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CLERK OF COURT
WETZEL COUNTY, WEST VIRGINIA

IN CIRCUIT COURT OF WETZEL COUNTY WEST VIRGINIA
BUSINESS COURT DIVISION

MARKWEST LIBERTY MIDSTREAM &
RESOURCES, L.L.C.

Plaintiff,

v.

Case No. 16-C-82

Honorable H. Charles Carl, III

J.F. ALLEN COMPANY; AMEC FOSTER
WHEELER ENVIRONMENT &
INFRASTRUCTURE, INC.; REDSTONE
INTERNATIONAL INC.; COASTAL
DRILLING, EAST, LLC; and CIVIL &
ENVIRONMENTAL CONSULTANTS, INC.,

Defendants,

and

J.F. ALLEN COMPANY,

Defendant/Third-Party Plaintiff,

v.

THE LANE CONSTRUCTION
CORPORATION

Third-Party Defendant.

**ORDER GRANTING DEFENDANTS' JOINT MOTION TO STRIKE PLAINTIFF'S
AMENDED WITNESS LIST AND DEFENDANTS' JOINT MOTION FOR SANCTIONS
AGAINST THE PLAINTIFF FOR ITS LATE SUPPLEMENTATION OF DISCOVERY**

This matter came before the Court upon Defendants', J.F. Allen Company, AMEC Foster
Wheeler Environment & Infrastructure, Inc., Redstone International, Inc., and Coastal Drilling,
Inc., *Joint Motion to Strike Plaintiff's Amended Witness List and Joint Motion for Sanctions*

Against the Plaintiff for Its Late Supplementation of Discovery. The parties have fully briefed the issues necessary, and oral argument occurred on the motion via teleconference held on August 6, 2020. Upon full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

1. This Order emanates from the Joint Motion to Strike Plaintiff's Amended List ("Joint Motion") and the Joint Motion for Sanctions Against the Plaintiff for Its Late Supplementation of Discovery filed by Defendants J.F. Allen Company ("JF Allen"), AMEC Foster Wheeler Environment & Infrastructure, Inc. ("Amec"), Redstone International Inc. ("Redstone"), and Coastal Drilling, East, LLC ("Coastal"), collectively the "Moving Defendants".

2. On or about July 6, 2020, MarkWest filed its Amended Witness List.

3. Following that, Defendants filed the Joint Motion to Strike Plaintiff's Amended List on July 13, 2020, and the Court heard oral argument via telephone conference on August 6, 2020. In the Joint Motion, Defendants seek exclusion of the following witnesses named in the July 6, 2020 Amended Witness List filed by MarkWest: 1) "A corporate representative of MarkWest"; 4) Jonathan Jackson, Vice President of Eastern Region, MPLX; 5) Tim Miller, P.E., G&P Engineer III, Marathon Petroleum; 11) Adam Westfall, Bowman Consulting; 12) "A representative of Nicholson Construction"; 13) "A representative of GZA GeoEnvironmental, Inc."; and 14) "A representative of GEI Consultants". See Amended Witness List, 7/6/20, p. 1-2.

4. During oral argument, it was determined that Defendants were withdrawing the Motion with regard to Number 11, Adam Westfall, regarding drone video footage of the retaining wall at issue that MarkWest proposes to show at trial. However, Adam Westfall is still at issue with regard to Light and Distance and Ranging data (hereinafter "LiDAR"). Further, during oral argument, it was determined that Plaintiffs were no longer utilizing Number 4, Jonathan Jackson,

given the Defendants' stipulation to the MarkWest contract with EQT. For that reason, the Court finds the motion has been withdrawn as to Jonathan Jackson.

5. The Court asked the parties to confer to determine whether additional agreement might be had as to the remaining witnesses, but has subsequently been informed that no additional agreement was achieved. On or about August 26, 2020, Defendants filed their Joint Motion for Sanctions Against the Plaintiff for Its Late Supplementation of Discovery, seeking the exclusion of "voluminous new documents, witnesses, and expert opinions dating as far back as early 2019" produced in supplementary discovery productions in July and August 2020, outside of the discovery period in this civil action and outside of the deadlines set forth in this Court's scheduling order. *See* Defs' Mot., p. 2.

