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

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

PLAINTIFF AMERICAN ENERGY CORPORATION'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER (REDACTED FILING PURSUANT TO COURT ORDER, ECF NO. 56. ORIGINAL FILED UNDER SEAL.)

Plaintiff American Energy Corporation ("AEC"), by its undersigned counsel, respectfully submits this Memorandum in Opposition to Defendants American Energy Partners, LP ("AEP"), American Energy – Utica, LLC ("Utica"), and Aubrey McClendon's ("McClendon") (collectively, "Defendants") Motion for Protective Order (the "Motion").

INTRODUCTION

This is a dispute between competing energy companies over the use of the "American Energy" trade name and trademark. AEC is an Ohio based energy company that has been in business in Southeast Ohio for years, whereas AEP and Utica, at the direction of McClendon, are start-up Oklahoma-based energy businesses that have recently set up operations focused on the same corner of Southeast Ohio – operations that are expanding at a dramatic pace and are fueled by billions of dollars of financing. Having previously misstated the nature of their intended business to the Court to limit discovery in this case, Defendants now misstate the protections afforded to AEC under

Ohio law in another attempt to shield themselves from basic discovery. Because Defendants are only in the earliest stages of selling the fossil fuels they plan to drill and recover, they hope to limit all discovery about public confusion between the parties to confusion among customers. While perhaps convenient for Defendants, such is not the law. AEC's straightforward, narrowly tailored discovery requests go squarely to the legal issues presented in this case.

BACKGROUND

Defendants ask the Court for a protective order that would bar AEC from seeking discovery related to the following requests made in AEC's Second Set of Requests for Production:

1. employee recruiting efforts in Ohio by American Energy Management Services or AEU Services since January 1, 2013, (Doc. 52-7 at Req. No. 1);
2. job duties or expected qualifications of employees recruited for job roles with Defendants or their affiliates in or relating to Ohio, (*id.* at Req. No. 2);
3. board notes of Defendants or their affiliates that discuss coal, AEC, or Defendants' commercial plans and activities in Ohio, (*id.* at Req. No. 6);
4. communications between Defendants or their affiliates and Orange Energy Consultants, LLP or Great River Energy, LLC regarding land acquisition in Ohio since January 1, 2013, (*id.* at Req. No. 8);
5. advertisements in Ohio regarding Defendants' attempts to acquire or lease land since January 1, 2013, (*id.* at Req. No. 9);
6. utilities expected to use Defendants' Southern Utica Shale natural gas and liquefied natural gas, (*id.* at Req. No. 23);
7. oil and gas leases owned or controlled by Defendants or their affiliates in Belmont, Guernsey, Harrison, Monroe, Jefferson, and Noble counties in Ohio since January 1, 2013, (*id.* at Req. No. 24);
8. communications referring to any affiliate of AEP as just "American Energy" since January 1, 2013, (*id.* at Req. No. 25);
9. business plans and organizational charts for American Energy Ohio, (*id.* at Req. No. 26); and
10. complaints from landowners, vendors, employees, or potential employees since January 1, 2013 relating to Defendants' business actions or practices, (*id.* at Req. No. 29).

I. Nonconsumer Confusion Is Relevant and At Issue.

Defendants' Motion mischaracterizes not only the applicable law, but also the scope and nature of this case as set forth in AEC's Amended Complaint and previous filings of this Court. Defendants contend that AEC did not allege nonconsumer confusion in its Amended Complaint. (Doc. 52 at 2.) Selectively citing to paragraphs of the Amended Complaint that "appropriately focus on the consumer," Defendants contend that inquiry into nonconsumer confusion is unwarranted. (*Id.* at 2-3 (citing Doc. 14 ¶¶ 35, 44, 49).) But AEC's Amended Complaint, while pleading confusion among customers as a basis for liability, *also* pleaded allegations that were targeted at likely confusion among noncustomers.

Under Fed. R. Civ. P. 8(a)(2), a complaint need only contain a short and plain statement showing that the pleader is entitled to relief. Defendants had an opportunity to challenge the Amended Complaint, and their attempt to do so was denied. (*See* Doc. 39.)

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." (Doc. 14 ¶¶ 12, 14, 19, 49, 51.) It is alleged 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*." (*Id.* ¶ 49 (emphasis added); *see also id.* ¶ 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*." (*Id.* ¶¶ 19, 25 (emphasis added).) Based on these allegations, it should be beyond dispute that AEC'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 nonconsumers. To prevail, AEC will prove that there is a likelihood of confusion with respect to the "affiliation, connection or association" between it and Defendants within these populations. *See Leventhal & Assocs., Inc. v. Thomson Cent. Ohio*, 714 N.E.2d 418, 424 (Ohio Ct. App. 1998); *accord Corrova v. Tatman*, 844 N.E.2d 366, 369 (Ohio Ct. App. 2005).

The Amended Complaint is even more specific when it comes to potential confusion among landowners, which is a critical component of this case. 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," (Doc. 14 ¶ 37);
- "American Energy – Utica has entered into transactions for the acquisition of 80,000 acres in the Utica Shale" (admitted in Defendants' Answer), (*id.* ¶ 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," (*id.* ¶ 40); and
- "Aubrey McClendon has signed agreements to acquire land in Guernsey County, Ohio and Noble County, Ohio on behalf of American Energy – Utica," (*id.* ¶41.)

These allegations and Defendants' dealings with landowners are important to the claims at issue in this case. Defendants' primary business activity since creating AEP and Utica has been the acquisition of land interests in Southeastern Ohio, and Defendants have been publicly advertising themselves to landowners for this purpose. (*See* Ex. 1.) Thus, 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.

II. Discovery Has Been Stymied By Defendants.

As this Court is aware, the parties have already had disputes over the scope of discovery in this case. Defendants have stymied AEC in AEC's efforts to obtain discovery into a number of areas relevant to the claims at issue in this case, including (but not limited to) information on Defendants' affiliate companies (particularly those that use or promote the "American Energy" name), Defendants' business plans, Defendants' dealings with third parties such as landowners and vendors, and Defendants' intended customer base. This Court had already addressed in preliminary fashion some of the parties' discovery disputes. In particular, the Court in its March 27, 2014 Discovery Dispute Conference Order, as a basis for limiting the scope of Plaintiff's discovery, found:

> As I understand it, American Energy Corporation [*sic*, Defendants] is purchasing rights to natural gas/oil/minerals in six eastern Ohio counties. It is not currently producing natural gas, but it intends to do so. When it does, the natural gas will be delivered by a pipeline to a midstream pipeline operator and intermingled with other natural gas. *The midstream pipeline operator will purchase the natural gas* American Energy Corporation [*sic*, Defendants] delivers to the pipeline. Later that natural gas will be sold to purchasers who would have no idea whose natural gas they were buying.

(Doc. 30 at 2 (emphasis added).)

The Court's understanding, which was based on inaccurate representations by Defendants at the preliminary pretrial conference in February and then at the Discovery Dispute Conference convened in March, has proven to be incorrect. At a recent deposition, Annie Psencik, formerly the director of midstream and marketing for AEP,

[redacted]

[redacted]

Other events during the course of discovery have also undermined the premise upon which this Court based its earlier ruling. On June 19, 2014, having previously asserted that Defendants would only sell to midstream pipelines and therefore never compete with AEC, AEP issued a press release and "announced the formation of American Energy – Midstream, LLC," an entity never before mentioned in any interrogatory response, unredacted document, business plan, organization chart, or deposition testimony. (*See* Ex. 3.) The press release clarifies that the new business will "build a portfolio of midstream assets strategically focused on natural gas gathering and processing systems and long-haul pipelines associated with four affiliates of [AEP]," including Utica. (*Id.*) Thus, there is a strong inference that Defendants intend to provide midstream services. Of course, Defendants previously claimed these services would be provided only by third parties whose involvement would shield end customers from even knowing they were buying Defendants' products.

[redacted]

[redacted] Accordingly, a major reason behind this Court's limitation on discovery in its March 27 Order—namely, the Court's "understanding" of how Defendants' business model worked—has proven to be false.

III. Consumer Confusion Is Alleged and Is Still At Issue.

Another faulty factual underpinning of Defendants' motion is that AEC has somehow abandoned its claim that there is a likelihood of consumer confusion. (Doc. 52 at 2.) Defendants cite to AEC's Objections to the Magistrate Judge's March 27, 2014 discovery order as the source of this purported abandonment. (*Id.* (citing Doc. 30 at 3).) But AEC did no such thing. While AEC argued that confusion could extend to landowners, regulators, vendors, and the labor force, AEC nowhere stated that it was abandoning arguments concerning consumer confusion. Indeed, the gravamen of AEC's Objections (which are still pending before the Court) is that AEC respectfully contends that the Court unduly narrowed discovery into areas of nonconsumer confusion.

Moreover, consumer confusion is not only in issue but also the proper subject of discovery in some of the challenged requests. For example, Defendants seek a protective order to prevent AEC from discovering information about business plans for the sale of natural gas and of utilities expected to use Defendants' natural gas products. (*See* Doc. 52-7 at Req. Nos. 6 & 23.) But these are categories of discovery aimed at consumer confusion. The requests' connection with consumer confusion has become evident through the course of discovery thus far. As discovery has progressed, it has become clear that Defendants do not intend to sell natural gas only to "midstream pipeline operators," as they have previously represented to this Court. Defendants are essentially a start-up business that has sold little product since its inception, but who intends to be a major industry actor in the near future. Based on the evidence thus far,

Defendants may well be marketing and selling their products [redacted]

LEGAL STANDARD

The Federal Rules of Civil Procedure authorize extremely broad discovery. *United States v. Leggett & Platt, Inc.*, 542 F.2d 655, 657, *cert. denied*, 430 U.S. 945 (1977). "Rule 26(b) states that parties may obtain discovery regarding any non-privileged matter relevant to the subject matter of the pending action, and that the information need not be admissible at trial if it appears reasonably calculated to lead to the discovery of admissible evidence." *Dunn v. Midwestern Indem.*, 88 F.R.D. 191, 194-95 (S.D. Ohio 1980). The burden is on the party resisting discovery to clarify and explain precisely why its objections are proper given the broad and liberal construction of the federal discovery rules. *See, e.g., Obiajulu v. City of Rochester, Dep't of Law*, 166 F.R.D. 293, 295 (W.D.N.Y. 1996). This includes, of course, where the resisting party asserts that the discovery is irrelevant. *See, e.g., Nat'l Credit Union Admin. v. First Union Capital Mkts. Corp.*, 189 F.R.D. 158, 161 (D. Md. 1999). The concept of relevance during discovery is necessarily broader than at trial. *Mellon v. Cooper-Jarrett, Inc.*, 424 F.2d 499, 500-01 (6th Cir. 1970). Furthermore, discovery is not so narrowly constrained by parsing of the pleadings because "discovery itself is designed to help define and clarify the issues." *See generally Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 (1978).

ARGUMENT

AEC's discovery requests relating to Defendants' hiring activities, leaseholds, and relationships with lessees, employees, and vendors are directed squarely to central issues in dispute in this case. Yet, Defendants seek to prevent *any* substantive response to AEC's discovery requests relating to these subjects by arguing that the requests are somehow a fishing expedition that is not reasonably calculated to lead to the discovery of admissible evidence. Defendants' argument rests on two premises: (1) that the scope of the likelihood of confusion test is limited to purchasers of the parties' goods and services; and (2) that AEC has no evidence of actual confusion. Both of these premises are false.

I. The Scope of the Likelihood of Confusion Test Is Not Limited to Purchasers of the Parties' Goods and Services.

To prove that Defendants violated the Ohio Deceptive Trade Practices Act, the Ohio common law of unfair competition, and the Ohio common law of trademark and trade name infringement, AEC must show that Defendants' use of "American Energy Partners, LP" and "American Energy – Utica, LLC" will cause a likelihood of confusion. *See*, *e.g.*, Ohio Rev. Code §§ 4165.02(A)(2) & 3. The determination of whether there is a likelihood of confusion will reference the consideration of eight factors: (1) strength of the plaintiff's mark; (2) relatedness of the goods; (3) similarity of the marks; (4) evidence of actual confusion; (5) marketing channels used; (6) likely degree of purchaser care; (7) defendant's intent in selecting the mark; and (8) likelihood of expansion of the product lines. *Cesare v. Work*, 520 N.E.2d 586, 590 (Ohio Ct. App. 1987). These factors are helpful guides rather than rigid requirements, implying no mathematical precision. *Gen. Motors Corp. v. Lanard Toys, Inc.*, 468 F.3d 405, 412 (6th Cir. 2006). A plaintiff

"need not show that all, or even most, of the factors listed are present in any particular case to be successful." *Wynn Oil Co. v. Thomas*, 839 F.2d 1183, 1186 (6th Cir. 1988). The general concept underlying likelihood of confusion is that "the public believe that the mark's owner sponsored or otherwise approved of the use of the trademark." *Id.* (internal quotation omitted).

