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.
v.	:	Magistrate Judge Mark R. Abel
AMERICAN ENERGY PARTNERS, LP, et al.,	:	**ORAL ARGUMENT REQUESTED**
Defendants.	:	

PLAINTIFF AMERICAN ENERGY CORPORATION'S MOTION
TO EXTEND DEADLINES FOR DISCOVERY AND DISPOSITIVE MOTIONS

(REDACTED PURSUANT TO ECF NO. 72; ORIGINAL FILED UNDER SEAL)

Plaintiff-Counterclaim Defendant American Energy Corporation, by its undersigned counsel, respectfully moves to extend the deadlines for fact and expert discovery, as well as case-dispositive motions, by ninety days. Pursuant to S.D. Ohio Civ. R. 7.1(b)(2), American Energy Corporation respectfully requests oral argument if the Court would find it helpful. This Motion presents significant issues of fairness and prejudice. Oral argument may assist the Court in reaching a full understanding of the issues presented and the underlying facts. The full legal and factual basis for this Motion is set forth in the accompanying Memorandum in Support.

Respectfully submitted,

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Attorneys for Plaintiff-Counterclaim Defendant American Energy Corporation

MEMORANDUM IN SUPPORT

American Energy Corporation filed this action alleging that under Ohio law Defendants American Energy Partners, LP ("American Energy Partners"), American Energy – Utica, LLC ("American Energy – Utica"), and Aubrey McClendon's ("McClendon") (collectively, "Defendants") use of the names "American Energy Partners, LP" and "American Energy – Utica, LLC" constitutes (1) deceptive trade practice and (2) unfair competition; and infringes upon American Energy Corporation's (3) trade name rights and (4) trademark rights. In turn, Defendants have asserted counterclaims seeking declarations that they are not violating Ohio law in any of these four respects. Defendants have also asked the Court to declare that American Energy Corporation has no interest in "American Energy Corporation" that it could enforce in the first place and that Defendants' use of "American Energy Partners, LP" and "American Energy – Utica, LLC" does not violate federal trademark law.

Defendants are rapidly expanding start-up businesses funded by billions of dollars in capital, and the entirety of the parties' relevant operations developing fossil fuel resources in Ohio overlap in just a six county area in the Southeastern corner of the state. Accordingly, American Energy Corporation has sought to discover the extent, nature, and plans for American Energy Partners and American Energy – Utica's commercial activities to prove the elements of the asserted claims. Defendants themselves have put these exact subjects at issue through their counterclaims against American Energy Corporation.

PROCEDURAL HISTORY

As the Court is already familiar with the filings in this instance, American Energy Corporation will not belabor the point with a complete recitation of this case's full

procedural history. For present purposes, it is sufficient to state that, on August 11, 2014, the Court entered a Scheduling Order (Doc. 48) setting the following case management deadlines:

Fact Discovery:	November 25, 2014.
Primary Experts' Disclosures:	December 19, 2014.
Responsive Experts' Disclosures:	January 16, 2015.
Expert Discovery:	February 16, 2015.
Case-Dispositive Motions:	February 27, 2015.

LEGAL STANDARD

Pursuant to Fed. R. Civ. P. 16(b)(4), a schedule may be modified for good cause and with the judge's consent. "The primary measure of Rule 16's 'good cause' standard is the moving party's diligence in attempting to meet the case management order's requirements." *Inge v. Rock Fin. Corp.*, 281 F.3d 613, 625 (6th Cir. 2002). "Another relevant consideration is possible prejudice to the party opposing the modification." *Id.*

ARGUMENT

The present circumstances warrant an extension of the case management deadlines set in the Scheduling Order. Specifically, (1) Defendant McClendon is not available to be deposed during the present fact discovery period, (2) Defendants have withheld the identity of witnesses on subjects of central importance to this case, and withheld *all* documents and correspondence that might be in the possession of those witnesses, and (3) two already-filed motions relating to Defendants' prior efforts to avoid discovery and American Energy Corporation's Motion to Dismiss and to Strike Defendants' Counterclaims remain pending before the Court.

American Energy Corporation has at all times pursued discovery diligently by propounding written discovery and conducting depositions as contemplated by the August 11, 2014 Scheduling Order. From July 2014, American Energy Corporation has

taken or defended twenty depositions scheduled in Ohio, Oklahoma, and West Virginia. Since this case was filed, American Energy Corporation has also served and responded to multiple sets of discovery and produced over 6,000 pages of documents. When disputes have arisen, American Energy Corporation has attempted to resolve them in good faith and in a timely manner. In spite of this, Defendants' unavailability and comprehensive resistance to discovery have made the current schedule unworkable. Indeed, neither American Energy Corporation nor Defendants expect to be able to complete fact discovery by the November 25, 2014 deadline.

