

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

FILED  
2022 MAR 14 PM 3:53

**MOUNTAIN STATE PIPELINE & EXCAVATING, LLC,**

CATHY S. GATSON, CLERK  
KANAWHA COUNTY CIRCUIT COURT

**Plaintiff/Counterclaim Defendant/Crossclaimant,**

**vs.**

**Civil Action No.: 20-C-350**

**Presiding Judge Akers**

**Resolution Judge Farrell**

**SMITH/PACKETT MED-COM, LLC,  
a Virginia limited liability company, and  
sole Manager-Member of Defendants SP WV, LLC,**

**Defendant/Counterclaimant; and**

**SP WV, LLC,  
a Virginia Manager-Managed Limited Liability Company, and  
"Pass Through Entity" acting as the Sole Member of  
Defendant WV IL-AL Investors, LLC,**

**Defendant/Counterclaimant; and**

**WV IL-AL INVESTORS, LLC,  
a Virginia Manager-Managed Limited Liability Company,**

**Defendant/Counterclaimant; and**

**JARRETT CONSTRUCTION SERVICES, INC.,  
a West Virginia limited liability company,  
as Construction Manager at Risk,**

**Defendant/Counterclaimant; and**

**CARTER BANK & TRUST,**

**Defendant; and**

**JARRETT CONSTRUCTION SERVICES, INC.,**

**Third-Party Plaintiff,**

**Vs.**

**ECS MID-ATLANTIC, LLC,**

848-  
850

**Third-Party Defendant/Crossclaim Defendant.**

**ORDER DENYING MOUNTAIN STATE PIPELINE & EXCAVATING, LLC'S  
MOTION TO ENFORCE COURT'S (SECOND) SCHEDULING ORDER ENTERED  
JUNE 7, 2021 AND MARCH 17, 2022 MEDIATION – AS SCHEDULED AND  
GRANTING JOINT MOTION OF THE DEFENDANTS AND THIRD-PARTY  
DEFENDANT TO AMEND SCHEUDLING ORDER**

This matter came before the Court this \_\_\_\_\_ day of March 2022. The Plaintiff, Mountain State Pipeline & Excavating, LLC, by counsel, has filed Mountain State Pipeline & Excavating, LLC's Motion to Enforce Court's (Second) Scheduling Order Entered June 7, 2021 and March 17, 2022 Mediation – As Scheduled. The Plaintiff, by counsel, and the Third-Party Defendant/Crossclaim Defendant, ECS Mid-Atlantic, LLC, by counsel, have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

**FINDINGS OF FACT**

1. This matter surrounds the construction of a \$30 million project known as The Crossings Project in Kanawha County West Virginia, with contractors, subcontractors, engineers, design professionals, and other affiliated entities and individuals. *See* Pl's Mot., p. 4; *see also* Th. Pty. Def's Resp., p. 1; Compl. In May of 2020, the Complaint was filed in this civil action, and on June 18, 2020, a Third-Party Complaint was filed. *See* case file. On September 4, 2020, Judge Kaufman entered the first Scheduling Order in this civil action. *Id.*

2. On September 14, 2020, a Motion to Refer this matter to the Business Court Division was filed. *Id.* On December 29, 2020, the motion to refer was granted by the Chief Justice, and this civil action was assigned to Judge Young as Presiding Judge. *Id.*

3. Meanwhile, on December 8, 2020, the parties mediated with private mediator Charles Piccirillo. *See* Th. Pty. Def's Resp., p. 4-5.

4. On June 9, 2021, Judge Young entered the second Scheduling Order in this case. The Court notes this Scheduling Order remains in effect. *See* case file.

5. Throughout June to December 2021, discovery continued and parties were added. Third-Party Defendant proffered that on November 5, 2021 a Crossclaim was filed and on December 6, 2021, Third-Party Defendant Terradon was brought into this matter. *See* Th. Pty. Def's Resp., p. 7.

6. On December 31, 2021, Judge Young's term of Business Court ended and on January 5, 2022, the undersigned as assigned as Presiding Judge in this action. *See* case file.

7. On February 7, 2022, Defendants and Third-Party Defendant filed Joint Motion of the Defendants and Third-Party Defendant to Amend Scheduling Order, requesting the Court to "abrogate Judge Young's June 7, 2021 Scheduling Order, and enter a new Scheduling Order" due to discovery disputes delaying discovery, outstanding discovery still needed to be completed, including 24 witnesses that still need to be deposed, prior to dispositive motions and trial. *See* Defs' Mot to Amend Sched. Ord., p. 4-5.

8. On or about March 7, 2022, the instant motion was filed. Plaintiff, Mountain State Pipeline & Excavating, LLC, filed Mountain State Pipeline & Excavating, LLC's Motion to Enforce Court's (Second) Scheduling Order Entered June 7, 2021 and March 17, 2022 Mediation – As Scheduled, seeking to enforce the June 7, 2021 Scheduling Order, specifically with regard to another mediation session with Mr. Piccirillo, which it avers is scheduled for March 17, 2022. *See* Pl's Mot., p. 1-2, 10.



9. On or about March 9, 2022, Defendant and Third-Party Defendant ECS Mid-Atlantic, LLC, filed its Response to Mountain State Pipeline & Excavating, LLC's Motion to Enforce Court's (Second) Scheduling Order Entered June 7, 2021 and March 17, 2022 Mediation As Scheduled, arguing a new scheduling order is necessary for proper adjudication in this matter, and averring very limited discovery has been taken to date, the case is underdeveloped factually, and discovery in this matter needs substantial amounts of time to develop. *See* Th. Pty. Def's Resp., p. 2, 8, 13. ECS also denies that the March 17, 2022 mediation is actually scheduled. *Id.* at 9.