Within this framework, Defendants assert that AEC's discovery requests related to parties with whom they have extensive business dealings have no bearing on the claims in dispute unless those parties are specifically purchasers of AEC's products, and that discovery should be limited only to customers. (Doc. 52 at 9.) But that is not the case. To the contrary, the Sixth Circuit reversed a district court under a "clearly erroneous" standard of review for adopting essentially the same position that Defendants propose to this Court to prevent AEC *from even doing discovery*. *See Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, 78 F.3d 1111, 1118 (6th Cir. 1996). Nor is it the case that nonconsumer confusion is only relevant to the extent it bears a relationship to the existence of confusion on the part of consumers themselves. (Doc. 52 at 9-11.) Although Defendants profess otherwise, *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190 (9th Cir. 2012), does not hold that the confusion of groups of nonconsumers is relevant only on the three grounds set forth in the opinion. *Id.* at 1214 n.9. In fact, the court assumes the opposite to be true:

> We need not—and do not—decide whether there are other circumstances or grounds for taking into account non-consumer confusion. For example, we do not decide whether confusion on the part of such non-consumers as vendors and suppliers, potential employees, and investors should be considered merely because such confusion could affect the trademark holder's business, goodwill, or reputation. We simply recognize that the confusion of vendors, suppliers, potential employees, investors, and similar groups of non-consumers could be relevant on the three specific grounds set forth in this opinion.

Id. (internal citation omitted). Defendants ignore this.

To be sure, in *Champions Golf Club, Inc. v. The Champions Golf Club, Inc.*, the district court found at a bench trial that a Texas golf course failed to show a likelihood of confusion arising from a Kentucky golf course's use of a similar name in spite of the fact that the plaintiff had evidence of actual confusion among non-customers. *Id*. at 1114-15. The plaintiff appealed, claiming that the district erred in concluding that there was no likelihood of confusion in the parties' simultaneous use of the "Champions" mark. *Id*. at 1115. The Sixth Circuit agreed and vacated the district court's judgment. *Id*. at 1124. Particular fault was found in the district court's opinion that "only confusion among consumers that actually use the parties' services [was] relevant." *Id*. Calling the opinion "mistaken," the *Champions* Court instead stated: "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.'" *Id*. at 1119 (quoting *Ferrari S.P.A. Esercizio Fabriche Automobili E Corse v. Roberts*, 944 F.2d 1235, 1243 (6th Cir. 1991)).

In spite of this, Defendants cite *Champions* as though it supports their position. Defendants are very specific, citing to page 1119 of the decision for the proposition that "the Sixth Circuit found that incidents of actual non-purchaser confusion were relevant insofar as they may give rise to the inference that consumers may also be confused." (Doc. 52 at 8.) But *Champions* states nothing of the kind. 78 F.3d at 1119-20.

At no point did the *Champions* court draw any connection between the evidence of confused suppliers and any "inference" to confused consumers. Instead, the court in *Champions* found that non-customer confusion was not only relevant but actionable in

its own right, stating "potential confusion among nonpurchasers [is] *just as significant* as that among purchasers." *Id.* (emphasis added). The court explained that this was necessary to protect the reputation of a business. *Id.* Indeed, the court suggested that nonconsumer confusion was especially "significant" because the vendors in question were "knowledgeable" and were confused despite having an "incentive to accurately identify" the correct golf course. *Id.* at 1120.

Others courts have done the same. For instance, in *Beacon Mut. Ins. Co. v. OneBeacon Ins. Grp.*, 376 F.3d 8 (1st Cir. 2004), the First Circuit indicated that relevant confusion among non-purchasers extends "beyond the confusion of those persons positioned to influence directly the decisions of purchasers." *Id.* at 16-17. Relying on *Champions*, the court held that "the likelihood of confusion inquiry is not limited to actual or potential purchasers, but also includes others whose confusion threatens the trademark owner's commercial interest in the mark." *Id.* Likewise, the Eighth Circuit in *First Nat'l Bank v. First Nat'l Bank S.D.*, 679 F.3d 763 (8th Cir. 2012), concluded that the test for confusion "includes confusion of nonpurchasers as well as direct purchasers." *Id.* at 770. In a case where the defendant, like Defendants here, complained about reliance on evidence of non-purchaser confusion among "vendors, delivery people, or other non-customers," the court explained that such confusion was actionable in and of itself. *Id.*