I. Defendant McClendon Is Not Being Made Available for Deposition.

On October 15, 2014, 41 days prior to the close of fact discovery under the present schedule, counsel for American Energy Corporation requested that defense counsel provide available dates for the deposition of Defendant McClendon. McClendon is himself a named defendant, as well as the individual who founded and controls the other named defendant business entities. After almost a week, Defendants' attorneys advised that McClendon would not be available to be deposed until two months later on December 17 or 18, 2014 - three weeks past the current deadline for fact discovery.

Given McClendon's schedule, the parties agree that fact discovery should extend until at least December 18, 2014. However, the fact discovery deadline must extend beyond that date to allow McClendon's deposition to be taken sufficiently prior to the close of fact discovery under any amended schedule. In large part, this is necessary because American Energy Corporation has repeatedly learned of relevant and responsive undisclosed evidence while deposing Defendants' witnesses, as exemplified in the discussion below. Consequently, American Energy Corporation will not agree to

depose McClendon on a date that works to its prejudice.[1]

Put simply, American Energy Corporation cannot agree to take the deposition of a witness and key party after, or on the day, fact discovery is set to close when the opportunity to pursue newly disclosed information is practically unavailable. If McClendon is unavailable to be deposed until December 17, 2014, then fact discovery needs to remain open for a reasonable time thereafter. Considering that the availability of McClendon falls in the midst of the holiday season, it is realistic to anticipate that any follow-on discovery matters from his deposition will extend well into January 2015, and perhaps longer if these matters cannot be resolved with transparency through good-faith cooperative efforts of counsel. Also, for the additional reasons noted below in Sections II and III, the deposition of McClendon will not bring an end to fact investigation issues that indisputably relate to the claims of both American Energy Corporation and Defendants in this case.

II. Defendants Have Withheld the Very Existence of Key Witnesses and Produced No Documents From Such Witnesses.

The parties have disputed, and previously briefed to the Court, the scope of the protections offered by Ohio trademark and trade name law as it relates to Defendants' hiring activities, leaseholds, and economic relationships with area landowners, mineral rights holders, employees, and vendors. There is no dispute, however, that information relating to the manner in which American Energy – Utica identifies and brings its goods and services to market is discoverable. (*See* Defendants' Motion for Protective Order, Doc. 52 at 7.) Therefore, it is agreed that the manner in which (1) Defendants plan to market and sell their products, and (2) to what customer base, bear directly on

[1] To protect American Energy Corporation's rights given the impending deadlines, American Energy Corporation noticed the deposition of McClendon for November 21, 2014. Defendants have indicated that McClendon will not be produced on that date.

establishing the offending use of American Energy Corporation's trade name and trademark rights under Ohio law.

Because Defendants are start-up businesses, many of the relevant facts relate to their plans for how they will go to market. In their efforts to resist transparency in discovery, Defendants' attorneys have made repeated representations to the Court regarding the supposed business model to be employed as the startup-up business operations of Defendants are put in place, and argued that discovery should be limited because it would be self-evident that American Energy Corporation and Defendants would not compete in any way under the claimed business model described. Troublingly, those bare assertions have been disproven by the actual facts as American Energy Corporation has slowly uncovered the identity of undisclosed witnesses and established the existence of undisclosed documents.