6. Accordingly, the Court issues the following Order.

PROCEDURAL BACKGROUND

7. This controversy arises from the design and construction of a retaining wall for MarkWest at its Mobley Facility in Wetzel County, West Virginia.

8. This case was originally filed in the Circuit Court of Wetzel County on August 18, 2016.

9. On April 10, 2018, the West Virginia Supreme Court of Appeals issued an Order transferring the case to the Business Court Division, and on May 8, 2018, an Order was issued assigning the undersigned to serve as presiding judge.

10. Prior to the transfer to the Business Division, preliminary fact witness disclosures were made by all parties, including MarkWest, in or around October 2017.

11. On July 6, 2018, this Honorable Court issued a Scheduling Order, listing the case as ready for trial on or about February 24, 2020.

12. Per a timeline submission made by Redstone at the August 6, 2020 hearing, the last identified document production made by MarkWest was on August 12, 2018.

13. Per the Redstone timeline, fact witness depositions commenced in March 2019.

14. Per the Scheduling Order, fact discovery was scheduled to close on June 28, 2019.

15. On June 7, 2019, per stipulation by all parties, the Court issued an Amended Scheduling Order, setting July 26, 2019 as the deadline for MarkWest to file any supplementation to its expert disclosures, and indicating that the Pre-trial Conference deadlines, including the Pre-Trial Memoranda deadlines, as outlined in the Scheduling Order, were to remain unchanged. Notably, discovery was not extended, and thereby closed on June 28, 2019.

16. MarkWest chose not to supplement its original expert reports, which were initially served in December 2017 pursuant to the Wetzel County Circuit Court scheduling order then in effect.

17. Per the Amended Scheduling Order, expert depositions were to be concluded on or before September 13, 2019, but per agreement of the parties, were actually concluded on or about September 30, 2019.

18. On October 7, 2019, following his deposition, MarkWest expert Dr. Jon Wren issued an amended report allegedly correcting a "typo".

19. On February 14, 2020, the date the Scheduling Order designated for the Pre-trial Conference, the Court received notice of a substitution of counsel for MarkWest, with Frost Brown Todd entering its appearance.

20. Pursuant to this Court's Scheduling Order, no later than ten (10) days prior to the Pre-trial Conference, the parties were to exchange amongst themselves, and deliver to the Court, a Pre-trial Conference Memorandum, which was ordered to contain a "List of Witnesses."

21. On June 7, 2019, this Honorable Court issued an Agreed Order Setting/Extending Certain Deadlines in the Current Scheduling Order.

22. Therein, it was indicated that the Pre-Trial Conference deadlines, including the Memoranda deadlines, as outlined in the July 6, 2018, Order, were to remain unchanged.

23. A Pre-Trial Conference was held on May 8, 2020.

24. Therefore, the parties' Pre-Trial Conference Memoranda were due on or before April 28, 2020, *and all parties complied with this deadline.*

25. Pursuant to the July 6, 2018, Order, incorporated into a more recent January 13, 2020 Order, the parties' Pre-Trial Conference Memoranda, submitted by and circulated between all parties, including Plaintiff, contained a complete list of fact and expert witnesses expected to testify on behalf of the respective parties at the time of trial.

26. At the May 8, 2020 Pre-trial Conference, this Court granted Plaintiff's Motion to Continue Trial, due to the COVID-19 pandemic. *See Ord., 5/19/20.*

27. The Court notes that at no time during the Pre-trial Conference did MarkWest indicate that it may be producing new witnesses, including potential expert witnesses.

28. Trial is scheduled to start September 21, 2020, and is expected to continue through October 9, 2020.

29. On or about July 6, 2020, Plaintiff filed and served its Amended Witness List. Such list included the following newly identified witnesses:

- a. Jonathan Jackson, Vice President of Eastern Region, MPLX;
- b. Tim Miller, P.E., G&P Engineer III, Marathon Petroleum;
- c. Adam Westfall, Bowman Consulting;
- d. A representative of Nicholson Construction;
- e. A representative of GZA GeoEnvironmental, Inc.;

f. A representative of GEI Consultants.

30. By Joint Motion to Strike Plaintiff's Amended List filed July 13, 2020, the Moving Defendants requested that this Honorable Court strike Plaintiff's Amended List.