In this respect, *Exxon Corp. v. Humble Exploration Co., Inc.*, 524 F. Supp. 450 (N.D. Tex. 1981), *aff'd in part and rev'd in part on other grounds*, 695 F.2d 96 (5th Cir. 1983), is instructive. There, the plaintiffs sued the defendant for the infringing use of the plaintiffs' trademark and trade name "Humble." 524 F. Supp. at 453. Just as the Defendants in the present case seek to conduct exploration of oil and gas in a particular

geological formation underlying six counties in Southeast Ohio, (*see* Exs. 1 & 5), the defendant in *Exxon Corp*. sought to conduct oil and gas exploration in a particular geological formation underlying five Southeast Texas counties. *Id*. at 455-56.

To enjoin the defendant's use of its trade name, the plaintiff put on evidence of actual confusion that involved "landowners," "a woman whose parents had negotiated an oil and gas lease with the [d]efendant," employees of a regulatory agency, an employee of a consulting firm, a media report, and a letter from a legislator. *Id*. at 463. None were described as consumers or customers of the parties' products, nor as having any bearing on such consumers' or customers' potential confusion. Even so, the court held that this evidence alone was "sufficient to show actual confusion." *Id*. at 464. In contrast, Defendants in the present case would have the Court believe that such evidence is *not even discoverable*. It simply cannot be the case that facts found to be sufficient for a finding on the merits in *Exxon*, are nevertheless beyond even the broad reach of Fed. R. Civ. P. 26 in this case.

Additionally, separate from its claim for trademark protection, AEC has also brought a distinct cause of action to restrain Defendants' infringement of its trade name. Trade names may serve to identify not only a product, but also a business. *See Younker v. Nationwide Mut. Ins. Co*., 191 N.E.2d 145, 148 (Ohio 1963). As stated by one court:

> A trade name symbolizes the reputation of a business. Consumers are interested in the quality and cost of the goods or services it offers; suppliers are concerned with the prompt payment of bills and credit standing; investors, with financial stability, return and growth; labor, with rates of pay, fringe benefits and personnel policies; and the general public, with management's participation in public affairs. All of these factors, and more, make up the communal mosaic in which a business enterprise must fit and which its trade name reflects.

Commc'ns Satellite Corp. v. Comcet, Inc., 429 F.2d 1245, 1250 (4th Cir. 1970) (internal quotation omitted). "Infringement of a trade name is a tort touching all these factors." *Id.* As the Ohio Supreme Court has stated, the gist of the wrong is that it "operates to whittle away and disperse in the mind of the public the identity of the name in relation to the one who invented it." *Nat'l City Bank v. Nat'l City Window Cleaning Co.*, 190 N.E.2d 437, 439 (Ohio 1963). Hence, where public confusion adversely affects the plaintiff's reputation among the groups with whom it interacts, courts have indicated that "the likelihood of confusion inquiry, when applied to trade names, embraces the public as a whole." *Perini Corp. v. Perini Constr., Inc.*, 915 F.2d 121, 128 (4th Cir. 1990).

The examination of whether the public will likely be confused by Defendants' trade name infringement will again reference the confusion factors adopted by the Supreme Court of Ohio. *See Cesare*, 520 N.E.2d at 592. That court has expressed the same concepts described above:

> 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.

Nat'l City, 190 N.E.2d at 439. Thus, in Ohio, it is generally recognized "that, 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.*

Against this overwhelming weight of authority, Defendants still contend that AEC's discovery requests related to non-customers have no bearing on the claims in

dispute. (Doc. 52 at 7.) Defendants rely on *Lucky's Detroit, LLC v. Double L, Inc.*, 533 F. App'x 553 (6th Cir. 2013), in support of their position. However, their reliance is misplaced. *Lucky's* does not stand for the proposition that only customer confusion is relevant. *See id.* at 558-59. By arguing otherwise, Defendants overstate the import of the court's recitation that "the 'ultimate question' is 'whether relevant consumers are likely to believe that the products or services offered by the parties are affiliated in some way.'" *Id.* at 555-56 (quoting *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, 931 F.2d 1100, 1107 (6th Cir. 1991)). That same statement was quoted by the court in *Champions* before it went on to hold that confusion among nonconsumers was relevant. *See* 78 F.3d at 1116, 1119-20. *Lucky's* simply described the particular facts before it and did not purport to overrule *Champions*, nor criticize its analysis. *See* 533 F. App'x at 558-59. In fact, *Lucky's* and *Champions* both relied on *Homeowners Grp., Inc. v. Home Mktg. Specialists, Inc.*, which recognized that relevant confusion extends beyond actual customers. *See* 931 F.2d at 1110. Taken in context, and considering the entirety of the proceedings, Defendants are wrong in stating that *Lucky's* considers non-customers irrelevant in a case like this one, and they are wrong in their belief that *Lucky's* stands for an expansive and novel limitation of the law as it related to facts not before that court.

