IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

AMERICAN ENERGY CORPORATION,	:	**CASE NO. 2:13-CV-00886-EAS-MRA**
Plaintiff,	:	**Judge Edmund A. Sargus, Jr.** **Magistrate Judge Mark R. Abel**
v.	:	
AMERICAN ENERGY PARTNERS, LP, et al.,	:	
Defendants.	:	

PLAINTIFF AMERICAN ENERGY CORPORATION'S
MOTION TO COMPEL DISCOVERY

Pursuant to Fed. R. Civ. P. 37 and the Court's Discovery Dispute Conference Order filed on March 27, 2014 (ECF No. 30), Plaintiff American Energy Corporation hereby moves this Court for an Order compelling Defendants to respond fully to discovery requests propounded by Plaintiff. Specifically, Plaintiff seeks an Order compelling Defendants to produce unredacted copies of lease documents described more particularly in the attached Memorandum In Support.

Respectfully submitted,

__/s/ Vladimir P. Belo_____

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MEMORANDUM IN SUPPORT OF MOTION TO COMPEL DISCOVERY

I. BACKGROUND

Plaintiff American Energy Corporation has been registered as an Ohio corporation since April 12, 1993. (Am. Compl. ¶ 2, ECF No. 14.) Since at least 2001, American Energy Corporation has sold Ohio coal under the "American Energy Corporation" trade name and trademark. (*Id.* ¶ 3.) American Energy Corporation has cultivated considerable goodwill in the Ohio fossil fuel power generation industry. American Energy Corporation has also developed relationships with landowners in the region, from whom it has acquired coal rights.

Plaintiff brought this action in the wake of an invasion by out-of-state interests seeking to develop the shale oil and natural gas industry in southeastern Ohio. Defendants have usurped the "American Energy" name through their engagement in business under their "American Energy Partners" and "American Energy-Utica" names and marks. The breadth of this invasion has only widened as this litigation has progressed. Defendants' complex business organization includes several other entities that operate under the "American Energy" formative, including "American Energy-Utica Minerals," "American Energy Midstream," "American Energy Ohio Holdings," and "American Energy Management Services."

Plaintiff American Energy Corporation served discovery requests on Defendants American Energy Partners and Aubrey McClendon on September 27, 2013 and American Energy Utica on November 8, 2013. American Energy Partners and Aubrey McClendon responded to the written requests on November 7, 2013 and an initial document production on November 18, 2013. American Energy-Utica responded to the written requests on December 11, 2013, and served its initial document production on December 27, 2013.[1]

[1] Defendant Aubrey McClendon refused to respond to any substantive discovery until June 9, 2014, after the Court denied his motion to dismiss for want of personal jurisdiction.

The dispute before the Court in this motion centers upon Defendants' responses to requests for production of oil and gas leases owned or controlled by Defendants or their affiliates. Though Defendants produced some documents (in large part subject to numerous objections and in massively redacted form), Defendants did not produce oil and gas leases that were responsive to at least one of Plaintiff's requests for production of documents.[2]

The parties exchanged a series of lengthy letters regarding numerous discovery disputes from mid December 2013 through early March 2014. By March 20, 2014, the discovery disputes were informally briefed and argued to Magistrate Judge Abel. Based largely on the representations of defense counsel, the March 27 Discovery Conference Order placed much of the sought-after discovery out of Plaintiff's reach, but recognized that the issues could be revisited as discovery progressed. As to Defendants' leases with landowners, the Court ruled:

> I find that plans regarding which areas to acquire natural gas leases are highly confidential and irrelevant to the issues in this law suit *as I now understand them*. However, it is further ORDERED that defendant American Energy Partners produce signed leases it owns or which are under its control.
>
> . . .
>
> If there is a dispute regarding production of the leases, plaintiff should brief why the leases are relevant and proffer any evidence it has of land owner confusion about who is seeking to obtain natural gas/oil/mineral leases from them.

