

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

**M & D RENTAL CORPORATION,**  
a Foreign Corporation,  
Plaintiff,

VS.

Civil Action No. 15-C-38  
Presiding Judge: Thomas C Evans, III  
Resolution Judges: Christopher C. Wilkes  
Russell M. Clawges, Jr.

**FARMERS & MERCHANTS BANK AND TRUST, INC.,  
DEALERSHIP MANAGEMENT COMPANY, LLC,  
WINCHESTER HOSPITALITY, LLC,  
UNITED BANKSHARES, INC.,  
BGR ASSOCIATES, LLC,  
UNITED BANK, INC.,  
MID-ATLANTIC GROUP, LLC,  
RJCPTP, LLC,  
and PATTHOFF FAMILY, LLC,**  
Defendants.

BERKELEY COUNTY CIRCUIT COURT  
2015 AUG 10 AM 9:04  
VIRGINIA L. SHERIDAN, CLERK

**SCHEDULING ORDER**

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:** July 26, 2016 at 9:00 a.m.

  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 4 days.

2. **PRE-TRIAL CONFERENCE DATE:** July 1, 2016 at 1:00 p.m.

At which time lead counsel must appear. 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:

- |                          |   |
|--------------------------|---|
| 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  |   |
| 6. List of Witnesses     | 10. Proposed Voir Dire                                      |

Parties are to confer and provide a joint Instruction Charge to the Court.

#### **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 at least 5 work days prior to the pre-trial conference. By the time of the pre-trial 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.

#### **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.

#### **JURY INSTRUCTIONS**

The Court desires that all counsel read all parties' proposed jury instructions prior to the conference and be prepared to discuss them at the conference. The Court will not be inclined to receive instructions after the pre-trial conference.

- |                              |             |                   |
|------------------------------|-------------|-------------------|
| 3. <b>EXPERTS DISCLOSED:</b> | Plaintiff:  | October 1, 2015   |
|                              | Defendants: | November 15, 2015 |

A. 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).

B. The admissibility of expert testimony is subject to Rule 104(a) of the Rules of Evidence. Objection to the admissibility of expert testimony will be deemed waived if not objected to by a motion *in limine* filed at least 10 days prior to the pre-trial and a hearing thereon set with the Court prior to first day of trial.

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

4. **EXPERT EVIDENTIARY INSPECTIONS:** Requests for Inspection shall be filed/served September 15, 2015

All medical examinations by expert physicians must be completed by this date. Medical examinations in accordance with WVRCP 35 are granted, but subject to court control. Any modification to the standard medical examination of the plaintiff must be made by plaintiff's counsel in writing and noticed for hearing prior to the examination. Any continuing medical treatment to be admissible at trial must be disclosed prior to the discovery completion date.

5. **DISPOSITIVE MOTIONS:** WVRCP 12(b) and 56 motions shall be filed at least 60 days prior to the pre-trial conference.

6. **AMENDMENTS, THIRD PARTY PLEADINGS, AND OTHER MATTERS OF JOINDER OF PARTIES/CLAIMS NO LATER THAN:** September 30, 2015

7. **FINAL WITNESS LIST EXCHANGED:** February 10, 2016  
This is to be a *bona fide* list of intended trial witnesses.

8. **DISCOVERY COMPLETION DATE:** April 12, 2016

All requests must be filed at least 35 days in advance of this date so that all responses may be completed by this date. All trial depositions must be completed at least 5 days before the pre-trial.

**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.

9. **MOTIONS IN LIMINE MUST BE FILED AT LEAST 10 DAYS BEFORE PRE-TRIAL AND WILL BE RULED UPON AT THE PRE-TRIAL CONFERENCE.**

10. **MEDIATION COMPLETION DATE: May 15, 2016**

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 Christopher C. Wilkes and Russell M. Clawges, Jr. as Resolution Judges and shall be scheduled and concluded on or before May 15, 2016, unless such deadline is otherwise extended by the Presiding Judge for good cause shown. The Resolution Judges shall contact the parties 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@courtwv.gov.

11. **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.

12. **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.

13. **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.

14. 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.

15. 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.

The Clerk shall transmit certified copies to the Presiding Judge Thomas C. Evans, III; the Resolution Judges Christopher C. Wilkes and Russell M. Clawges, Jr.; the Business Court Division Central Office at Berkeley County Judicial Center, 380 W. South Street, Suite 2100, Martinsburg, West Virginia; Judge H. Charles Carl, III; the following counsel of record who attended the Scheduling Conference: Eric Black of the Law Office of Eric S. Black, Robert Glenn of Jackson Kelly, Peter A. Pentony of the Law Offices of F. Samuel Byrer, and Austin M. Hovermale of Steptoe and Johnson, and pro se parties.

ENTERED: \_\_\_\_\_

7/14/15

*Thomas C. Evans III*

The Honorable Thomas C. Evans, III  
Presiding Judge  
Business Court Division

A TRUE COPY  
ATTEST

Virginia M. Sine  
Clerk Circuit Court

By: \_\_\_\_\_

*J. Cooper*

Deputy Clerk