FINDINGS OF FACT

31. Factual discovery has been closed since June 28, 2019 and expert discovery has been closed since September 30, 2019.

32. Per its Preliminary Fact Witness Disclosure and Pre-trial Conference Memorandum, Plaintiff has had two (2) opportunities to provide the parties with a comprehensive, exhaustive and complete list of all witnesses expected to testify on its behalf at the time of trial.

33. The latter opportunity, via the Pre-Trial Conference Memorandum, came after all written discovery had been exchanged and the depositions of corporate representatives and expert witnesses on behalf of each party, including Plaintiff, had been taken.

34. Moreover, Markwest additionally responded to at least ten written discovery requests but never, for example, disclosed GEI Consultants, which, as detailed below, had apparently been performing work related to the Wall at least since February of 2019.

35. Notably, it has been proffered that the following individuals, identified in the Amended Witness List, have not previously disclosed in any written discovery, documents, and or witness posts or disclosures :

- a. Jonathan Jackson, Vice President of Eastern Region, MPLX;
- b. Tim Miller, P.E., G&P Engineer III, Marathon Petroleum;
- c. Adam Westfall, Bowman Consulting.

36. As noted above in paragraph four, with the parties' stipulations regarding the drone footage and EQT contract, Plaintiff has withdrawn Mr. Westfall and Mr. Jackson as witnesses¹.

37. The following witnesses are not identified by name in the Amended List and it has been proffered the companies and entities they are associated with were not disclosed during written discovery or the deposition testimony from the multitude of witnesses already deposed on this matter:

- a. A representative of Nicholson Construction;
- b. A representative of GZA GeoEnvironmental, Inc.;
- c. A representative of GEI Consultants.

38. The Moving Defendants have since supplied the Court with additional information regarding these "representative" witnesses.

39. With regard to Nicholson Construction, on August 12, 2020, it was proffered to the Court that MarkWest produced for the first time a construction contract for certain work on the Wall which MarkWest represented had been signed the day before (although the document itself is dated July 5, 2020), and MarkWest has offered no explanation why it was not produced until a month later.

40. Pursuant to the contract with Nicholson, certain work on the Wall is to begin one month before trial, on or about August 20, 2020, and is to conclude well after trial, on December 4, 2020.

41. More importantly, the GEI Consultants' stamped drawings for certain Wall work, attached as Appendix B to the contract, are dated "for review February 13, 2019," and "final design April 4, 2019," and these dates are prior to any depositions taking place, prior to expert reports

¹ The Court notes Plaintiff has proffered in its proposed order that Adam Westfall is still at issue with regard to Light and Distance and Ranging data (hereinafter "LiDAR").

being finalized and served in August 2019, and should have been produced long before August 12, 2020.

42. Further, with regard to GEI, the Court is informed that, on or about July 23, 2020, MarkWest produced a large volume of new data, including two reports from GEI Consultants opining about previously undisclosed Wall surveying data (only provided in summary charts without back up) dating as far back as February to 2019 shows minimal differences in the soldier pile portion of the wall (less than 1 inch) and slight differences in some portions of the RSS wall of a few inches.

43. However, it is unknown, for example, what surveying equipment was used and what the margin of error for the equipment is, which may render the data meaningless.

44. When GEI opines as to the above-mentioned newly disclosed survey data, the Defendants are left with insufficient information to know if the data is accurate and reliable, and should not be forced blindly into trial when MarkWest apparently has been relying on GEI-generated data since February of 2019.

45. Further evidentiary problems are presented by these latest MarkWest minimal disclosures. For example, MarkWest counsel indicates that GEI data has been provided to MarkWest expert Dr. John Wren, leading to the result of Dr. Wren providing testimony that is not consistent with his expert report and previous deposition testimony. In sum, MarkWest, by withholding evidence for 18 months, is surprising the Moving Defendants, and contradicting MarkWest's own previously disclosed experts' opinions, reports, and testimony. Trial by ambush is impermissible.

46. The two GEI Consultants reports that were provided by MarkWest were dated June 4, 2020 and June 9, 2020, respectively, and signed by one Mary Nodine, PE.