(ECF No. 30, at PageID# 664 (emphasis added).)[3]

Approximately two months after the Court entered its Discovery Dispute Conference Order, Defendants finally produced 67 oil and gas lease documents, designating each document as "Attorneys Eyes Only" in accordance with the agreed protective order filed in this case. (ECF No. 13.) Despite the existence of the protective order, Defendants redacted nearly every material

[2] Request for Production No. 15 to American Energy Partners asked for "all documents and things that refer to the territorial areas in the United States where Defendant manufactures, develops or creates or plans to manufacture, develop or create fossil fuels." Similarly, Request for Production No. 15 to American Energy-Utica asked for "all documents and things that refer to the territorial areas in the United States where Defendant extracts, produces, refines, or delivers or plans to extract, produce, refine, or delivers fossil fuels." (ECF No. 34-4, at PageID# 1460 and 1500.)

[3] Plaintiff filed objections to the order on April 14, 2014, which remain pending. (ECF No. 33.)

term in each lease produced to Plaintiff.[4] Furthermore, it became evident in later communications between counsel that the 67 leases produced were only a fraction of the total number that are discoverable in this action. In a meet-and-confer discussion on June 16, 2014, Defendants' counsel acknowledged that they had produced only those leases entered into "directly" by the two named corporate defendants, presumably excluding leases acquired from prior lessees. (*See* Exhibits A and B (American Energy Partners press releases reporting that American Energy—Utica's acquisition of thousands of net acres of leasehold).) Defendants limited their production in this manner despite the language of the Court's order explicitly requiring them to "produce signed leases it owns *or which are under its control*." (ECF No. 30, at PageID# 664 (emphasis added).)[5]

In a further effort to meet and confer concerning the leases produced and redacted, the parties exchanged communications concerning the discoverability of the information Plaintiff sought. Defendants asked that Plaintiff explain the relevance of material that had been redacted. Without benefit of knowing precisely what Defendants redacted from the documents, Plaintiffs requested the production of a *single* unredacted lease document so that the parties could have a meaningful discussion about the relevance of the terms. (June 18, 2014 email from T. Connor to J. Pollack, Exhibit D.) The terms of those leases set forth the nature of Defendants' economic relationship with landowners in American Energy Corporation's region and therefore could inform issues in this case. Nearly one week later, Defendants refused to provide even one unredacted lease, claiming that the terms of such are not "reasonably calculated to lead to the discovery of admissible evidence." (June 24, 2014 Ltr. from J. Pollack to T. Connor, Exhibit E.).

[4] If the Court desires, Plaintiff will submit representative leases produced by Defendants for *in camera* review.

[5] In addition to the Court's order, Plaintiff's second request for production of documents specifically asked for "all oil and gas leases owned or controlled by Defendants or affiliates of Defendants in Belmont, Guernsey, Harrison, Monroe, Jefferson and Noble counties in Ohio from January 1, 2013 to the present." (See Exhibit C.)

In response to Defendants' June 24 letter, Plaintiff reiterated its position with regard to the discoverability and relevancy of the leases. (June 27, 2014 Ltr. from T. Connor to J. Pollack, Exhibit F.) Among other things, Plaintiff pointed out that Defendants were seeking similar discovery from Plaintiff. (*Id.*) Defendants responded on July 3, 2014, adhering to their position that their leases with landowners were not reasonably calculated to lead to the discovery of admissible evidence. (July 3, 2014 Ltr from J. Pollack to T. Connor, Exhibit G.) The July 3 letter referred to previous correspondence in which Defendants disputed the relevance of leases with landowners because the claims in Plaintiff's Complaint focus solely on "the consumer." (*See* Exhibit E.) Defendants took this position despite the fact that Plaintiff's Amended Complaint broadly alleges that Defendants' conduct "demonstrates an intent to create *consumer and public* recognition as 'American Energy' being directly associated with Defendants in the relevant industry and geography" and that "This will cause confusion as to a potential affiliation with American Energy Corporation." (Am. Compl. ¶¶ 12, 14, 51, ECF No. 14 (emphasis added).)

