

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

FILED
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CATHY S. GATSON, CLERK
KANAWHA COUNTY CIRCUIT COURT

**MOUNTAIN STATE
PIPELINE & EXCAVATING, LLC,
a West Virginia Limited Liability Company,**

Plaintiff/Counterclaim Defendant/Crossclaimant,

v.

**Civil Case 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 Defendant 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 Member-Managed Limited Liability Company,**

Defendant/Counterclaimant; and

**JARRETT CONSTRUCTION SERVICES, INC.
a West Virginia Limited Liability Company,
as Construction Manager at Risk,**

Defendants/Counterclaimant; and

CARTER BANK & TRUST,

Defendant; and

JARRETT CONSTRUCTION SERVICES, INC.,

Third-Party Plaintiff,

v.

ECS MID-ATLANTIC, LLC,

Third-Party Defendant/Crossclaim Defendant.

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1185

**RECOMMENDED ORDER REGARDING DEPOSITIONS
BEFORE AUGUST 18, 2023 DEADLINE**

By a previous Order, this Court appointed David K. Hendrickson as the Special Commissioner for the purpose of making recommendations to the Court concerning pending discovery disputes. Recently, this Court adopted the Special Commissioner's Recommended Order extending the Discovery Deadline, as to Depositions, to August 18, 2023. Since that order's entry, the Parties have scheduled all depositions before the August 18, 2023 deadline. However, the parties seek clarification on the procedures governing those depositions. Specifically, the parties have sought guidance to how deposition questioning by Plaintiff/Counterclaim-Defendant MOUNTAIN STATE PIPELINE & EXCAVATING, LLC ("MSPE") will be performed. All parties agree that Carl J. Roncaglione, Jr., Esq., represents certain, separate interests of MSPE as a Plaintiff, while J. Victor Flanagan, Esq., and Daniel J. Burns, Esq., represent other distinct and separate interest as Counterclaim-Defendant. Following discussions with all parties in-person, via phone, via email and via letter since the most recent Recommended Order, and, most importantly, the e-mails sent to the Special Commissioner on July 7, 2023 and a July 10, 2023 telephonic conference including all parties, the Special Commissioner offers these findings and recommendations:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Again, the Special Commissioner has been pleased with the efforts of the parties to schedule times, dates and places for the numerous depositions in this matter.
2. On July 7, 2023, Robert H. Sweeney, Jr., Esq., counsel for Defendant JARRETT CONSTRUCTION SERVICES, INC. ("JCSI"), first broached the subject of deposition procedures with the Special Commissioner via e-mail. Specifically, Mr. Sweeney sought clarification as to how Mr. Roncaglione and Mr. Burns or Mr. Flanagan would proceed in depositions, considering their roles addressed above. Evan Aldridge, Esq., counsel for ECS MID-ATLANTIC, LLC ("ECS"), responded via e-mail and offered his client's similar concern. Last, Plaintiff MSPE, represented in

specific interests as a counterclaim defendant by Daniel Burns and Vic Flanagan, offered their counter position to those of JSCI and ECS.

3. In sum, the parties sought clarification in how MSPE's separate and distinct counsel, with Mr. Roncaglione representing the Plaintiff MSPE and Mr. Burns and Mr. Flanagan representing MSPE as counterclaim Defendant in this matter, should participate in the forthcoming depositions.

4. Moreover, the parties were heard briefly on this topic on July 10, 2023. First, after an in-person hearing on a separate discovery issue in this matter, Mr. Roncaglione and Mr. Aldridge briefly addressed this issue to the Special Commissioner. Later that same day, the Special Commissioner hosted a teleconference involving all parties where their perspectives and arguments were heard as to the deposition procedures going forward.

5. The process of depositions, including the ability for multiple attorneys to represent a single client and ask questions, is generally consistent across all U.S. jurisdictions, including West Virginia, subject to any specific state rules or court procedures.

6. The federal rules governing depositions are outlined in the Federal Rules of Civil Procedure (FRCP), specifically Rule 30. States often model their rules on the FRCP, though there may be local variations.

7. In West Virginia, one can refer to the West Virginia Rules of Civil Procedure. Particularly, Rule 30 speaks about depositions, but it does not limit the number of attorneys who can ask questions. Therefore, it is reasonable to conclude that two attorneys can ask deposition questions if they are representing the same client but have distinct, separate interests.

8. However, it is also essential to note the West Virginia Rules of Professional Conduct also affect how attorneys conduct themselves during a deposition, particularly Rule 1.7 regarding conflicts of interest.

9. Given the silence of, first, the West Virginia Rules and Case Law, and, second, the applicable federal rules on this specific issue, it would generally be governed by the West Virginia

Rules of Civil Procedure, West Virginia Rules of Professional Conduct and this Court's discretion. Attorneys should avoid behaviors that might be seen as obstructive, dilatory, or harassing, and should generally conduct depositions in a manner that promotes the "just, speedy, and inexpensive determination" of the case. *See* W.Va. R. Civ. P. 1.

10. The Findings set forth above have guided my Recommendations in this matter.

RECOMMENDATIONS

11. The Special Commissioner has considered the arguments and rationale enunciated by all parties on this issue. The Special Commissioner has also considered judicial economy, fairness and available law on this issue when crafting this recommended order. Therefore, upon consideration of such, this Special Commissioner **RECOMMENDS** that, as to these depositions before the August 18, 2023 deadline only, that both counsel representing MSPE as Plaintiff (Mr. Roncaglione) and as Counterclaim Defendant (Mr. Flanagan and Mr. Burns) can **BOTH** depose any witness under the applicable rules of civil procedure and all applicable law.

12. This Special Commissioner **RECOMMENDS THAT** all parties only ask questions that are (1) non-duplicative; (2) do not piggyback or follow-up already answered questions; and (3) specifically related to the interests in which they represent their client. In sum, it is **RECOMMENDED** this Court retain any and all powers to address repetition if brought by any party.


13. This Special Commissioners **RECOMMENDS** that all parties, if they believe objectionable questioning occurs at any deposition, put their objection in the record and allow the deposition to continue, all for Judge Akers's sole review prior to trial, or if assigned to the Special Commissioner.

14. Last, this Special Commissioner **RECOMMENDS** that this order **SPECIFICALLY AND SOLELY** applies to the depositions related to the August 18, 2023 deadline. This Recommended Order, if entered, **WILL NOT APPLY** to any unrelated discovery

WHEREFORE, the Court adopts the recommendations of the Special Commissioner. A copy of this “RECOMMENDED ORDER REGARDING DEPOSITIONS BEFORE AUGUST 18, 2023 DEADLINE” is being forwarded to all counsel by email and U.S. regular mail.

IT IS SO ORDERED, this 11th day of July 2023.

ACCEPTED BY:



HON. MARYCLAIRE AKERS, JUDGE

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