47. Those reports, in turn, reference large amounts of other data collected by GEI Consultants and others which has never been produced by MarkWest, including the following:

- a. February 4, 2019 baseline data
- b. May 21, 2019, new inclinometer install and data
- c. June 7, 2019 baseline data
- d. June 24, 2019, GEI Memo
- e. August 2019 GEI Memo/ wall condition survey report
- f. September 2019 data
- g. November 2019 survey data
- h. November 25, 2019 wall condition survey report (GEI)
- i. December 20, 2019 memo from GEI (of November 13, 2019 survey)
- j. January 2020 surveying data
- k. February 2020 surveying data
- l. February 27, 2020 GEI proposal
- m. March 12, 2020, GEI memo (of Feb 10-11 Survey)
- n. May 2020 surveying data

48. With regard to GZA GeoEnvironmental, Inc., Moving Defendants have represented that if all Markwest proposes to do is to introduce a 2017 borehole report, Moving Defendants will not object. However, if any other evidence or testimony is to be offered from GZA GeoEnvironmetal, Inc., then the Moving Defendants will object due to late disclosure.

49. As a result, the remaining witnesses at issue under the Joint Motion are a corporate representative of MarkWest; Tim Miller, P.E., G&P Engineer III, Marathon Petroleum; Adam Westfall, Bowman Consulting, only as it relates to authentication of Light Distance and Ranging data (hereinafter "LiDAR"); a representative of Nicholson Construction; a representative of GZA GeoEnvironmental, Inc. related to anything other than the borehole report; and a representative of GEI Consultants. In their proposed order submitted after the hearing, Defendants appear to no longer contest No. 1, a corporate representative of MarkWest. MarkWest proffered at the hearing and in their proposed order that its new designation is to serve as its appearance corporate representative at trial, as Mr. Dan Rowlands is no longer employed by MarkWest. For this reason,

the Court finds No. 1, a current corporate representative of MarkWest, may appear at trial. The Court notes that it has been acknowledged by MarkWest that this individual, which will be Tim Miller, is bound by the prior testimony of Mr. Rowlands. *See* MarkWest's Proposed Ord., p. 6.

50. As noted, trial in this matter was originally set to commence on June 8, 2020, but was continued upon motion of MarkWest, and now is set to commence on September 21, 2020. At no time prior to the previous trial date of June 8, 2020 did MarkWest advise the Defendants or the Court that it anticipated commencing with certain work on the Wall based upon information that its consultants and contractors began collecting as far back as February 4, 2019.

51. It has been proffered that the information and witnesses now being identified were the subject of multiple discovery requests from various of the Defendants.

52. Specifically, it has been proffered that the following JF Allen Interrogatories are implicated by the recently disclosed information: 7, 14, 15, 16, 17, 18, 20, 21, 28, 33 ("Produce any and all wall monitoring data pertaining to the Retaining Wall"), 34, 37, 41, 44, 45, 54, 57, 58, 62, 63, 68, and 73; and a cursory review of AMEC's first Request shows that every single request is implicated by the recent disclosure of GEI and Nicholson documents.

CONCLUSIONS OF LAW

53. Pursuant to Rules 16, 26, and 37 of the West Virginia Rules of Civil Procedure, the Court has the authority to enter orders governing the order and time limitations for discovery and to impose sanctions when a party fails to comply. One such sanction is the exclusion of evidence.

54. The West Virginia Supreme Court of Appeals has held that "a party responding to a discovery request is under a continuing duty to make a seasonable supplementation to its original answers to any question asking for the identity of an expert witness expected to be called at trial, the subject matter on which the expert will testify and the substance of his testimony." *State ex*

rel. Tallman v. Tucker, 769 S.E.2d 502, 506 (W.Va. 2015) (quoting Franklin D. Cleckley, Robin Jean Davis, and Louis J. Palmer, Jr., *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 26(e)(1) (4th ed. 2012)).

55. Rule 26(e)(1) provides “that if supplementation is not made as required by the rule, the court, upon motion or upon its own initiative, may impose an appropriate sanction as provided for under Rule 37.” Cleckley, et al., *Litigation Handbook*, § 26(e)(1). See *Jenkins v. CSX Transp., Inc.*, 649 S.E.2d 294, 300 (W.Va. 2007) (affirming trial court decision to prohibit certain testimony by expert witness because of failure to supplement discovery response). See also *Tucker*, 769 S.E.2d at 506 (internal citations removed), noting that “[i]f a party does not seasonably supplement its disclosures, a court does not abuse its discretion by limiting the witness’s testimony to what has been timely disclosed.”

