

**IN THE CIRCUIT COURT OF TYLER COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION**

**DIRECTIONAL ONE SERVICES, INC. USA,
a foreign corporation authorized to do business
in the State of West Virginia,**

Plaintiff,

vs.

**Civil Action No. 18-C-14
Presiding Judge: H. Charles Carl, III
Resolution Judge: Christopher C. Wilkes**

**ANTERO RESOURCES CORPORATION,
a foreign corporation authorized to do business
in the State of West Virginia,**

Defendant.

FILED

JUL 12 2019

Candy L. Warner
Tyler Co. Circuit Clerk

**ORDER GRANTING IN PART AND DENYING IN PART
DEFENDANT'S SECOND MOTION TO COMPEL**

This matter came before the Court this 13th day of July 2019, upon Antero Resources Corporation's Second Motion to Compel and Memorandum of Law. The Plaintiff, Directional One Services Inc. USA, by counsel, Sean P, McGinley, Esq., and Defendant, Antero Resources Corporation, by counsel, W. Henry Lawrence, Esq., have fully briefed the issues necessary. The Court dispenses with oral argument because the facts and legal contentions are adequately presented in the materials before the court and argument would not aid the decisional process. So, upon the full consideration of the issues, the record, and the pertinent legal authorities, the Court rules as follows.

FINDINGS OF FACT

1. This matter was commenced with the filing of the Complaint on April 6, 2018¹, alleging claims of Breach of Contract (Count I); Lien Foreclosure (Count II);

¹ The Court notes the court file reflects that a First Amended Complaint with Jury Demand was filed April 19, 2018, but the causes of action are the same.

- Estoppel (Count III); Mutual Mistake/Equitable Reformation of Contract (Count IV); and Negligent Misrepresentation (Count V). *See* Compl. ¶¶44-79. The allegations involve a dispute between Plaintiff, Directional One Services Inc. USA (hereinafter “Plaintiff”), a directional drilling contractor, and Defendant, Antero Resources Corporation (hereinafter “Defendant”), an oil and gas well owner and operator.
2. On August 3, 2018, Defendant filed its Answer and Counterclaim, alleging Breach of Contract for Lost In Hole Charges (Count I); Breach of Contract for Lost In Hole Insurance Charges (Count II); Breach of Contract for Repair Charges (Count III); and Breach of Contract for Day-Rate and Standby Charges (Count IV). *See* Counterclaim, ¶¶ 40-28.
 3. On March 6, 2019, Defendant served its Fourth Set of Requests for Production of Documents to Plaintiff”. *See* Def’s Mot., p. 1; *see also* Def’s Mot., Ex. A. Relevant to the instant motion are Requests for Production of Documents Nos. 1, 2, 3, and 4, which request sought all state and federal tax returns for Plaintiff for 2014 through 2018, all personal state and federal tax returns for Kevin Onishenko for 2014 through 2018, employee records for Plaintiff’s employees, and corporate financial statements for Plaintiff, respectively. *Id.*
 4. On April 26, 2019, Defendant filed the instant Antero Resources Corporation’s Second Motion to Compel and Memorandum of Law, seeking the Court to enter and order compelling the response to the instant disputed discovery requests because they are relevant to the undue influence and lost profits issues in this civil action. *See* Def’s Mot., p. 2, 4.

5. On June 3, 2019, Plaintiff filed "Plaintiff's Motion to File Response Out of Time; and Response in Opposition to Defendant's Second Motion to Compel", seeking permission from the Court to file a proposed Response to the instant motion outside of the deadlines set forth by the undersigned in the Briefing Order on the instant motion. *See* Pl's Rsep., p. 1-2. On June 13, 2019, the Court entered an Order Granting Plaintiff's Motion to File Response Out of Time, deeming Plaintiff's proposed Response to the instant motion as filed and setting forth a Reply brief deadline for Defendant. *See* Ord., 6/13/19, p. 2.
6. On June 27, 2019, Defendant filed its Reply in Support of Its Second Motion to Compel.
7. The Court now finds this issue is ripe for adjudication.

CONCLUSIONS OF LAW

8. Defendant seeks to compel Plaintiff to fully respond to Defendant's Requests for Production Nos. 1, 2, 3, and 4 served March 6, 2019. *See* Def's Mot., p. 1; *see also* Def's Mot., Ex. A.

