

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

**SOARING EAGLE LODGE MASTER
ASSOCIATION, INC., a West Virginia non-
profit corporation; and SOARING EAGLE
LODGE ASSOCIATION, INC., a West
Virginia non-profit corporation,**

Plaintiffs,

v.

**SOARING EAGLE DEVELOPMENT
COMPANY, LLC, a West Virginia limited
liability company; GBBN ARCHITECTS,
INC., an Ohio corporation; and BRANCH
& ASSOCIATES, INC., a Virginia
corporation,**

Defendants,

and

**SOARING EAGLE DEVELOPMENT
COMPANY, LLC, a West Virginia limited
liability company; and BRANCH &
ASSOCIATES, INC., a Virginia
corporation,**

Third-Party Plaintiffs,

v.

**TRI-STATE ROOFING & SHEET METAL
COMPANY OF WEST VIRGINIA, a/k/a
TRI-STATE ROOFING & SHEET METAL
CO., a West Virginia corporation;
APPLIED MECHANICAL SYSTEMS,
INC., an Ohio corporation; RICHARDSON
AND MARCH CARPENTRY, LLC, A West
Virginia limited liability company; and
EASTCOAST SIDING, INC., a Maryland
corporation, and O.C. CLUSS LUMBER
COMPANY, a Pennsylvania corporation,**

Third-Party Defendants,

**FILED
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DEC 11 PM 4:44
CATHY S. HANCOCK, CLERK
KANAWHA COUNTY CIRCUIT COURT**

CIVIL ACTION NO.: 15-C-2202

Presiding Judge: Tabit

Resolution Judge: Matish

And

**O.C. CLUSS LUMBER COMPANY, a
Pennsylvania corporation,**

Fourth-Party Plaintiff,

v.

**GAF MATERIALS CORPORATION, a
New Jersey corporation, and FIBERON,
LLC, a North Carolina Limited Liability
Company,**

Fourth-Party Defendants.

**ORDER GRANTING
DEFENDANT/THIRD-PARTY PLAINTIFF, BRANCH & ASSOCIATES, INC.'S,
MOTION TO AMEND SCHEDULING ORDER, VACATING SCHEDULING ORDER
ENTERED MAY 23, 2017, AND SETTING NEW SCHEDULING ORDER DATES**

At a telephonic hearing held on November 30, 2017, *Defendant/Third-Party Plaintiff, Branch & Associates, Inc.'s Motion to Amend Scheduling Order*, filed on November 8, 2017, was heard.

The court having reviewed said Motion finds that good cause exists to **GRANT** said Motion to Amend the Scheduling Order entered May 23, 2017, and hereby **VACATES** said May 23, 2017 Scheduling Order, and hereby **ORDERS** a new Scheduling Order as follows:

1. **TRIAL DATE: 11/26/2018**

 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 6-7 days.

2. **PRE-TRIAL CONFERENCE DATE: 11/7/2018 at 11:00 a.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 (Disk as well as hard copy shall be provided to the Court.) |
| 4. Proposed Stipulations | 10. Proposed Voir Dire |
| 5. Schedule of Exhibits | |
| 6. List of Witnesses | |

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. EXPERTS DISCLOSED:

Plaintiffs:	5/13/2018
Defendants:	6/13/2018
Third Party Defendants:	7/13/2018

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 experts 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. MEDICAL EXAMINATIONS AND
EXPERT EVIDENTIARY INSPECTIONS: N/A**

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: 9/7/2018

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 NO LATER THAN: 2/2/2018**

7. FINAL WITNESS LIST EXCHANGED: 6/13/2018

This is to be a *bona fide* list of intended trial witnesses.

8. DISCOVERY COMPLETION DATE: 9/10/2018

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/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. In addition to the private mediation being conducted between the parties, by order of this Court, mediation or other form of dispute resolution shall also be conducted by the Honorable James A. Matish as Resolution Judge and shall be scheduled and concluded on or before 9/28/2018, unless such deadline is otherwise extended by the Presiding Judge for good cause shown. The Resolution Judge 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 at Business.Court@courts.wv.gov and the Resolution Judge via Jennifer.Watson@courts.wv.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 counsel of record; the Presiding Judge **Joanna Tabit**; the Resolution Judge **James A. Matish**; the Business Court Division Central Office, Berkeley County Judicial Center, 380 W. South Street, Martinsburg, West Virginia 25401, and any *pro se* parties.

ENTERED this 11th day of December 2017.

Joanna A. Tabit
Honorable Joanna Tabit, Judge

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STATE OF WEST VIRGINIA
COUNTY OF KANAWHA, SS
I, CATHY S. GATSON, CLERK OF CIRCUIT COURT OF SAID COUNTY
AND IN SAID STATE, DO HEREBY CERTIFY THAT THE FOREGOING
IS A TRUE COPY FROM THE RECORDS OF SAID COURT
GIVEN UNDER MY HAND AND SEAL OF SAID COURT THIS 12
DAY OF Dec 2017
Cathy S. Gatson CLERK
CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

Document No. 4242

Date: 12/21/17
Certified copies sent to:
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By: _____ (please indicate)
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Other disciplines accomplished:
R. Allen
Deputy Circuit Clerk

Judge Tabit
Judge Matish
Bus. Ct
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JB MF
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