In late July, Plaintiff received information that further underscored the relevance and need for the leases. At that time, Plaintiff became aware that one of its affiliates, Ohio American Energy, Inc., had received a "Lease Packet" from Purple Land Management, LLC, an independent contractor of Defendant American Energy-Utica. Ohio American Energy, Inc., is the record owner of property for which Purple Land Management was trying to acquire an oil-and-gas lease on behalf of American Energy-Utica. (Exhibit H.) Included in the "Lease Packet" provided by Purple Land Management was a proposed lease that was substantially similar in format to the redacted leases produced by Defendants. Ohio American Energy received this packet ostensibly because it was the record owner of land for which Defendant American

Energy-Utica desired to obtain an oil and gas lease. The packet contained a draft "Paid-Up Oil & Gas Lease" agreement. (*Id.*) The "Leasing Clause" of the agreement states:

> Lessor hereby leases exclusively to Lessee all the oil and gas (including, but not limited to, *coal seam gas*, *coalbed gas*, methane gas, *gob gas*, occluded methane/natural gas and all associated natural gas and other hydrocarbons and non-hydrocarbons contained in, associated with, emitting from, or produced/originating within any formation, gob area, mined-out area, *coal seam*, and all communicating zones), and their liquid or gaseous constituents . . . underlying the land herein leased . . . .
>
> (*Id.* (emphasis added).)[6]

This Leasing Clause—redacted from every lease produced by Defendants to Plaintiff—expressly purports to lease coal-related gas underlying the leased land. The lease's reference to coal-related gas belies Defendants' contention that the specific terms of their leases are "not reasonably calculated to lead to the discovery of admissible evidence." Defendants' express intent to obtain rights to coal-generated gas is relevant to, among other issues, whether a landowner may perceive an affiliation between American Energy Corporation and Defendants and the extent to which Defendants compete with American Energy Corporation using the "American Energy" name.

Given the Court's invitation in the March 27 Order for Plaintiff to brief a dispute regarding the leases, Plaintiff now brings this motion to compel before the Court.

[6] "Gob gas" is methane extracted from wells drilled into the coal seam. These wells may be drilled in order to extract much of the methane before it is released into the mine, thereby reducing the load on the mine's ventilation system.

II. ARGUMENT

Fed. R. Civ. P. 37 authorizes a motion to compel discovery when a party fails to provide proper response to interrogatories under Rule 33 or requests for production of documents under Rule 34. In this case, Plaintiff's requests for documents concerning Defendants' leases with landowners are relevant to the matters at issue in this case. Yet, Defendants continue to withhold leases with landowners under the guise of purported relevancy concerns.

A. Noncustomer confusion is relevant and actionable.

Plaintiff's amended complaint alleges Ohio law claims relating to (1) deceptive trade practices, (2) unfair competition, (3) common-law trade name infringement, and (4) common-law trademark infringement. A common issue among all of these claims is whether there is a likelihood of confusion between American Energy Corporation and the American Energy entities created and operated by Defendants. Indeed, the amended complaint alleges broad harms arising from confusion "among customers, consumers, suppliers, and others in the market," in "consumer and public recognition," and relating to "goods, services, or commercial activities." (Am. Compl., ECF No. 14, at ¶¶ 12, 14, 19, 49, 51.) Thus, in order to prevail in this action, Plaintiff must prove that there is a likelihood of confusion with respect to the "affiliation, connection or association" between it and Defendants. *See Leventhal & Assocs. v. Thomson Cent. Ohio*, 128 Ohio App. 3d 188, 197 (Ohio App. 10th Dist. 1998); *accord Corrova v. Tatman*, 164 Ohio App. 3d 784, 788 (Ohio App. 5th Dist. 2005).

Pertinent to this inquiry is the actual and potential confusion that may result in the minds of the relevant public as a result of Defendants' use of Plaintiff's "American Energy" name. Defendants have repeatedly argued to this Court that the only relevant "confusion" is that experienced by "customers." Indeed, in justifying their virtually wholesale objections to

Defendants' second set of discovery requests (which included another request for leases), Defendants cited *Lucky's Detroit, LLC v. Double L, Inc.*, 533 F. App'x 553, 555-56 (6th Cir. 2013), for the proposition that non-consumer confusion is not relevant because the "ultimate question" in an unfair competition case is "'whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.'" (Exhibit C, Ltr. from J. Pollack to A. Davis, July 31, 2014 (quoting *Lucky's Detroit*).) Thus, Defendants contend that leases with landowners are not discoverable.