10. The Court finds the issue ripe for adjudication.

#### **CONCLUSIONS OF LAW**

The Court, having been assigned this case upon the expiration of Judge Young's term, in considering its own docket and calendar availability, the scheduled trial date of May 2022, the record, the pending motions, and the arguments of the parties, finds good cause is shown to VACATE Judge Young's June 9, 2021 Scheduling Order and enter a new scheduling order.

The Court considers the numerous pending motions, including motions for summary judgment which have not yet, and will need to be briefed, before becoming ripe for a decision by the undersigned. Additionally, the Court considers that ECS averred as an initial matter, there is a pending motion to dismiss and motion to compel arbitration, the adjudication of which will be "instrumental to determine how this civil action progresses". *See* Th. Pty. Def's Resp., p. 7. This Court agrees.

Furthermore, the Court considers the stage in the litigation. The Court considers Third-Party Defendant Terradon has not yet filed an Answer in this litigation. The Court considers that counsel for ECS has proffered that Terradon's Answer would effect depositions that are still

outstanding in this matter. The Court notes the parties disagree on who is at fault in causing discovery delays throughout 2021. Regardless, the Court finds that the parties are not ready for a May 2022 trial date, and are certainly not ready for any meaningful mediation on March 17, 2022. Further, with regard to mediation before trial, there seems to be a disagreement between the parties as to whether, in addition to the private mediator they have chosen, the parties will mediate before Resolution Judge Farrell. *Id.* at 9.

The Court considers that ECS has identified 24 witnesses which still need to be deposed, and cannot currently be deposed under the Court's current scheduling order, as the discovery period has closed. *See* Th. Pty. Def's Resp., p. 8-9. The Court considers that ECS has proffered that it has taken no expert depositions. *Id.* at 9.

The Court finds that mediation would be premature and not meaningful at this time. The Court further finds a May 2022 trial date to be unrealistic. For the reasons stated therein, the Court hereby VACATES the June 9, 2021 Scheduling Order in this matter and GRANTS the Joint Motion of the Defendants and Third-Party Defendant to Amend Scheduling Order. A scheduling conference will be held with the undersigned at a later date. Further, the Court DENIES Mountain State Pipeline & Excavating, LLC's Motion to Enforce Court's (Second) Scheduling Order Entered June 7, 2021 and March 17, 2022 Mediation – As Scheduled.

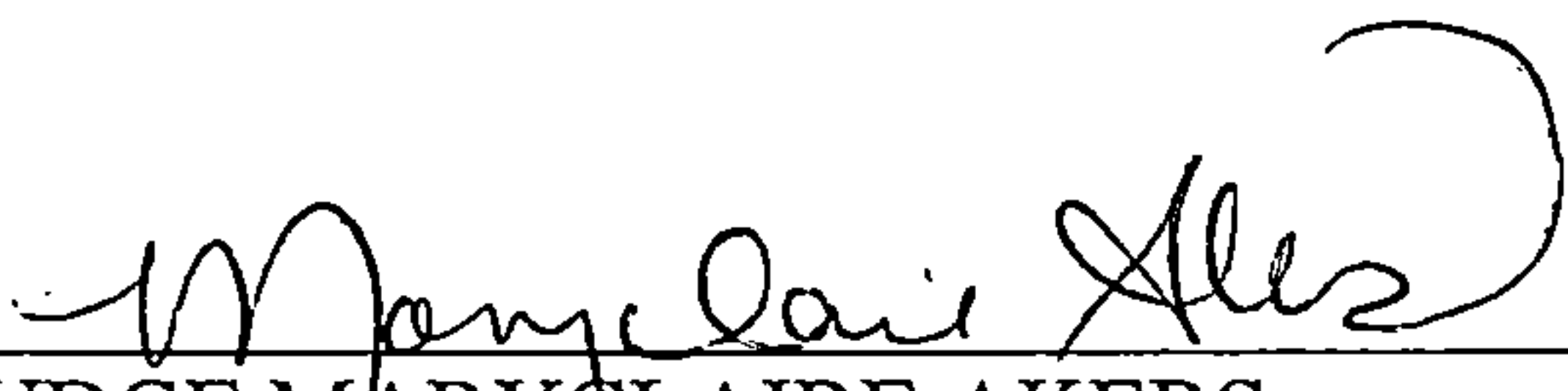
### **CONCLUSION**

Accordingly, it is hereby ADJUDGED and ORDERED that Mountain State Pipeline & Excavating, LLC's Motion to Enforce Court's (Second) Scheduling Order Entered June 7, 2021 and March 17, 2022 Mediation – As Scheduled is hereby DENIED. Further, it hereby ADJUDGED and ORDERED that Joint Motion of the Defendants and Third-Party Defendant to Amend Scheduling Order is hereby GRANTED.

The Court notes the objections and exceptions of the parties to any adverse ruling herein.

The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of record, and to the Business Court Central Office at West Virginia Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

DATED: March 14, 2022

  
JUDGE MARYCLAIRE AKERS  
JUDGE OF THE WEST VIRGINIA  
BUSINESS COURT DIVISION

3-18-22  
Date: 3-18-22  
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