In short, the scope of the likelihood of confusion is not limited to purchasers of the parties' goods and services. This is especially true for purposes of discovery. As much as Defendants may wish it was otherwise, the truth remains that Defendants' business dealings with non-customers go straight to the merits and are highly relevant in this case.

II. AEC Has Evidence of Actual Confusion.

Defendants also rest their Motion on the faulty factual premise that there is no evidence of actual confusion in the record thus far, and so suggest that the discovery is a "fishing expedition." But while Defendants wish this were so, the record does not support Defendants' claim. Deposition testimony has illustrated the presence of some instances of actual confusion.

A critical fact should not be overlooked in the assessment of the oil and gas leases' particular importance to the confusion analysis in this case. Defendants have used the "American Energy" name for a relatively short period of time: AEP was created in 2013 and Defendants' major activities since then have been raising capital from investors and securing oil and gas leases from landowners in Southeast Ohio, and they have extensively advertised and reached out to landowners for that purpose. (*See* Ex. 1.) Since Defendants have not begun selling oil and gas products in earnest, a primary source of confusion would be with the landowners contacted by or on behalf of Defendants or who are now in an ongoing economic relationship with Defendants governed by the terms of the oil and gas leases. And notably, there is already significant evidence of confusion among such groups in the parties' respective businesses.

[redacted]

[redacted]

The receptionist [redacted] corroborates his account of the caller who mistook AEC and AEP and also cites additional incidents of apparent confusion by members of the public and by vendors. (Santini Aff. ¶¶ 4-5, Ex. 7.) According to Heather Santini:

- On at least 15 occasions over the past eight months, she has had contact with individuals who were trying to call or visit AEP;
- The mistaken callers or visitors included landowners and vendors;
- A man identifying himself as John Henry called on August 5, 2014, inquiring about oil and gas wells; he asked for AEC, but was trying to reach AEP;
- A gentleman appeared in person at AEC's headquarters on July 31, 2014, looking for AEP's office in Ohio. He explained that if you Google "American Energy," AEC's name results. He said that his company works with AEP in Oklahoma, but he couldn't find its Ohio office and "they are trying to fly under the radar";
- On September 2, 2014, a phone caller called the AEC headquarters asking to speak with the accounts payable department for Utica about a past due account;
- On another occasion, a gentleman called the AEC headquarters asking to speak with someone about oil and gas leases.

(*Id.* ¶¶ 5-9; [redacted])[1]

[1] Defendants took the deposition of Jason Witt on September 18, 2014. A final transcript was not yet available as of the time of filing this Opposition. The excerpts of the Witt deposition attached to this Opposition are from the rough draft provided by the court reporter. AEC will substitute the final transcript when available.

In light of the aforementioned evidence, Defendants' are simply wrong when they claim that the parties "agree there is no such evidence" of confusion. (Doc. 52 at 3.) AEC's discovery requests are far from a fishing expedition. They are reasonably calculated to lead to the discovery of admissible evidence with regard to the likelihood of potential confusion or false affiliation of AEC and AEP, Utica, and their affiliate companies. Discovery into nonconsumer confusion is germane not only to the question of whether actual confusion exists, but also to the question of whether there is potential confusion in the future as Defendants' operation expands to sales and marketing of natural gas in the same region as AEC markets coal under the "American Energy Corporation" name and trademark.

CONCLUSION

For the foregoing reasons, this Court should deny Defendants' motion for protective order. AEC should not be barred from obtaining discovery related to the written discovery requests referenced in Defendants' Motion. In addition, this Court should reject Defendants' request for a ruling that *Lucky's Detroit* limits the inquiry in this case in the novel and unsupported manner Defendants advocate. AEC should be allowed to pursue the discovery to which it is clearly entitled in this case. In light of the above, Defendants' Motion for Protective Order should be denied.

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 13th day of October, 2014.

s/Vladimir P. Belo
One of the attorneys for Plaintiff