Though Defendants want to make this case purely about customer confusion, the legal truth is that they are wrong about the applicable law. As an initial matter, *Lucky's Detroit*'s statement that the "ultimate question" involves consumer confusion should not be viewed as a holding that *only* consumer confusion is relevant. *Lucky's Detroit* must be read in its proper context: the only confusion placed at issue by the parties in the case was that "among patrons [*i.e.*, customers] regarding the ownership of the restaurants" involved. *Lucky's Detroit*, 533 F. App'x at 555. Thus, *Lucky's Detroit* does not stand for a proposition as broad as the one Defendants posit.

Indeed, other Sixth Circuit cases endorse the view that *non-customer* confusion is not only relevant, but actionable. "There is no requirement that evidence of actual confusion, to be relevant, 'must be confusion at the point of sale—purchaser confusion—and not the confusion of nonpurchasing, casual observers.'" *Champions Golf Club v. Champions Golf Club*, 78 F.3d 1111, 1119-1120 (6th Cir. 1996) (quoting *S.P.A. Esercizio v. Roberts*, 944 F.2d 1235, 1243 (6th Cir. 1991)). This is so because "the potential confusion among nonpurchasers [is] just as significant as that among purchasers." *Id.* at 1120.

Champions Golf Club is itself instructive and cuts firmly against the notion, championed

by Defendants, that customer confusion is the only relevant inquiry in a trademark and/or trade name infringement case. In that case, the dispute was between a golf club located in Houston, Texas and a golf club of the same name located in Nicholasville, Kentucky. The plaintiff, the Houston-based "Champions Golf Club," alleged service mark infringement and unfair competition arising from the defendant's use of the "Champions" mark. Following a bench trial, the district court ruled in favor of the defendant Kentucky club, concluding that the plaintiff Houston club failed to show a likelihood of confusion arising from the parties' dual use of the "Champions" name. 78 F.3d at 1116. On appeal, the Sixth Circuit reversed, criticizing the district court's mode of analysis. In particular, it was not fatal to the plaintiff's claim that it had presented no evidence of actual confusion among consumers of the golf clubs' services. Confusion of nonpurchasers—in that case, confusion among suppliers of both plaintiff and defendant—was relevant evidence of actual confusion. *Id.* at 1119-20. *See also Beacon Mut. Ins. Co. v. OneBeacon Ins. Group*, 376 F.3d 8, 16-17 (1st Cir. 2004) (citing *Champions Golf Club* with approval); *First Nat'l Bank v. First Nat'l Bank S.D.*, 679 F.3d 763, 770 (8th Cir. 2012) (noting that actionable confusion includes confusion of nonpurchasers).

Significantly (as this action is brought under Ohio substantive law), the Ohio Supreme Court has also espoused these concepts in the context of trade name infringement.

> It stands to reason that a business of high standing and with a distinctive name has a real and vital concern in protecting that name and in preventing its exploitation by another to promote the latter's interests. That the two businesses may be noncompetitive is not controlling. Coattail riding of this sort has met with disapproval and has often been enjoined by the courts.

National City Bank v. National City Window Cleaning Co., 174 Ohio St. 510, 513 (Ohio 1963). Accordingly, under Ohio law, "where there is such a similarity of names that confusion in identity might result, lack of competition between the users of the name may not be interposed

as an effective defense by the junior appropriator, especially where such use would tend to lead the public to believe that the two businesses were in association." *Id.* at 514.

With these principles in mind, Plaintiff's request for production of Defendants' leases is aimed at discovering facts related to potential and actual confusion, which includes confusion with respect to a false affiliation between Plaintiff and Defendants' multitude of "American Energy" entities doing business (or planning to do business) in the same region of Ohio in which American Energy Corporation operates. Discovery into landowner activity is critical in this case in particular: procuring land and/or mineral rights is of central importance to both businesses and land activity has been Defendants' primary business activity to date as they ramp up efforts to begin drilling for natural gas. *See* Press Release, *American Energy-Utica, LLC and American Energy-Marcellus, LLC Agree to Acquire 750,000 Net Acres*, June 9, 2014, available at http://www.americanenergypartners.com/Home/News/.[7]