56. Factors to be considered in determining whether documents produced late should be excluded as evidence include (1) the prejudice or surprise of the party against whom the evidence is to be admitted; (2) the ability of that party to cure the prejudice; (3) the bad faith of the party who failed to timely disclose the evidence; and (4) the practical importance of the evidence to be excluded. See *First National Bank in Marlinton v. Blackhurst*, Syl. Pt. 4, 345 S.E.2d 567 (W.Va. 1986); *Prager v. Meckling*, syl. Pt. 6, 310 S.E.2d 852 (W.Va. 1983).

57. The seriousness of a party’s violation of a discovery deadline was best summated by the Supreme Court of Appeals in *Bartles v. Hinkle*, 472 S.E.2d 827, 837 (W.Va. 1996), in which the Court held that “[w]here documents relevant to the merits of the litigation are concealed or their delivery delayed, it is appropriate to presume the deception or delay casts doubt on the concealing party’s case. We squarely reject the notion that a failure to comply with the rules of discovery is purged by belated compliance. The last minute tender of documents does not cure

the prejudice to the opponents nor does it restore to other litigants on a crowded docket the opportunity to use the court.”

58. More specifically regarding whether to permit late supplemental expert witness disclosure, factors that courts consider include: (1) the explanation for making the supplemental disclosure at the time it was made; (2) the importance of the supplemental information to the proposed testimony of the expert, and the expert's importance to the litigation; (3) potential prejudice to an opposing party; and (4) the availability of a continuance to mitigate any prejudice. *Tucker*, 769 S.E.2d at 506.

59. There are numerous instances of West Virginia courts excluding evidence supplemented by a party after the close of discovery. For example, in *Hanson v. Keeling*, No. 16-0799, 2017 W. Va. LEXIS 726, at *22 (Sep. 25, 2017), the Supreme Court of Appeals held that “it would have been within the trial court’s discretion to impose [a discovery] sanction” when a party failed to supplement discovery for five months.

60. Similarly, even applying “a relaxed standard,” the Supreme Court of Appeals has upheld a trial courts’ denial of a “belated[.]” attempt to supplement expert discovery, months after the close of discovery. *Grant v. Kelly Paving, Inc.*, No. 17-0863, 2018 W. Va. LEXIS 714, at *7 (Nov. 16, 2018). The Court noted the party’s “extraordinary awareness of and involvement with the litigation of their claims” and that “[t]hey were sufficiently aware . . . of the need for an expert witness.” *Id.*

61. The Supreme Court of Appeals has held that “[w]here a party’s counsel intentionally or with gross negligence fails to obey an order of a circuit court to provide or permit discovery, the full range of sanctions under W. Va. R. Civ. P. 37(b) is available to the court and the party represented by that counsel must bear the consequences of counsel's actions.” *Syl. Pt. 2*,

Woolwine v. Raleigh Gen. Hosp., 460 S.E.2d 457 (W.Va. 1995) (quoting *Syl. Pt. 4, Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985)).

62. The above reasoning was applied in *Ohio Power Co. v. Pullman Power, LLC*, 741 S.E.2d 830, 836 (W.Va. 2013) where the Court upheld the circuit court's decision to dismiss a party's cross-claim when it found that the party's late production of "hundreds of thousands of pages of documents a week before trial constituted unjustified noncompliance with the West Virginia Rules of Civil Procedure." *Id.* The circuit court found that the party's "failure to timely respond to discovery sent years ago and its noncompliance with the scheduling order was willful." *Id.* Such conduct "had not only impeded the fact-finding process, but subverted it altogether, [presenting] a serious threat to the administration of justice." *Id.* The Supreme Court noted the "magnitude of the violation of the scheduling order [stemming] from the massive volume of documents that went completely unchecked." *Id.*

63. In *Gilbert v. W. Va. DOT*, No. 15-0994, 2016 W. Va. LEXIS 827, at *15 (Nov. 10, 2016), the Supreme Court of Appeals upheld the circuit court's consideration of the above-listed *Tucker* "factors when ruling on [a] motion to file [a late] expert disclosure." The court allowed the late expert disclosure, but only because the opposing party was not prejudiced by the late addition and had plenty of time and opportunity to examine, utilize, and respond to the new discovery.

