

21-BCD-6

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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

Petitioner and Counterclaim Defendant,

v.

**Civil Action No. 20-C-142(B)
(Hon. Paul M. Blake, Jr.)**

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

**Respondents, Counterclaim Plaintiffs and
Third-Party Plaintiffs,**

v.

**DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,**

Third-Party Defendants.

To: THE HONORABLE CHIEF JUSTICE EVAN JENKINS

**RESPONSE OF FRASURE CREEK MINING, LLC, DEEP WATER
RESOURCES, LLC, AND NEW TRINITY COAL, INC. TO RESPONDENTS,
COUNTERCLAIM PLAINTIFFS AND THIRD-PARTY PLAINTIFFS' MOTION TO
REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION**

Now comes Petitioner/Counterclaim Defendant, Frasure Creek Mining, LLC ("Frasure Creek"), Third-Party Defendant, Deep Water Resources, LLC ("Deep Water"), and Third-Party Defendant, New Trinity Coal, Inc. ("New Trinity") by and through their undersigned counsel, and in response to Respondents, Counterclaim Plaintiffs and Third-Party Plaintiffs' Motion to Refer to the West Virginia Business Court Division ("Motion to Refer") state that the same should be

denied because it is premature and the only claims between the proper parties to this litigation do not rise to the level of a business dispute warranting referral to the Business Court Division.

At first blush, the case as presented by Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (collectively, the “Pocahontas Entities”) appears to fit within the definition of “Business Litigation” as set forth in West Virginia Trial Court Rule 29.04. However, most of the claims currently pending in the underlying litigation are not proper and are the subject of pending motions to dismiss before the Circuit Court.¹ Indeed, all of the claims against Deep Water and New Trinity are subject to a motion to dismiss because the Pocahontas Entities improperly joined Deep Water and New Trinity as third-party defendants despite making no claim that they may be liable to the Pocahontas Entities for any of the claims made by Frasure Creek. The Third-Party Complaint fails as a matter of law because it does not meet the requirements of *West Virginia Rules of Civil Procedure* Rule 14. See Deep Water Resources, LLC and New Trinity Coal, Inc.’s Motion to Dismiss Third-Party Complaint attached hereto as Exhibit 1.

Because Deep Water and New Trinity are not proper parties, the only potential remaining claims are the counterclaims against Frasure Creek. Some of the claims against Frasure Creek, however, are also not appropriate. See Frasure Creek Mining, LLC’s Motion to Dismiss Counts 1 and 2 of the Counterclaim attached hereto as Exhibit 2. The Pocahontas Entities are attempting to bind Frasure Creek to the terms of a coal lease and its accompanying arbitration provision. Frasure Creek is not a signatory to the lease and never agreed to resolve any disputes via

¹ Frasure Creek and the Pocahontas Entities resolved, by agreement, the issues pending in the *Verified Petition for Preliminary and Permanent Injunction* with respect to the preliminary injunction. Given the agreement, a hearing on the merits for a permanent injunction may unnecessary.

arbitration. Despite the claim of the Pocahontas Entities, the only procedurally proper claims² are neither exceedingly complex nor require industry-specific knowledge. Rather, the remaining claims to which Frasure Creek did not move for dismissal are for trespass and a declaratory judgment action to pierce the corporate veil that Frasure Creek, Deep Water, and New Trinity are alter egos. These remaining claims are not, as the Pocahontas Entities suggest, “a determination of rights, duties, and obligations of the parties under the Lease, a commercial transaction governing the relationship between” the Pocahontas Entities and Frasure Creek. *See* Motion to Refer at p. 4. A trespass claim is not the type of claim that requires specialized knowledge and does not involve a commercial transaction between the Pocahontas Entities and Frasure Creek. And, while a declaratory judgment action to determine whether Frasure Creek is the alter ego of Deep Water and New Trinity does involve some business consideration, this claim does not relate to the relationship between the Pocahontas Entities and Frasure Creek. Rather, it involves the relationship of Frasure Creek to Deep Water and new Trinity. Depending on the nature of a case, consideration of whether to pierce the corporate veil may touch on the definition of “Business Litigation” but it does not in this instance. A decision whether to pierce the corporate veil as it is presented in this case can be made by the circuit court and need not involve the specialized knowledge of the Business Court Division.

