to fax, please do not mail an additional copy to the Judge's Office. If you must or insist on faxing to the Clerk's Office, be mindful that the Trial Court Rules require you to have the original physically signed document or the certified copy of the original in your possession. See Rule 12.03(f)(2). Therefore, do not mail the original to the Clerk's Office. Also, the Clerk's Office may bill you for the copies faxed to its office.

If you file a motion that needs a ruling from the Court, please remember that the Trial Court Rules require you to provide a courtesy copy to the Presiding Judge. The parties are directed to provide a courtesy copy of all motions, responsive pleadings, supporting memoranda, and proposed orders to the Presiding Judge via email at Alison.Burke@courts.wv.gov, with a courtesy electronic copy to Samantha.Clarkson@courts.wv.gov, Tessa.Bowers@courts.wv.gov, and Business.Court@courts.wv.gov.

The Clerk is HEREBY DIRECTED TO transmit certified copies to counsel of record; the Resolution Judge Shawn D. Nines at 47 Church Street, Third Floor, Philippi, West Virginia, 26416; the Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, West Virginia 25401, and any *pro se* parties.

July 12, 2021
date of entry


JUDGE JENNIFER P. DENT
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION