

IN THE CIRCUIT COURT OF WETZEL COUNTY, WEST VIRGINIA
BUSINESS COURT DIVISION

MARKWEST LIBERTY MIDSTREAM
& RESOURCES, L.L.C.,

Plaintiff,

v.

CIVIL ACTION NO. 16-C-82
JUDGE H. CHARLES CARL, III

J.F. ALLEN COMPANY; AMEC
FOSTER WHEELER ENVIRONMENT
& INFRASTRUCTURE, INC.;
REDSTONE INTERNATIONAL, INC.;
CIVIL & ENVIRONMENTAL
CONSULTANTS, INC.; and
COASTAL DRILLING EAST, LLC,

Defendants,

v.

THE LANE CONSTRUCTION
CORPORATION,

Additional Defendant.

**ORDER DENYING DEFENDANT'S MOTION TO STRIKE
PLAINTIFF'S EXPERT'S NEW AND ALTERNATIVE THEORY OF DAMAGES**

This matter came before the Court this 27 day of February 2020, upon Defendant J.F. Allen Company's Motion to Strike Plaintiff's Expert's New and Alternative Theory of Damages. The parties 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. On November 20, 2017, the contract between EQT and Plaintiff MarkWest Liberty Mistream & Resources, L.L.C., (hereinafter “Plaintiff” or “MarkWest”) was produced by MarkWest to Defendant J.F. Allen Company (hereinafter “Defendant” or “JFA”) in this litigation. *See* Pl’s Resp., p. 2, 7.

2. In December 2017, the expert report of MarkWest’s expert, Bradley D. Wolf, P.E., was produced in this litigation, a 71-page report which contained the following language:

“With the above tolling service type contracts, MarkWest’s anticipated revenue from EQT for the plant output of Mobley V was based on the fixed rates in its agreement with EQT. The following damages used the minimum EQT volume commitments and the contracted rates in the calculations.”

See Pl’s Resp., Ex. B., p. 54; *see also* Pl’s Resp., p. 4, 6-7, 11.

3. On June 7, 2019, Daniel Rowlands, the corporate designee of MarkWest, testified as to the provisions of MarkWest’s contract with EQT wherein EQT made a commitment to MarkWest to pay a fee for a minimum volume of gas processing, or minimum commitments for capacity, regardless of whether EQT provided the natural gas to MarkWest. *See* Def’s Mot., p. 8; *see also* Pl’s Resp., p. 3, 7. During this deposition, Mr. Rowlands explained the contractual arrangement with EQT as follows:

Q: Now, you talked about an election that EQT made pursuant to that contract.

A: That’s correct.

Q: Just in very general terms, what was that election for?

A: That was for 50 million per day in capacity they were committing to in Mobley V.

Q: And so, Mobley V at the time of the election wasn't built yet, right?

A: That's correct.

Q: Didn't exist?

A: They had to make that election to trigger the contract – the MarkWest contractual obligation to build Plant 5.

Q: So MarkWest was contract – upon that election, MarkWest was contractually obligated to build Mobley V, and in return, are you saying EQT made a minimum commitment?

A: Of 50 million per day.

Q: And what does that mean, 50 million per day? What's that commitment mean?

A: That's a quarter of the capacity of Mobley V for raw make coming through the plant.

Q: And that's a minimum commitment by EQT?

A: That's correct.

Q: Did that – do you have an understanding as to whether that's regardless of whether the raw make would actually be available or not?

A: That's – that is accurate. They paid for that whether they used it or not.

See Pl's Resp., Ex. I, p. 2-3; *see also* Pl's Resp., p. 7-8.

4. Thereafter, counsel for JFA questioned Mr. Rowlands on this topic during the deposition. After that, the parties engaged in discovery as to this issue. JFA served discovery on July 2, 2019, and MarkWest provided its responses on August 12, 2019. *See* Def's Mot., p. 8.

5. Discovery closed in this civil action nearly four months after the June 2019 deposition date. *See* Pl's Resp., p. 14.

6. On a prior day, JFA filed the instant Motion to Strike Plaintiff's Expert's New and Alternative Theory of Damages, wherein it argued that the Court should strike all references to take or pay, or minimum volume fees, from expert Brad Wolf's testimony and report, and should prohibit him from testifying at trial to any such theory. *See* Def's Mot., p. 13, 16.

7. Thereafter, MarkWest filed its Response to Defendant J.F. Allen's Motion to Strike Plaintiff's Expert's New and Alternative Theory of Damages, arguing the motion should be denied because MarkWest's minimum volume fees evidence is not new and the record clearly shows it was disclosed in this litigation as early as November 2017. *See* Pl's Resp., p. 2.

8. No Reply was filed.

9. The Court now finds the instant Motion is ripe for adjudication.

CONCLUSIONS OF LAW

10. JFA filed the instant Motion to Strike Plaintiff's Expert's New and Alternative Theory of Damages, wherein it argued that the Court should strike all references to take or pay, or minimum volume fees, from expert Brad Wolf's testimony and report, and should prohibit him from testifying at trial to any such theory. *See* Def's Mot., p. 13, 11, 16. JFA argues this is appropriate because this is a "new damage theory", as "there is nothing in Wolf's December 15, 2017 report" or in the Complaint relating to any claim for fees associated with a minimum volume clause. *Id.* at 6, 10. JFA alleges MarWest has made an "inappropriate attempt to shoehorn a new theory of damage recovery in at the last moment available". *Id.* at 13.

11. The general rule of depositions and discovery is governed by Rule 26 of the West Virginia Rules of Civil Procedure. Rule 26(b)(4) provides, in pertinent part, that "[d]iscovery of facts known and opinions held by experts...acquired or developed in anticipation of litigation or for trial, may be obtained...through interrogatories [that] require any other party to identify each

person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.” W. Va. R. Civ. P. 26. Further, “[a] party may depose any person who has been identified as an expert whose opinions may be presented at trial. *Id.*

12. One of purposes of discovery process under Rules of Civil Procedure is to eliminate surprise; trial by ambush is not contemplated by Rules. *McDougal v. McCammon*, 193 W. Va. 229, 455 S.E.2d 788 (1995); *see also Smith v. Clark*, 241 W. Va. 838, 858, 828 S.E.2d 900, 920 (2019).

13. The discovery process is the manner in which each party in a dispute learns what evidence the opposing party is planning to present at trial. Each party has a duty to disclose its evidence upon proper inquiry. The discovery rules are based on the belief that each party is more likely to get a fair hearing when it knows beforehand what evidence the other party will present at trial. This allows for each party to respond to the other party’s evidence, and it provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, thus increasing the chances of a fair verdict. *Graham v. Wallace*, 214 W. Va. 178, 184–85, 588 S.E.2d 167, 173–74 (2003).

14. As an initial matter, EQT is one of MarkWest’s customers at Mobley and provides unprocessed natural gas to MarkWest for processing pursuant to an ongoing contractual relationship. *See* Pl’s Resp., p. 5. Prior to the construction of Mobley V at issue in this civil action, MarkWest already built and operated for EQT and other customers Mobley plants I-IV. *Id.* As EQT’s production volumes increased, it would request increased capacity from MarkWest by way of ordering the construction of another Mobley plant. *Id.* As part of their

agreement, in exchange for MarkWest's significant investment of resources to build additional natural gas plants, EQT agreed that once the requested plant is available, it will pay processing fees to MarkWest based on its increased priority capacity rights as a minimum volume commitment. *Id.* at 6. In other words, once the plant was completed and came online, MarkWest was guaranteed minimum processing fees regardless of whether or not EQT delivered any unprocessed natural gas to MarkWest. *Id.* It is this basic arrangement that supports, MarkWest avers, its investment in the physical plant construction at Mobley. *Id.*