The Pocahontas Entities are correct that the claims Frasure Creek believe are appropriate to

² Frasure Creek believes it will succeed on the merits of the remaining claims against in Counts 3 and 5, but did not move to dismiss them pursuant to Rule 12 of the West Virginia Rules of Civil Procedure as discovery would be required before a dismissal is warranted. In its answer to these remaining claims, Frasure Creek made a counterclaim against the Pocahontas Entities for damages for tortious interference with its permits issued by the West Virginia Department of Environmental Protection. This claim does not require specialized knowledge or treatment.

survive the initial motions to dismiss are not expressly excluded from the definition of “Business Litigation.” However, the mere fact that the parties to litigation are businesses does not justify referral to the Business Court. The principal claims must “involve matters of significance to the transactions, operations, or governance between business entities.” W.Va. Tr. Ct. R. 29.04(a)(1). Here, that does not exist. At a minimum, the Motion to Refer should be held in abeyance until the Circuit Court has an opportunity to rule on the pending motions to dismiss so that an analysis can be performed on the surviving claims and whether those are appropriate for referral.

WHEREFORE, Frasure Creek Mining, LLC, Deep Water Resources, LLC, and New Trinity Coal, Inc., respectfully request that the Motion to Refer be DENIED in its entirety or held in abeyance until the Circuit Court has had an appropriate opportunity to rule on the pending motions to dismiss.

Respectfully submitted,

**FRASURE CREEK MINING, LLC,
DEEP WATER RESOURCES, LLC
NEW TRINITY COAL, INC.**

By Counsel.



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EXHIBIT 1

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

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

Petitioner and Counterclaim Defendant,

v.

**Civil Action No. 20-C-142(B)
(Hon. Paul M. Blake, Jr.)**

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

**Respondents, Counterclaim Plaintiffs and
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v.

**DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,**

Third-Party Defendants.

**DEEP WATER RESOURCES, LLC AND NEW TRINITY COAL, INC.'s
MOTION TO DISMISS THIRD-PARTY COMPLAINT**

Now come Deep Water Resources, LLC, ("Deep Water") and New Trinity Coal, Inc. ("NTCI") (collectively, "Third-Party Defendants"), by and through their undersigned counsel and pursuant to Rules 12 and 14 of the West Virginia Rules of Civil Procedure hereby move this Court to dismiss the Third-Party Complaint. Because Third-Party Plaintiffs, Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (collectively, the "Pocahontas Entities") have failed to state a claim such that the Third-Party Defendants are or may be liable as required under Rule 14 of

the West Virginia Rules of Civil Procedure, the Motion should be granted. In further support of this Motion, Third-Party Defendants state as follows:

FACTS

Plaintiff and Third-Party Defendants are affiliated entities. NTCI is the parent of Plaintiff, Frasure Creek Mining, LLC (“Frasure Creek”) and Deep Water. Deep Water is the Lessee in a coal lease dated September 1, 2017, with the Pocahontas Entities with respect to certain land in the Page/Kincaid area of Fayette County, West Virginia (the “Lease”). NTCI is a Guarantor under Lease. Frasure Creek is not a party to the Lease. It is, however, the operator and permit holder with the West Virginia Department of Environmental Protection (“WVDEP”).

On December 30, 2020, Plaintiff filed its Verified Petition for Preliminary and Permanent Injunction (the “Petition”) against the Pocahontas Entities resulting from their interference with Frasure Creek’s reclamation obligations to the State of West Virginia regarding lands covering the surface or minerals owned by the Pocahontas Entities. Succinctly, Frasure Creek, as permittee and operator, had certain reclamation obligations arising out of its coal operations on the property at issue. Because the Pocahontas Entities blocked and would not permit access to the so that Frasure Creek could conduct the reclamation activities, Frasure Creek was forced to file the Petition.

As this Court is aware, on January 25, 2021, Frasure Creek advised the Court that the issues giving rise to the Petition were resolved and that there was no longer a need for a preliminary injunction hearing. On January 25, 2021, the Pocahontas Entities served their

Counterclaim and Third-Party Complaint.¹ The Pocahontas Entities ask this Court to determine that NTCI and Frasure Creek are bound by the Lease and the arbitration provision set forth therein and that certain of the Pocahontas Entities' potential claims against Frasure Creek and NTCI are subject to arbitration. Alternatively, the Pocahontas Entities ask this Court to determine that if NTCI and Frasure Creek are not bound by the Lease and its arbitration provision that: (a) New Trinity is required to transfer ownership of the coal preparation plant; (2) Frasure Creek is required to transfer the permits to the Pocahontas Entities; and (3) NTCI and Frasure Creek are liable to the Pocahontas Entities for an alleged trespass. Finally, the Pocahontas Entities seek a determination that NTCI, Frasure Creek, and Deep Water are alter egos under the Lease.

ARGUMENT

Frasure Creek's Petition sought only injunctive relief and did not seek any monetary damages against the Pocahontas Entities. The Third-Party Complaint makes no reference to any damages or other claim for which the Pocahontas Entities claim that NTCI or Deep Water may be liable to the Pocahontas Entities for all or part of the claims against the Pocahontas Entities. Rule 14 of the Rules of Civil Procedure states in pertinent part:

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action *who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff* ...

W. Va. R. Civ. P. 14(a).

¹ This Motion addresses only the Third-Party Complaint. Should this Court deny this Motion, the Third-Party Defendants reserve the right to file answers and assert all other defenses and claims related to the Third-Party Complaint, including but not limited to any additional bases for dismissal under Rule 12 of the West Virginia Rules of Civil Procedure.

According to the W. Va. Supreme Court of Appeals:

... we hold that a third-party complaint filed pursuant to Rule 14(a) of the West Virginia Rules of Civil Procedure is proper only when the party to be joined is or may be liable to the third-party plaintiff for all or part of the original plaintiff's claim(s) against the third-party plaintiff. A third-party complaint is not proper merely because it arises from the same transaction or occurrence that is the subject matter of the original plaintiff's complaint against the defendant.

Braxton Lumber Co., Inc. v. Lloyd's Inc., 238 W.Va. 177, 181–82, 793 S.E.2d 341, 345–46 (2016).

Here, the Pocahontas Entities make no attempt to articulate a basis for joinder under Rule 14 of the West Virginia Rules of Civil Procedure. Frasure Creek and the Pocahontas Entities have reached an agreement with respect to access to the properties. Unless and until the parties change their current agreement, the claims in Frasure Creek's Petition are moot. More importantly, the claims asserted in the Third-Party Complaint do not relate to any obligation/liability on the part of the Pocahontas Entities to cease and desist from interfering with Frasure Creek's efforts to discharge its reclamation obligations to the State of West Virginia. To the contrary, the Third-Party Complaint presents claims for which the Pocahontas Entities seek damages directly from the Third-Party Defendants.

Simply stated, there is no claim in the Petition for which the Third-Party Defendants are or may be liable to the Pocahontas Entities for Frasure Creek's claims. The Pocahontas Entities have failed to state any claim against Deep Water and NTCI which satisfies Rule 14 of the West Virginia Rules of Civil Procedure. To the extent that the Pocahontas Entities seek direct relief from the Third-Party Defendants, this civil action is not the proper mechanism to do so. Therefore, the Third-Party Complaint must be dismissed.

WHEREFORE, the Third-Party Defendants respectfully request this Honorable Court to GRANT their motion, enter an ORDER dismissing the Third-Party Complaint, and award any

further and general relief as this Court may deem appropriate.

Respectfully submitted,

**Deep Water Resources, LLC, and
New Trinity Coal, Inc.,**

By Counsel.



R. Scott Long, Esquire (# 2238)
David F. Nelson, Esquire (#5754)
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Also counsel for Frasure Creek Mining, LLC.

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**DEEP WATER RESOURCES, LLC,
a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,**

Third-Party Defendants.

CERTIFICATE OF SERVICE

I, Stephen E. Hastings, counsel for Frasure Creek Mining, LLC, Deep Water Resources, LLC, and New Trinity Coal, Inc. do hereby certify that on the 25TH day of February, 2021, a true and exact copy of the foregoing *“Deep Water Resources, LLC and New Trinity Coal, Inc.’s Motion to Dismiss Third-Party Complaint”* was served via United States Mail, postage pre-paid, upon the following counsel of record via United States Mail, postage-prepaid:

J. Thomas Lane, Esquire
J. Mark Adkins, Esquire
Charles B. Dollison, Esquire
BOWLES RICE, LLP
600 Quarrier Street
Charleston, West Virginia 25301
*Counsel for Pocahontas Land, LLC and
Pocahontas Surface Interests, LLC*

A handwritten signature in dark ink, appearing to read 'S. Hastings', is positioned above a horizontal line.

Stephen E. Hastings, Esquire (WVSB # 9065)

EXHIBIT 2

IN THE CIRCUIT COURT OF FAYETTE COUNTY, WEST VIRGINIA

**FRASURE CREEK MINING, LLC,
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a West Virginia limited liability company, and
NEW TRINITY COAL, INC.,**

Third-Party Defendants.

**FRASURE CREEK MINING, LLC'S MOTION TO DISMISS
COUNTS 1 AND 2 OF THE COUNTERCLAIM**

Now comes Plaintiff, Frasure Creek Mining, LLC ("Frasure Creek"), by and through its undersigned counsel, and pursuant to Rule 12(b)(6) of the West Virginia Rules of Civil Procedure hereby moves this Court to dismiss Counts 1 and 2 of the Counterclaim filed against it by Pocahontas Land, LLC and Pocahontas Surface Interests, LLC (collectively, the "Pocahontas Entities"). Frasure Creek is not a signatory to the applicable lease, which includes an arbitration provision, and is not subject to the terms and conditions thereof. In further support of this Motion,

Frasure Creek states as follows:

The Pocahontas Entities ask this Court for a declaration that Frasure Creek is bound by the terms and arbitration provisions contained in a coal lease dated September 1, 2017, between the Pocahontas Entities and Deep Water Mining, LLC (“Deep Water”) (the “Lease”). The Lease relates to the mining of coal in the Page/Kincaid area of Fayette County, West Virginia (the “Lease”). Frasure Creek is not a party to the Lease. Frasure Creek is an affiliated entity of Deep Water and is the operator and permit holder with the West Virginia Department of Environmental Protection (“WVDEP”) with respect to the mining of the coal covered by the Lease.

As a non-signatory to the Lease, Frasure Creek is not bound by the arbitration clause included within the Lease. See e.g. *Chesapeake Appalachia, L.L.C. v. Hickman*, 236 W.Va. 421, 435, 781 S.E.2d 198, 212 (2015) (recognizing that “a party cannot be forced to submit to arbitration any dispute which he or she has not agreed to submit. A court may submit to arbitration ‘those disputes—but only those disputes—that the parties have agreed to submit to arbitration’”) (quoting *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995)). See also *Richmond Am. Homes*, 228 W.Va. 125, 129, 717 S.E.2d 909, 913 (2011).

This Court cannot require Frasure Creek to participate in an arbitration where it has not agreed to submit to arbitration. Moreover, although it is unnecessary for this Court to analyze the scope of the arbitration provision in order to conclude that Frasure Creek cannot be forced to arbitrate claims it did not agree to arbitrate, a simple reading of the arbitration provision makes clear that the arbitration provision does not apply to Frasure Creek. As the Pocahontas Entities have correctly pointed out, Section 32.1 of the Lease applies to disputes between “Lessors” and “Lessee.” See Counterclaim ¶¶ 18. The Lease defines “Lessors” as the Pocahontas Entities and

“Lessee” as Deep Water. The Lease also contains a Guaranty provision and defines “Guarantor” as New Trinity Coal, Inc. (“NTCI”). The applicable arbitration provision applies to disputes between the Pocahontas Entities and Deep Water, not to any disputes involving Frasure Creek or NTCI. However, as stated above, the Court need not reach a conclusion as to the scope of the arbitration agreement to determine that Frasure Creek cannot be subject to it because Frasure Creek is not a signatory to the Lease. Therefore, Count 1 of the Lease should be dismissed.

For the same reasons, Count 2 of the Counterclaim should be dismissed. The Pocahontas Entities alternatively suggest that even if Frasure Creek is not bound by the arbitration agreement, the Lease provisions should still be enforced against Frasure Creek even though it is a non-party. This claim, however, has no merit as with the arbitration provision. The obligation to transfer permits is limited to permits held by Lessee (i.e., Deep Water). The Pocahontas Entities apparently agree with this singular proposition. *See* Counterclaim ¶¶ 13 and 16. Frasure Creek never agreed that it would transfer permits. Nor did Deep Water agree that permits held by another entity would be transferred. In fact, the Pocahontas Entities did not require, and the Lease does not contain, any language that requires the transfer of permits owned by any entity other than Deep Water.

The Pocahontas Entities were scriveners of the Lease and are trying to add in language to the Lease that does not exist. They are asking this Court to compel Frasure Creek to be bound by the terms of a Lease, where the Pocahontas Entities failed to insist upon these requirements when they agreed to Lease the property in 2017. The Pocahontas Entities knew that Frasure Creek held the permits long before the Lease was entered into by the Pocahontas Entities and Deep Water. In fact, it has been no secret and a matter of public record that Frasure Creek has been a permit holder

and operator on the property at issue since at least 2010. The Pocahontas Entities cannot claim that NTCI, Deep Water, and Frasure Creek were involved in a scheme to trick them and avoid liability by entering into the Lease in the manner in which it exists. Instead, by making the alter ego arguments, the Pocahontas Entities are attempting to avoid being bound by the limitations set forth in the Lease they negotiated with Deep Water. Indeed, the Lease specifically references different obligations for Deep Water and NTCI and the Pocahontas Entities should be estopped from suggesting otherwise.¹

Further, the Pocahontas Entities cannot show that a transfer of the permits is even possible. The Pocahontas Entities have never provided, for themselves or their designee, the necessary information to allow the transfer of the permits. Nor has any potential operator. Specifically, the Pocahontas Entities or their designee must bring forth the appropriate bonding information to allow a transfer of the permits. To date, Frasure Creek has not been provided with any bonding information which would be a prerequisite to the transfer of the permits with the WVDEP. Therefore, irrespective of any other legal basis supporting the dismissal of Count 2 of the Counterclaim, a claim that Frasure Creek must do something which is technically impossible cannot be considered by this Court.² Count 2 is premature and by the very definition is a claim upon which relief cannot be granted.

Finally, the permits are currently in revoked status with the WVDEP. This is due, in

¹ A corporate structure and relationship wherein one entity holds the lease and another entity is the operator is commonplace.

² The same reasoning would apply if Frasure Creek were a party to the arbitration agreement. Frasure Creek cannot be compelled by a court or arbitration panel to do something that is impossible because the Pocahontas Entities have not brought forth the necessary information and bonding requirements to effectuate the transfer of the permits.

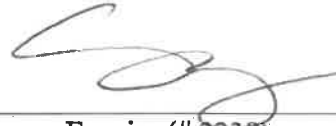
whole or part, to the Pocahontas Entities' conduct in blocking access to the property at issue.

WHEREFORE, Frasure Creek Mining, LLC, respectfully requests the Court to GRANT its motion, enter an ORDER dismissing Counts 1 and 2 of the Counterclaim, and to award any further and general relief as this Court may deem appropriate.

Respectfully submitted,

FRASURE CREEK MINING, LLC,

By Counsel.



R. Scott Long, Esquire (# 2238)

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New Trinity Coal, Inc.*

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J. Thomas Lane, Esquire
J. Mark Adkins, Esquire
Charles B. Dollison, Esquire
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*Counsel for Pocahontas Land, LLC and
Pocahontas Surface Interests, LLC*



Stephen E. Hastings, Esquire (WVSB # 9065)

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CERTIFICATE OF SERVICE

I, Stephen E. Hastings, counsel for Frasure Creek Mining, LLC, Deep Water Resources, LLC, and New Trinity Coal, Inc. do hereby certify that on the **1ST day of March, 2021**, a true and exact copy of the foregoing **“RESPONSE OF FRASURE CREEK MINING, LLC, DEEP WATER RESOURCES, LLC, AND NEW TRINITY COAL, INC. TO RESPONDENTS, COUNTERCLAIM PLAINTIFFS AND THIRD-PARTY PLAINTIFFS’ MOTION TO REFER TO THE WEST VIRGINIA BUSINESS COURT DIVISION”** was served via United States Mail, postage pre-paid, upon the following counsel of record via United States Mail along with a courtesy copy sent via electronic mail:

J. Thomas Lane, Esquire
J. Mark Adkins, Esquire
Charles B. Dollison, Esquire
BOWLES RICE, LLP
600 Quarrier Street
Charleston, West Virginia 25301



Stephen E. Hastings, Esquire (WVSB # 9065)