B. Leases with landowners are relevant to the matters at issue in this case.

Oil and gas leases are a category of documents that have crucial importance to this case, particular considering the fact that American Energy Corporation and Defendants have entered and continue to enter into agreements with landowners in the same communities in southeastern Ohio. Lease documents are directly relevant to whether actual or potential confusion exists among area landowners. From the facts developed in this case, there is little (if any) dispute that:

- Interactions with landowners and the acquisition of rights in land and minerals is of central importance to the business activities of both Plaintiff and Defendants;
- Plaintiff and Defendants conduct nearly all of their respective acquisition of rights in land and minerals in six adjacent counties in southeastern Ohio;

[7] The press release states in part: "The Utica acquisition marks AEU's seventh major acquisition in the southern Utica Shale play and boosts AEU's leasehold in the play to approximately 280,000 net acres, the largest leasehold position in this rapidly developing and prolific play. AEU has invested over $3.5 billion in the Utica to date and plans to drill approximately 2,600 gross wells and 1,560 net wells on its acreage in the years ahead."

- A good reputation is extremely important in the acquisition of land and mineral rights, and in maintaining positive relationships with landowners;
- Both Plaintiff and Defendants use "American Energy" in their names and Defendants are often referred to as "American Energy" for short.

American Energy Corporation's offices have fielded multiple phone calls from landowners who thought they were contacting *Defendants* about oil and gas lease transactions in area land, when in fact they were contacting the offices of *Plaintiff*. These landowners contacted American Energy Corporation in response to solicitations or communications from American Energy Partners concerning their land and, simply put, did not understand that American Energy Corporation and American Energy Partners were two different entities. In one case, a landowner who contacted American Energy Corporation's offices in search of American Energy Partners stated candidly, "I thought American Energy was American Energy; one company." Thus, there is no question that landowners either perceived some affiliation between American Energy Corporation and American Energy Partners or were confused as to the identity of American Energy Partners. Accordingly, there is already evidence of actual confusion among landowners. Defendants' leases with landowners in the relevant region are therefore calculated to lead to the discovery of admissible evidence of the likelihood of further confusion that will result as Defendants continue to expand and actively conduct their business in Ohio.[8]

A critical fact should not be overlooked in the assessment of the leases' importance to the confusion analysis in this case. Defendants have used the "American Energy" name for a relatively short period of time: American Energy Partners was created in 2013 and Defendants' major activities since then have been raising capital from investors and securing oil and gas

[8] It should be noted that landowner confusion is not the only type of actual confusion that Plaintiff has experienced firsthand. On July 31, 2014, a representative of Forum Energy Technologies came to American Energy Corporation's offices in St. Clairsville, Ohio, believing he was at the offices of Defendant American Energy Partners. And just in the past week, a vendor of Defendant American Energy—Utica contacted Plaintiff's offices asking for American Energy—Utica's accounts payable department. Thus, there are at least two instances of vendor confusion.

leases from landowners in the Utica shale region. Since Defendants have not begun actively selling oil and gas products to date, a primary source of confusion would be with the landowners contacted by or on behalf of Defendants American Energy Partners and/or American Energy-Utica. And notably, there is already some evidence of confusion among this very class of crucial players in the parties' respective businesses.

Despite the importance of landowner confusion to the matters at issue in this case, Defendants contend that the lease information sought by Plaintiff is not "reasonably calculated to lead to the discovery of admissible evidence" because the claims in Plaintiff's Complaint focus solely on "the consumer." But the Amended Complaint places the acquisition of oil and gas leases squarely at issue:

- "American Energy Partners acquired oil and gas leases over approximately 22,500 acres of land in Southeastern Ohio," Amended Complaint ¶ 37;
- "American Energy – Utica has entered into transactions for the acquisition of 80,000 acres in the Utica Shale" (admitted in Defendants' Answer), Amended Complaint ¶ 39;
- "News articles have reported that American Energy Partners has run advertisements in an Ohio newspaper seeking oil and gas leases in Jefferson, Harrison, Guernsey, Noble, Belmont and Monroe counties," Amended Complaint ¶ 40; and
- "Aubrey McClendon has signed agreements to acquire land in Guernsey County, Ohio and Noble County, Ohio on behalf of American Energy – Utica," Amended Complaint at ¶41.