9. As an initial matter, the disputed discovery requests are as follows. Request for Production No. 1 requests the following:

"Provide all state and federal tax returns for Directional One from 2014 to 2018."

See Def's Mot., Ex. A.

10. Request for Production No. 2 requests the following:

"Provide all state and federal tax returns for Kevin Onishenko from 2014 to 2018."

Id.

11. Request for Production No. 3 requests the following:

“Provide all employment, personnel, payroll or other records including, but not limited to pay stubs, payroll registers, time sheets, worksheets, job logs, sign-in sheets, or other documents for all Directional One employees and/or agents who worked at or on Antero well sites from January 1, 2014, until December 31, 2018.”

Id.

12. Request for Production No. 4 requests the following:

“Provide all year end corporate financial statements, including, but not limited to, balance sheets, ledgers, profit and loss statements, and depreciation schedules for fiscal years 2014 through 2018.”

Id.

13. Defendant brought its motion to compel under Rule 37 of the West Virginia Rules of Civil Procedure. Generally,

Civil discovery is governed by the West Virginia Rules of Civil Procedure, Rules 26 through 37. The Rules of Civil Procedure generally provide for broad discovery to ferret out evidence which is in some degree relevant to the contested issue.

Syl. Pt. 1, in part, *Evans v. Mutual Min.*, 199 W.Va. 526, 485 S.E.2d 695 (1997) (internal quotations and citations omitted).

14. Requests for Production are governed by Rule 34 of the West Virginia Rules of Civil Procedure which provides, inter alia, “[a]ny party may serve on any other party a request (1) to produce ... any designated documents...” This Rule requires parties to respond to this type of request within certain time frames and to “organize and label them to correspond with the categories in the request.” W.Va. R. Civ. P. 34 (b).

23. Further, Rule 37 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(2) *Motion*. If a deponent fails to answer a question propounded or submitted under Rule 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(7) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant in good faith has conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or action without court action.

W. Va. R. Civ. P. 37.

24. Plaintiff contends that the motion to compel should be denied for the following reasons: Plaintiff avers it has already produced all relevant financial information, Mr. Onishenko's personal tax returns are not relevant to any claim or defense in this case, and employee records are not relevant to the Counterclaim as Plaintiff has already produced the field tickets reflecting all of its standby charges. *See* P1's Resp., p. 2-4.

25. Specifically, Plaintiff argues Defendant has not proffered what the financial information sought has to do with undue influence defense/arguments. *Id.* at 2. Further, with regard to the lost profits claim, Plaintiff proffers it has produced all information that its expert used to calculate its lost profits calculation. *Id.* Specifically, Plaintiff avers its expert used federal tax returns from 2015 through part of 2018 to prepare the expert report, and therefore, state tax returns, "corporate financials", and federal returns from the year 2014 are not relevant as it is not relevant to its damages forecast. *Id.* at 2-3.

26. Given the standards of law, and the court's analysis above, the Court will take up the disputed discovery requests in turn.

Request for Production Nos. 1 and 4

27. First, the Court addresses the motion to compel as it relates to Request for Production Nos. 1 and 4². Plaintiff stated in its Plaintiff's Responses and Objections to Antero Resources Corporation's Fourth Set of Request for Production of Documents to Plaintiff that it objected to Request for Production No. 1 as this request is unduly burdensome and seeks confidential and proprietary information that is not relevant to any claim or defense in this action. *See* Def's Mot., Ex. B. Likewise, Plaintiff responded in its Plaintiff's Responses and Objections to Antero Resources Corporation's Fourth Set of Request for Production of Documents to Plaintiff that it objected to Request for Production No. 4 by lodging an identical objection. *Id.* Further, Plaintiff indicated in its responses to Requests for Production Nos. 1 and 4 that to the extent tax documents are relevant, it "fully disclosed" all that were relevant to this action in the expert report of its expert, Dan Selby, "and during Mr. Selby's deposition". *See* Pl's Resp., p. 2.

28. Plaintiff produced, and Mr. Selby utilized, federal tax returns from 2015 through part of 2018. He did not utilize the sought-after federal tax return from 2014 or state tax returns from 2014-2018, and thus, Plaintiff did not produce the same. *Id.*

29. The Court finds that Plaintiff and Plaintiff's expert do not get to select which documents, or which years' tax returns, are relevant to the claim for lost profits, and which are not. *See* Def's Reply, p. 3. The Court notes that there is no explanation as to why Plaintiff deemed federal returns from 2014 to part of 2018 as relevant to the future lost profits issue, but not 2014 federal returns. *Id.* Likewise, no explanation was provided by Plaintiff as to why

² Request for Production No. 1 requests the following: "Provide all state and federal tax returns for Directional One from 2014 to 2018." *See* Def's Mot., Ex. A. Further, Request for Production No. 4 requests the following: "Provide all year end corporate financial statements, including, but not limited to, balance sheets, ledgers, profit and loss statements, and depreciation schedules for fiscal years 2014 through 2018". *Id.*

federal returns were relevant to future lost profits in its view, and *state* tax returns were not. *Id.* Defendant urges this Court that Plaintiff does not “get to choose which documents are relevant, much less which documents must be produced in discovery”, and this Court agrees. *Id.*

30. Defendant further contends that Plaintiff “has put its tax returns and financial statements in issue by seeking future lost profits”. *See* Def’s Mot., p. 4. The Court agrees that Plaintiff’s financial information, including state and federal tax returns, are relevant to this issue. The Court finds it would be impermissible to allow Plaintiff to get to cherry pick which returns are relevant to the issue, let alone discoverable.

31. The Court notes that Plaintiff stated in its objection in its Plaintiff’s Responses and Objections to Antero Resources Corporation’s Fourth Set of Request for Production of Documents to Plaintiff that as to the financial information not utilized by Mr. Selby: “Defendant has waived its objections to this disclosure by failing to raise any Rule 26 objections to Plaintiff’s expert disclosures prior to the court-ordered deadline in which to do so”. *See* Def’s Mot., Ex. B; *see also* Pl’s Resp., p. 3.

32. The Court does not find this assertion persuasive. Just because Defendant did not object to what the expert utilized in the expert disclosure, does not mean that Defendant waived its right assert that other financial evidence is discoverable. Defendant may choose to not object to what Plaintiff’s expert has utilized for his report, while still desiring to review discoverable material for its claims and defenses in this civil action. The Court finds that Defendant’s lack of an objection to Plaintiff’s expert disclosure does not preclude it from moving to compel any discoverable evidence.

33. In light of the foregoing, the Court finds that the instant motion is **granted** as to Requests for Production Nos. 1 and 4, and accordingly, Plaintiff must fully produce in response to these requests.

Request for Production No. 2

34. Next, the Court considers Request for Production No. 2 served March 6, 2019. Request for Production No. 2 all state and federal tax returns for Kevin Onishenko personally from 2014 to 2018. *See* Def's Mot., Ex. A. Kevin Onishenko is the president, only officer, and sole owner of Plaintiff Directional One, which is an S corporation. *See* Def's Reply, p. 4. Plaintiff's response to the discovery request states that it objects on the basis that the request is unduly burdensome, seeks confidential/proprietary information, and is not relevant. *See* Def's Mot., Ex. B. Further, the objection/response states that all relevant tax information was provided to Mr. Selby and, thus, disclosed. *Id.* The tax information provided to Mr. Selby was the 2015-part of 2018 federal corporate tax returns for Directional One. *See* Pl's Resp., p. 2. Mr. Onishenko's personal tax returns were not produced or utilized by Mr. Selby.

35. Although the Court has already concluded that *corporate* financial and tax information outside of what Mr. Selby deemed relevant is discoverable, the Court declines to find that Mr. Onishenko's *personal* tax returns are discoverable. The Court notes that Mr. Onishenko is not a party to this litigation, and any request for his personal tax returns should have been sought by third-party discovery and subpoena during the discovery period. *Id.*

36. The Court considers that Defendant argues that Mr. Onishenko's tax returns are relevant to Plaintiff's claim for future lost profits and its undue influence defense. *See* Def's Reply, p. 4. Defendant avers that Plaintiff's damages expert includes officer compensation as the predominant portion of Plaintiff's damages. *Id.* Further, Defendant proffers that Mr.