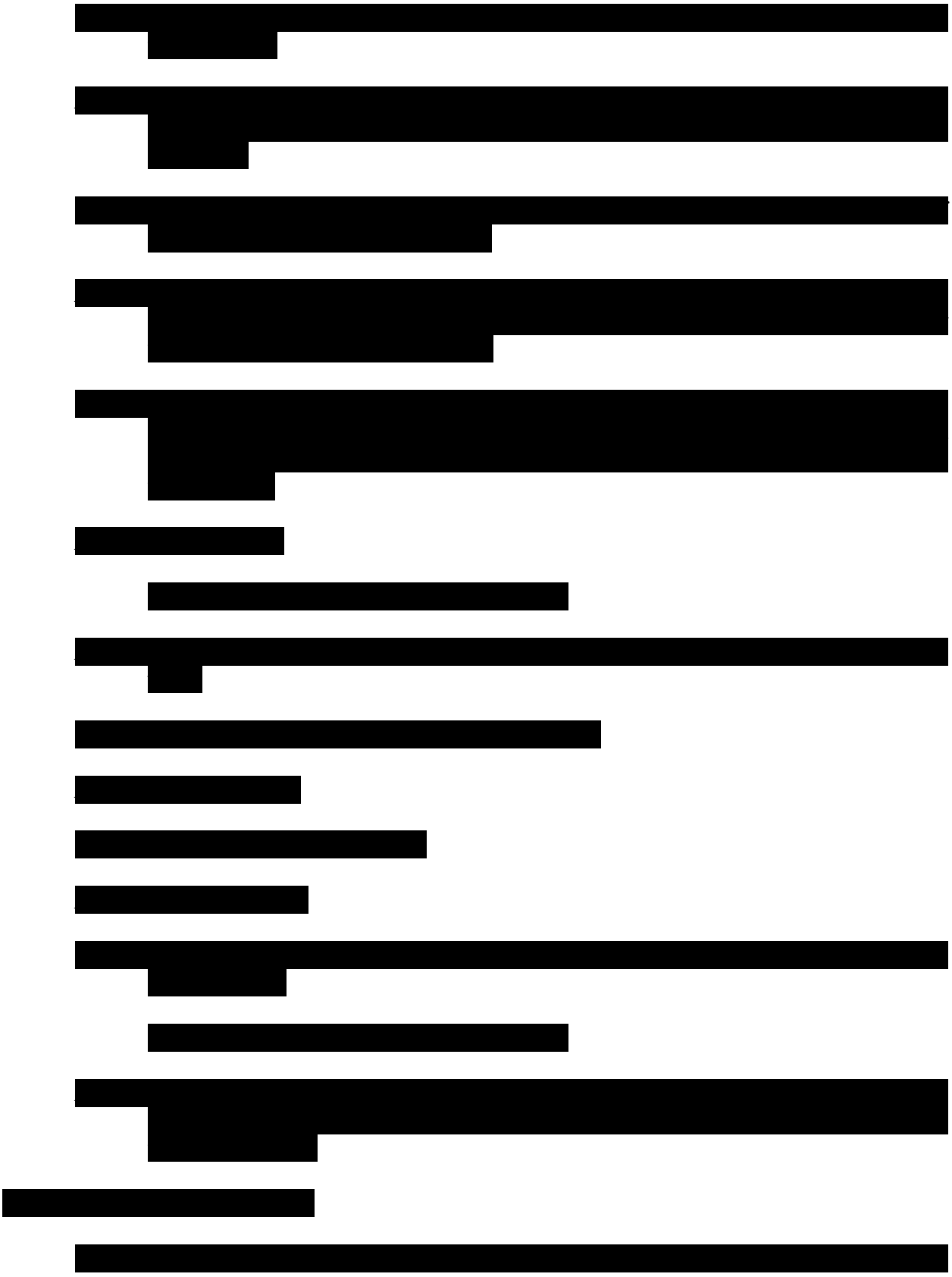
Initially, it was asserted, without evidence, that Defendants would only ever sell to midstream pipeline operators and that no consumer of Defendants' fossil fuels would ever know that those fuels were sourced from Defendants. (See Discovery Dispute Conference Order entered on March 27, 2014, Doc. 30 at 2.) This was inaccurate. [redacted]

[redacted] But this new assertion of counsel is not only inconsistent with Defendants' own pleadings (*See* Doc. 40 at Countercl. ¶ 24 (alleging that "American Energy – Utica intends to sell natural gas to pipeline operators")), it is also contradicted by the actual facts testified to by Defendants' leadership.

[redacted]

[2] [redacted]

[3] American Energy Corporation notes that the transcript [redacted] only became available on Monday, November 17, 2014 at 4:23 p.m. Upon receipt of the transcript, American Energy Corporation diligently sought to prepare and file the present Motion as soon as practicable.



[redacted]

Yet, as noted before, until October 28, 2014 – just three weeks ago – [redacted] had *never been disclosed* as someone having relevant knowledge or discoverable information of any kind. As for the other key witnesses, none of them have ever been disclosed *at all*. In a typical litigation, the identity of relevant witnesses could nevertheless be readily ascertained by a review of related documents produced in the course of discovery. But here Defendants' non-production of documents is so complete that, with respect to [redacted], there is no indication that *any* documents have *ever* been collected from any of them, and there are no produced documents of any substance that so much as hint at their roles in the marketing and sales arena. Indeed, Defendants have not produced even a single email from anyone relating to marketing or midstream activities.

[redacted]

[redacted] Perhaps it is unsurprising, then, that Defendants' counsel has recently refused to respond to a simple request that Defendants confirm that their production of documents on midstream and marketing subjects is complete. (*See* Pertinent Correspondence of Counsel attached hereto at Ex. B.) This wholesale non-production of evidence and non-disclosure of relevant witnesses will be the subject of a separate motion by American Energy Corporation, but in the meantime, clearly demonstrates that American Energy Corporation would be severely prejudiced by a discovery cut-off date that enabled Defendants to reap the benefits of withholding highly relevant evidence about a topic as fundamental as to whom they will sell their products and through what channels of trade.