Furthermore, the Amended Complaint alleges that "Defendants' use of the names 'American Energy Partners, LP' and 'American Energy – Utica, LLC' on goods and related services competing with and/or related to American Energy Corporation's goods and related services *is likely to cause confusion among customers, consumers, suppliers, and others in the market.* Amended Complaint ¶ 49; see also ¶ 51 (regarding confusion in "consumer and public

recognition"). The Amended Complaint also pointedly refers to potential confusion, not just as it relates to consumers, but as it relates to the parties' "goods, services *or commercial activities*." *See, e.g.*, Amended Complaint ¶¶ 19, 25.

Based on these allegations, it should be beyond dispute that Plaintiff's claims put Defendants on notice that the harms that arise out of Defendants' use of Plaintiff's name and trademark arise from *any and all commercial activities*, including those relating to property leases. And since Defendant's primary business activity up until now has been the execution of a land grab, the existence of confusion among landowners is the best indicator that greater confusion will spread as Defendants begin drilling and operating thousands of gas wells and selling and transporting gas to its customers. Plaintiff is already aware of actual confusion among landowners, and has every reason to expect that there will be (or already is) additional confusion.

Finally, Defendants' contention that the leases are not relevant to the claims at issue is curious, given that they also have sought the same information from Plaintiff. Following one of the depositions in this case, Defendants asked Plaintiff to produce its "leases with landowners." (Email from J. Pollack to T. Connor, May 23, 2014 and June 4, 2014.)[9] Moreover, Defendants recently deposed Ernie Banks, one of Plaintiff's primary land management agents, for several hours on topics relating primarily to land ownership, American Energy Corporation's relationships with landowners, and landowner confusion. Given the landowner-related discovery they have sought from Plaintiff in this case, Defendants cannot seriously contend that their own

[9] In the June 4, 2014 email, Defendants' counsel specifically referred to Request for Production Nos. 31 and 32 of Defendants' first request for production of documents as having asked for lease documents. Request No. 31 asked for "[a]ll documents showing Plaintiff's real estate assets, including both leased and purchased assets"; Request No. 32 asked for "[a]ll documents evidencing Plaintiff's acquisition or lease of land and equipment for the purpose of prospecting, drilling, or extracting natural gas or oil." In response to Defendants' request, Plaintiff produced 763 land-related documents totaling 2,131 pages.

leases with landowners are irrelevant.

C. Defendants have refused to fully disclose their oil and gas leases.

The Court ordered Defendants to produce certain previously withheld documents on March 27, 2014, including "signed leases owned *or under the control* of Defendants." (ECF No. 30, at PageID# 664 (emphasis added).) Despite that order, Defendants produced only the leases that were entered into "directly" by the two named corporate defendants, to the exclusion of leases acquired by Defendants' other affiliates. And for the leases Defendants chose to produce, Defendants redacted nearly every material term while *still* declaring the nearly fully redacted documents "Attorneys Eyes Only" under the protective order. Accordingly, Defendants' production of leases was incomplete in two significant respects: (1) they did not produce all of the leases under their control and (2) the leases they did produce were heavily redacted to exclude every material term of the agreement.

In the lease Defendants have produced, the nearly complete redaction of the document prevents Plaintiff from discovering relevant information. Among the information the location of the property in question, the address of the lessor landowner, all description of the property in question, every term describing the nature of the commercial relationship with the lessor, the term of the lease, the process by which the lease might be aggregated into "units" with other area landowners, as well as the identity of the individual who signed the lease on Defendants' behalf. Defendants have also redacted a host of terms whose subject matter is wholly unknown.

Plaintiffs are entitled to know, among other things, with which area landowners Defendants interact, the nature of the commercial interaction, in what ways Defendants use "American Energy" in such interactions, where the "American Energy" name may be used to "unitize" other area landowners into an economic relationship with Defendants using the

"American Energy" name, and certainly which of Defendants' representatives have entered into these economic relationships on Defendants' behalf. This type of information is germane to issues of landowner confusion, as well as the related issue of potential damage to Plaintiff's reputation and goodwill. For example, terms in the leases could lead to the discovery of potential disputes with landowners that might reflect badly on Plaintiff's name and reputation because of a perceived affiliation between American Energy Corporation and Defendants' "American Energy" entities.[10] Leases could also shed light on the extent to which Defendants are using the "American Energy" name: already, it is evident that an entity called "American Energy Ohio" has engaged in lease transactions in addition to American Energy-Utica and it appears that recently formed American Energy-Utica Minerals may be doing so as well.

