

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2005-012131

07/17/2007

HON. THOMAS DUNEVANT, III

CLERK OF THE COURT
S. Brown
Deputy

HARPER SAND & ROCK L L P, et al.

RANDALL S PAPETTI

v.

LUECK INVESTMENT L L C, et al.

BRIAN IMBORNONI

PRETRIAL CONFERENCE

2:10 p.m. This is the time set for trial management conference. Plaintiffs are represented by counsel, Randall Papetti and Emily Cates. Defendants are represented by counsel, Brian Imbornoni and James Ehinger.

A record of the proceedings is made by CD/videotape in lieu of a court reporter.

Pretrial matters are discussed. The Court is informed that there is no likelihood of settlement in this case prior to trial which is scheduled to begin on July 31, 2007.

The estimated time of trial of 12 days is affirmed, inclusive of jury selection.

The jury in this case will consist of ten jurors with two alternates to be selected by lot. Six out of the eight jurors will be necessary to return a verdict.

Discussion is held regarding jury selection (jury is to be prescreened for length of the trial), bench conferences, offers of proof, making objections, and questions from the jury.

The Rule of Exclusion of Witnesses has been invoked by the parties.

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Counsel are directed to submit their trial exhibits to the clerk of this division no later than **one week prior to trial at 602-506-8847**. Counsel are instructed to remove duplicate exhibits prior to submitting the exhibits to the clerk for marking. Counsel are directed to notify the clerk of any exhibits that can be directly marked into evidence.

Plaintiff's Motion To Preclude Re: New Expert Disclosure of Don Ross is discussed.

IT IS ORDERED taking this matter under advisement.

3:20 p.m. Matter concludes.

LATER:

UNDER ADVISEMENT RULING

(Plaintiff's Motion To Preclude Re: New Expert Disclosure of Don Ross)

The difference between the description of Mr. Ross's expert testimony in Defendants' June 1, 2007 disclosure and the disclosure of November 30, 2006 is striking. In the latter, Mr. Ross is said to be offering expert opinions "with regard to the materiality of Circle H's violations of the Mining Plan, applicable law and accepted mining practices." In particular, his area of expertise was distinguished from that of Mr. Sell, described as an expert in real estate appraisal who would testify with regard to the diminution of the property's value resulting from its exclusion from the Tres Rios Project and future restrictions on its use. Nowhere in pre-June disclosures is Mr. Ross indicated to hold, or even to be qualified to hold, similar opinions to Mr. Sell. Thus, Mr. Ross cannot piggyback his expert opinions onto his percipient observations. While his expert knowledge may affect his understanding of what he saw and heard, that does not open the door for him to provide commentary.

Defendants' attempt to place the responsibility on Plaintiffs for the delay is not persuasive: Plaintiffs had asked on several occasions when Mr. Ross would be available, and they cannot be expected to have known that his health was sufficiently restored by Spring so as to renew their insistence. Consideration of the *O'Toole* factors support exclusion of the newly disclosed opinions.

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Therefore, IT IS ORDERED:

1. Granting Plaintiff's Motion To Preclude new disclosed opinions (6-1-2007 disclosure).
2. Denying Plaintiff's Motion To Preclude disclosed opinions (11-30-2006 disclosure).
3. Defendants' compulsory claim is deemed withdrawn without prejudice.