Onishenko is Plaintiff's president and only officer. *Id.* As a result, Defendant argues his income tax returns reflect his compensation and any business expenditures. *Id.* Further, Defendant proffers that Plaintiff is an S corporation, with Mr. Onishenko being the sole owner, and as a result, the income of the business passes straight through to Mr. Onishenko. *Id.* Finally, Defendant avers that part of Plaintiff's claim is to recovery Mr. Onishenko's personal compensation. *Id.*

37. The Court, recognizing the corporate structure of Plaintiff, finds that Mr. Onishenko's personal tax returns are not relevant to the case at bar. Plaintiff's corporate tax returns, which this Court has ordered must be produced, will shed sufficient light as to Mr. Onishenko's officer compensation from Plaintiff. Any other income Mr. Onishenko may have received personally is certainly not relevant to this civil action. The Court must consider the privacy rights of a non-party to this litigation.

38. Therefore, the Court finds the motion is **denied** as to Request for Production No. 2 as to protect the privacy of the third party and for lack of relevance.

Request for Production No. 3

39. Request for Production No. 3 seeks "all employment, personnel, payroll or other records including, but not limited to pay stubs, payroll registers, time sheets, worksheets, job logs, sign-in sheets, or other documents for all Directional One employees and/or agents who worked at or on Antero well sites from January 1, 2014, until December 31, 2018". *See* Def's Mot., Ex. A.

40. Plaintiff argues the request for employee records "has no likelihood of containing any relevant information". *See* Pl's Resp., p. 4. Instead, Plaintiff argues it has already produced field tickets reflecting all of its standby charges, and that additional employee records would add

nothing to this “as to the ‘presence and availability of personnel working for Plaintiff at Antero well sites’”. *Id.*

41. On the other hand, Defendant avers that personnel records are relevant and necessary to confirm the presence and availability of personnel working for Plaintiff at Antero well sites in support of Antero’s counterclaim for improper day-rate and standby charges. *See* Def’s Reply, p. 4. Defendant argues that the field tickets are not sufficient because they do not show that Plaintiff’s personnel were actually present and available, and that payroll records, timesheets, job logs, and other employment records would indicate whether or not employees were paid and actually available for a full day on the dates that Plaintiff billed Antero for day-rates and/or standby charges. *Id.* at 4-5.

42. This Court has already made a finding in a previous Order that Plaintiff provided Defendant with the field tickets that reflect all of its standby charges (and did so in September 2018, shortly after the Counterclaim was asserted). *See* Ord. Granting Third Mot. to Compel, 6/3/18, p. 7.

43. The Court has likewise previously made a finding that the field tickets reflect the date the standby was charged to Defendant, the personnel of Plaintiff kept on site, and identity of the Antero field representative who reviewed and signed off on the field ticket, as well as the Antero supervisors who also reviewed and signed off on the field ticket. *Id.* In addition, the Court considered in its previous Order these field tickets are the most detailed information Plaintiff has that is potentially responsive to Defendant’s claim. *Id.* In fact, Plaintiff deems these field tickets as the “ultimate source” of information utilized for its corporate records generated in the “payroll and paycheck process”. *Id.*

44. Because Plaintiff has turned over its field tickets evidencing details of the standby charges and personnel kept on site, and because these field tickets are utilized to form the basis of the other payroll and personnel records that Defendant additionally seeks, the Court finds the instant motion must be **denied** as to Request for Production No. 3.

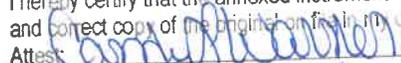
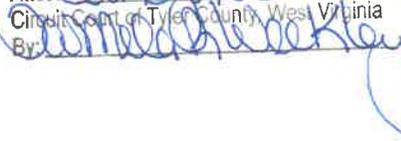
CONCLUSION

Accordingly, it is hereby ADJUDGED and ORDERED that Defendant’s Second Motion to Compel is hereby GRANTED IN PART and DENIED IN PART as detailed in this Order. The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Clerk shall enter the foregoing and forward attested copies hereof to all counsel, and to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 13th day of July 2019.



 JUDGE H. CHARLES CARL, III
 West Virginia Business Court Division

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.
 Attest:  Clerk
 Circuit Court of Tyler County, West Virginia
 By:  Deputy