But that is not all. American Energy Corporation is not acting upon simply speculation as to what evidence may be found in the leases withheld by Defendants. In June 2014, Ohio American Energy, Inc., an affiliate of American Energy Corporation, received a "Lease Packet" from Purple Land Management North, LLC, an independent contractor authorized to buy oil and gas leases on behalf of Defendant American Energy-Utica. (Exhibit H.) Ohio American Energy received this packet ostensibly because it was the record owner of land for which Defendant American Energy-Utica desired to obtain an oil and gas lease. The packet contained a draft "Paid-Up Oil & Gas Lease" agreement. (*Id.*) The "Leasing Clause" of the agreement states:

> Lessor hereby leases exclusively to Lessee all the oil and gas (including, but not limited to, *coal seam gas, coalbed gas,* methane gas, gob gas, occluded methane/natural gas and all associated natural gas and other hydrocarbons and non-hydrocarbons contained in, associated with, emitting from, or produced/originating within any formation, gob area, mined-out area, *coal seam*, and all communicating zones), and their liquid or gaseous constituents . . .

[10] One such dispute is already before this Court in *American Energy—Utica, LLC v. Geno Morelli & Sons, Inc.*, S.D. Ohio No. 2:14-cv-1449 (filed Sept. 4, 2014). In that case, American Energy—Utica has sued a landowner in a dispute over the scope of activity that American Energy—Utica is entitled to engage in under the oil-and-gas lease it acquired from a predecessor lessee. (*See* Complaint, ECF No. 1 in Case No. 2:14-cv-1449.)

underlying the land herein leased . . . .

(*Id.* (emphasis added).) By the plain terms of the lease, American Energy-Utica seeks to acquire gas associated directly with coal formation and coal-mining activity. This provision raises the possibility that American Energy-Utica and American Energy Corporation could potentially have conflicting claims for mineral rights in the same land. For example, if American Energy Corporation holds a coal severance deed for the coal seam but American Energy-Utica purports to lease all gas associated with the coal seam, there is necessarily a competition (if not a dispute) about ownership of coal-related gas. Moreover, the reference to *coal* in American Energy-Utica's leases enhances the possibility that a landowner—especially one who has dealt with American Energy Corporation in the past—could perceive some affiliation between Defendants and American Energy Corporation.

For all of these reasons, Defendants' leases with landowners are relevant to the matters at issue in this case. Accordingly, Defendants cannot and should not escape their obligation to produce fully their leases with landowners.

D. Defendants' Redactions are Improper.

Despite the relevance of the lease terms to the issues presented in this case, Defendants have not only withheld (by their own admission) leases that should have been produced, but have also unilaterally redacted almost the totality of every lease produced to Plaintiff. The redactions are improper and Defendants should be ordered to produce unredacted copies of all the leases to which Plaintiff is entitled.

In a recent case, this Court invalidated a litigant's attempt to unilaterally redact unprivileged material on the basis of relevance. *See Curtis v. Marquette Exploration, LLC*, No. 2:13-cv-453, 2013 U.S. Dist. LEXIS 178070 (S.D. Ohio Dec. 19, 2013) (King, M.J.). *Curtis*

involved a dispute over an oil and gas lease that the plaintiff lessor alleged to have been forfeited by the lessee. *Id.* at *1. During discovery, the plaintiff sought an unredacted copy of an email that one of the defendants had produced in redacted form. *Id.* at*2. The defendant resisted producing the unredacted version of the document, arguing that the redacted material was related to landowners other than the plaintiff and was neither relevant nor reasonably calculated to lead to the discovery of admissible evidence. *Id.* at *5. Magistrate King granted the plaintiff's motion to compel, finding no basis in the civil rules for a redaction based on purported irrelevance. Because the document in question was otherwise responsive to the plaintiff's request and the defendant did not claim a privilege as to the portion redacted, Magistrate King ruled that the defendant had to produce the document. *Id.* at *6 (citing Fed. R. Civ. P. 26(b)(1) and (b)(5)(A)).