64. Similarly, a late supplement was excused by the court in *Tucker*, 769 S.E.2d at 50, but, importantly, this was only because the court found that the party's delay in supplementing discovery was caused by the *other* party's delay. There is no activity on the part of Moving Defendants that has caused MarkWest's untimely identification of these witnesses and of their work product, some of which has been ongoing since before the first fact witness deposition.

65. Rule 37 is designed to permit the use of sanctions against a party who refuses to comply with the discovery rules. *Syl. Pt. 1, Shreve v. Warren Assoc. Inc.*, 355 S.E.2d 389 (W.Va. 1987).

66. Rule 37(b)(2) provides, in pertinent part, “[i]f a party or an officer, director, or managing agent of a party [. . . fails to obey an order to provide or permit discovery, . . . or if a party fails to supplement as provided for under Rule 26(e) . . .], the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

See W. Va. R. Civ. Pro. 37(b)(2).

67. In *Karpacs-Brown v. Murthy*, the Supreme Court of Appeals of West Virginia declared that “Rule of Civil Procedure 26(e) relates to the duty to supplement discovery responses in certain specified circumstances and provides that “[i]f supplementation is not made as required by this Rule, the court, upon motion or upon its own initiative, may impose upon the person who failed to make the supplementation an appropriate sanction as provided for under Rule 37.” 686 S.E.2d 746, 755 n.7 (W.Va. 2009). *See also* *McDougal v. McCammon*, 455 S.E.2d 788, 797 (W.Va. 1995) (stating that the trial court possesses the inherent authority to impose sanctions for

failure of a party to supplement discovery as required by Rule 26(e) of the Rules of Civil Procedure)).

68. The *McDougal* court succinctly stated the proper application of sanctions for failure to supplement material in discovery:

[T]he trial court possesses the inherent authority to impose sanctions for failure of a party to supplement discovery as required by Rule 26(e) of the Rules of Civil Procedure. One such sanction authorized by this Court is the exclusion of evidence. In Syllabus Point 5, in part, of *Prager v. Meckling*, we stated factors to be considered in determining whether the failure to supplement discovery requests should require the exclusion of evidence relating to the supplementary material. These factors include: . . .

‘(1) the prejudice or surprise in fact of the party against whom the evidence is to be admitted; (2) the ability of the party to cure the prejudice; (3) the bad faith or willfulness of the party who failed to supplement discovery requests; and (4) the practical importance of the evidence excluded.’ (Citations omitted).

McDougal, 686 S.E.2d at 797.

69. Additionally, in *Prager*, the Supreme Court of Appeals explicitly held that “a trial court has inherent power to impose sanctions as a part of its obligation to conduct a fair and orderly trial.” Syl. Pt. 4, 310 S.E.2d 852 (W.Va. 1983).

70. The party seeking sanctions under Rule 37(b) has the burden of proving noncompliance with a discovery order. If established, the burden of proof shifts to the noncompliant party to demonstrate either that it was unable to comply or that special circumstances exist which make the imposition of sanctions unjust. Syl. pt. 3, *Bell v. Inland Mut. Ins. Co.*, 332 S.E.2d 127 (W.Va. 1985).

71. If it is demonstrated that a noncompliant party intentionally or with gross negligence failed to obey a court order, the full range of sanctions under Rule 37(b) is available to the court. *Id.*

72. The law as applied to the facts here indicates that MarkWest's "defiance of the trial court's orders constituted an independent wrongful action upon which sanctions may be issued." *Bartles v. Hinkle*, 472 S.E.2d 827, 836 (W.Va. 1996).

73. As set forth above, MarkWest, as of 10:00 a.m. on August 12, 2020, informally produced a contract for repairs with Nicholson Construction via email. Notably, the contract is dated July 5, 2020, but MarkWest has offered no explanation why it was not produced until a month later.

74. More importantly, the GEI Consultants' stamped drawings for wall repairs, attached as Appendix B to the contract, are dated "for review February 13, 2019," and "final design April 4, 2019," and these dates are prior to any depositions taking place, prior to expert reports being finalized and served in August 2019, and should have been produced long before August 12, 2020.