American Energy Corporation has the right to know the identity of witnesses with discoverable knowledge, and to obtain and review relevant, responsive documents *before* deposing key witnesses. Otherwise depositions become a shell game of trying to uncover which witnesses should have actually been disclosed, and what documents should have been produced to inform deposition inquiry, to challenge and impeach witnesses, and to respond to unsupported factual assertions of counsel. As it is, the current path of discovery in this matter embodies "a gamesmanship view of discovery … [t]hat is not within the spirit of the Federal Rules Civil Procedure." *See e.g. In re Nat'l Century Fin. Enters.*, No. 2:03-md-1565, 2009 U.S. Dist. LEXIS 5772 (S.D. Ohio Jan. 8, 2009) (Abel, M.J.). Defendants have the obligation to cooperate in discovery in a good faith and transparent manner to permit discovery to proceed as envisioned by the Federal Rules of Civil Procedure so that the litigation may proceed fairly, and within the timeframes set by the Court.

Having only learned of the existence of undisclosed witnesses and unproduced documents just one week ago, American Energy Corporation simply requests sufficient time to pursue these matters as provided for in the Civil Rules of Procedure.

III. Other Matters Remain Pending that Require Resolution by the Court.

In addition to the above, there are three pending motions before the Court that relate to the scope of the claims in question and the parties' efforts to conduct discovery: Plaintiff American Energy Corporation's Motion to Dismiss and to Strike Defendants' Counterclaims (Doc. 42); Plaintiff American Energy Corporation's Motion to Compel Discovery (Doc. 50); and Defendants' Motion for Protective Order (Doc. 52).

If Defendants are allowed to proceed on their counterclaim seeking a declaration that American Energy Corporation has no right to exclusive use of "American Energy Corporation" on a national level under federal law, the scope of the case will necessarily be enlarged beyond the Ohio law claims now at issue. (*See* Doc. 40 at Countercl. ¶ 13.)

With respect to the pending discovery motions, despite the passage of time, document discovery from Defendants has essentially stalled as Defendants responded to Plaintiff's July 16, 2014 Second Set of Requests for Production with little more than a recitation of objections and a motion for a protective order, which remains pending. (*See*, *e.g.*, Discovery Responses attached hereto at Ex. C (responding to discovery requests largely with voluminous and repetitively copied and pasted objections).) Naturally, these matters should be resolved during the discovery period for the efficient conduct of the litigation.

CONCLUSION

Since an extension of the fact discovery deadline is necessary, the deadlines for expert disclosures and discovery and case-dispositive motions should be extended in

turn. Pursuant to S.D. Ohio Civ. R. 7.3(a), counsel for American Energy Corporation consulted in good faith with Defendants' attorneys prior to filing this Motion. Defendants were willing to briefly extend the case management deadlines, but only for the amount of time that *they* needed to make McClendon available. Thus, there is at least agreement that the deadline for fact discovery should extended through the third week of December, resetting the remaining deadlines for expert discovery and case-dispositive motions thereafter at their current spacing, although this is not alone sufficient for the reasons set forth above.

No prior extensions to the Scheduling Order have been requested by American Energy Corporation or granted by the Court. Furthermore, American Energy Corporation certifies that the request for an extension is not being made for delay or harassment. American Energy Corporation will be substantially prejudiced if the deadlines in the Scheduling Order are not extended for the above stated reasons. On the other hand, Defendants will not be prejudiced by the proposed extensions to the Scheduling Order. Additionally, the proposed extension will not disrupt the trial date for this matter since no trial date has been set.

For the reasons above, Plaintiff-Counterclaim Defendant American Energy Corporation respectfully asks the Court to grant its Motion to Extend Deadlines for Discovery and Dispositive Motions. A proposed Order is attached for the Court's Consideration.

Respectfully submitted,

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Attorneys for Plaintiff-Counterclaim Defendant American Energy Corporation

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 1st day of December, 2014.

/s Vladimir P. Belo
Vladimir P. Belo

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

ORDER

AND NOW, this ____ day of _____, 2014, upon consideration of Plaintiff-Counterclaim Defendant American Energy Corporation's Motion to Extend Deadlines for Discovery and Dispositive Motions, IT IS HEREBY ORDERED that said Motion is GRANTED. The Scheduling Order (Doc. 48) is revised as follows:

Fact Discovery:	Must be completed on or before February 23, 2015.
Fact Discovery Status Conference:	Prior to February 23, 2015 by agreement of the parties or order of the court.
Primary Experts' Disclosures:	Must be made on or before March 19, 2015.
Responsive Experts' Disclosures:	Must be made on or before April 16, 2015.
Expert Discovery:	Must be completed on or before May 18, 2015.
Case-Dispositive Motions:	Must be filed on or before May 28, 2015.

_____
UNITED STATES MAGISTRATE JUDGE