Also instructive is *Beverage Distributors, Inc. v. Miller Brewing Co.*, Nos. 2:08-cv-827, et al., 2010 U.S. Dist. LEXIS 50732 (S.D. Ohio Apr. 28, 2010) (Kemp M.J.), which, much like this case, involved the unilateral redaction by the defendants of large portions of voluminous documents. *See id.* at *10-11. Citing cases from federal courts in Illinois and New York, defendants argued that their redaction of "irrelevant" information was proper. *Id.* at *12.[11] To resolve the issue, Magistrate Kemp reconciled the defendants' cited cases with cases cited by the plaintiffs for the proposition that Fed. R. Civ. P. 34 does not allow for a party's unilateral redaction of documents on relevance grounds. *Id.*[12] Finding the cases cited by the parties to be "not necessarily irreconcilable," Magistrate Kemp found the redactions improper, due in large part to their extensive scope. *Id.* at *15-16. Magistrate Kemp therefore granted the motion to

[11] *See Spano v. Boeing Co.*, 2008 U.S. Dist. LEXIS 31306 (S.D. Ill. Apr. 16, 2008); *Beauchem v. Rockford Prods. Corp.*, 2002 U.S. Dist. LEXIS 14879 (N.D. Ill. Aug. 13, 2002); *Schiller v. City of New York*, 2006 U.S. Dist. LEXIS 88854 (S.D.N.Y. Dec. 7, 2006).

[12] *See Orion Power Midwest, L.P. v. America Coal Sales Co.*, 2008 U.S. Dist. LEXIS 76366 (W.D. Pa. Sept. 30, 2008); *In re Atlantic Financial Fed. Secs. Litigation*, 1991 U.S. Dist. LEXIS 11049 (E.D. Pa. Aug. 6, 1991).

compel production of unredacted versions of documents.

Admittedly, Magistrate Kemp's decision in *Beverage Distribs.* did not rule that redaction is *always* improper. And if Defendants' redactions in this case were targeted and limited, Plaintiff may not have taken issue with them. But Defendants have no justification for the widespread use of redactions here. In the context of the leases, Defendants have redacted almost every term. (Exhibit I.) Defendants' abuse of the redaction process is similar to that which occurred—and was denounced by the Court—in *Beverage Distribs*.

Nor can Defendants invoke "confidentiality" concerns to justify their wholesale redactions. The protective order entered in this case enables Defendants to designate documents as "confidential" or "attorneys eyes only," thereby giving allegedly confidential documents protection from public disclosure. (ECF No. 13.) The fact that information in otherwise responsive documents may be "confidential" does not shield the information from discovery. *McNabb v. City of Overland Park*, No. 12-cv-2331, 2014 U.S. Dist. LEXIS 37312, at *9 (D. Kan. Mar. 21, 2014) (citing *U.S. Fire Ins. Co. v. Bunge N. Am., Inc.*, No. 05-cv-2192, 2008 U.S. Dist. LEXIS 49024, at *7 (D. Kan. June 23, 2008)). Defendants have already taken advantage of the protective order by designating the redacted documents "confidential" and "attorneys eyes only." If Defendants were concerned that the existing protective order did not provide enough protection for allegedly confidential information, Defendants should have sought further protection in the form of another protective order. *See id.* at *14. What Defendants could *not* do is what they did here—invoke the protection of the protective order, yet unilaterally redact information from otherwise responsive documents. *See id.* *See also U.S. Fire Ins. Co.*, 2008 U.S. Dist. LEXIS 49024, at *7.

III. CONCLUSION

Defendants have unjustifiably withheld discoverable information through their unilateral redaction of otherwise responsive documents and their outright withholding of documents that are responsive to Defendants' requests and this Court's March 27 Order. The Court should therefore grant Plaintiff's motion to compel and order Defendants to produce unredacted copies of all leases with landowners, including those entered into by Defendants' affiliates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record, this 8th day of September, 2014.

___/s/ Vladimir P. Belo_____
Vladimir P. Belo

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