75. Further, as discussed above, the Court finds that with regard to GEI, on or about July 23, 2020, MarkWest produced a large volume of new data, including two reports from GEI Consultants opining about previously undisclosed Wall surveying data (only provided in summary charts without back up) dating as far back as February 2019, which is impermissible at this late date.

76. Further, with regard to the Amended Witness List, the Court finds the untimely disclosure of Plaintiff's new anticipated fact witnesses is not only a violation of West Virginia's discovery rules, but has surprised and will unfairly prejudice the Moving Defendants at the time of trial.

77. The Court further finds Plaintiff had opportunity to supplement its discovery responses with the identity of the new fact witnesses, but failed to do so.

78. The Court further finds that with trial scheduled to start later this month, it is undeniable that to permit Plaintiff to proceed and call the newly disclosed fact and expert witnesses would result in severe prejudice to the Moving Defendants.

79. Due to serious time constraints, the Court finds Plaintiff cannot cure the prejudice and has not exhibited a willingness to supplement discovery in a timely manner.

80. Finally, the Court finds the practical importance of striking the Amended Witness List and any document prepared or authored by newly disclosed witnesses is that this case has a long and complex history with which the Court, parties, and counsel, are intimately familiar.

81. The Court further finds that to permit new, unexpected, and unknown testimony from individuals Plaintiff failed to identify during the course of discovery would cause unnecessary confusion for everyone involved and complicate an already highly technical and complex case that the parties have been preparing for years to litigate.

82. The Court further finds that in addition to discovery having been closed for well over a year, pretrial motions have been argued and decided and trial is scheduled to begin later this month.

83. The Court further finds that to permit Plaintiff to call the individuals and representatives identified in Nos. 5, 11, 12, 13, and 14 of the Amended Witness List² would result in severe prejudice to the Moving Defendants. The Court notes Tim Miller is excluded in his capacity of his designation under No. 5 of the Amended Witness List, but is permitted as No. 1, MarkWest's current appearance corporate representative, subject to the limitations as described herein.

² The Court notes Nos. 4 and 11 were withdrawn and Defendants do not object to Number 13 to the extent this witness will be used only introduce a 2017 borehole report.

WHEREFORE, upon consideration of the *Joint Motion to Strike Plaintiff's Amended Witness List*, it is hereby **ORDERED** that the motion is **GRANTED** and the "Fact Witnesses" listed at Paragraphs 5, 11, 12, 13, and 14 are **STRICKEN** from Plaintiff's Amended Witness List, subject to limitations contained herein. The Court notes Tim Miller is excluded in his capacity of his designation under No. 5 of the Amended Witness List, but is permitted as No. 1, MarkWest's current appearance corporate representative, subject to the limitations as described herein. The Court further notes Defendants have preserved their Objection to the Fact Witness listed at Paragraph 13 to the extent he would be utilized to offer any other evidence or testimony from GZA Environmental, Inc. than the introduction of the aforementioned 2017 borehole report. Finally, the Court notes Number 11, Adam Westfall, has been partially withdrawn but is excluded as he relates to the remaining issue of LiDAR data.

It is further hereby **ORDERED** that Defendants' *Joint Motion For Sanctions Against The Plaintiff for Its Late Supplementation of Discovery* is **GRANTED**, and any of the evidence MarkWest has produced after the May 8, 2020 Pretrial, including but not limited to the recent voluminous supplementary discovery productions in July and August 2020 as described herein shall be **EXCLUDED AT TRIAL**.

It is further **ORDERED** that the Clerk shall enter the foregoing and forward attested copies hereof to all counsel, to any *pro se* parties of record, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 2nd day of September, 2020.



[Handwritten Signature]
 H. CHARLES CARL, III
 JUDGE OF THE WEST VIRGINIA
 BUSINESS COURT DIVISION

I HEREBY CERTIFY THAT THE ANNEXED INSTRUMENT IS A TRUE AND CORRECT COPY OF THE ORIGINAL ON FILE IN MY OFFICE.
 ATTEST:
[Handwritten Signature]
 WETZEL CO. WEST VIRGINIA
 DEPUTY CLERK