15. It is undisputed that MarkWest's expert, Bradley D. Wolf, P.E., listed MarkWest loss of profits resulting from Mobley V not being commissioned and running and planned as one of the categories of damages he was opining. *See* Def's Mot., p. 3; *see also* Pl's Resp., Ex. B. The Court notes that MarkWest avers it went above and beyond what is required by Rule 26 and provided JFA with a 71-page expert report authored by Mr. Wolf detailing his opinions and bases for the same, including lost profits based on the EQT contract. *See* Pl's Resp., p. 2; *see also* Pl's Resp., Ex. B. The Court finds that importantly, the record clearly shows that Mr. Wolf's expert report states that the lost profit damages he attributes to JFA's alleged delay "used minimum EQT volume commitments and the contracted rates in the calculations". *See* Pl's Resp., p. 7.

16. Further, it is undisputed that on Day 3 of his deposition, on June 7, 2019, MarkWest corporate designee Daniel Rowlands testified in this matter, while discovery was still open, regarding the minimum volume contractual arrangement between MarkWest and EQT. *See* Def's Mot., p. 8; *see also* Pl's Resp., p. 3, Pl's Resp., Ex. I.

17. It is also undisputed that following this deposition, the parties engaged in additional discovery on this matter, wherein JFA served discovery, and MarkWest fully and timely

responded. *See* Def's Mot., p. 8; *see also* Pl's Resp., p. 3. This additional, late discovery was done to specifically explore EQT's minimum commitments. *See* Pl's Resp., p. 3, 8. In addition, the Court notes this discovery was permitted by MarkWest outside of the 40-interrogatory limit under West Virginia Rule of Civil Procedure 33 without leave of court or stipulation of the parties, as it constituted JFA's sixty-fourth and sixty-fifth interrogatories. *Id.* at 8.

18. MarkWest then avers it agreed to allow JFA "additional time to file its supplemental expert report on damages so that its expert would be afforded additional time to evaluate and respond to MarkWest's discovery responses [on this issue] and expert's damages opinion". *Id.* at 3; *see also Id.* at 9.

19. Thereafter, after the discovery responses were fully provided, on August 20, 2019, Mr. Wolf was deposed regarding his opinions on delay and damages issues, including those opinions he holds on MarkWest's lost profits. *Id.*; *see also* Pl's Resp., Ex. K. At the close of this deposition day, the deposition did not conclude and was left open. *See* Pl's Resp., p. 3. During this time while the deposition was still open, JFA filed the instant motion. *Id.* On September 25, 2019, the deposition of Mr. Wolf continued and JFA was further able to examine Mr. Wolf regarding his lost profits topic. *Id.*; *see also Id.* at 12, 14.

20. MarkWest avers that the bases for MarkWest's right to recoup these lost profits are rooted in its contracts with its customer, EQT, and form; in part, the basis for Mr. Wolf's opinions on the lost profits allegedly owed to MarkWest by JFA, and the Court agrees. *See* Pl's Resp., p. 4.

21. The Court agrees and concludes that MarkWest's disclosures of Mr. Wolf's opinions, and the bases for the opinions, have been properly set forth by way of MarkWest's responses to discovery, production of Mr. Wolf's expert witness report and the deposition of Mr. Wolf. *See*

Id. For this reason, the Court finds JFA did have the opportunity to investigate these disclosures and undue prejudice has not been had. The Court notes JFA especially had the opportunity to investigate these disclosures because Mr. Wolf's deposition remained open and did not conclude until almost three weeks after JFA filed the instant motion. The Court concludes JFA had a full and fair opportunity to examine the opinions being offered by Mr. Wolf. A review of the record indicates that JFA had opportunities throughout the course of discovery to examine Mr. Wolf and his full opinions.

22. The Court also notes that the guaranteed minimum commitment is a revenue MarkWest was contractually entitled to, not simply Mr. Wolf's opinion or a favorable interpretation by MarkWest. Regardless, the Court finds that the disclosure of such revenue was properly produced in discovery in November 2017 and that disclosures of Mr. Wolf's opinions regarding lost profits damages were properly and timely produced as well.

23. The Court finds JFA, through the discovery process, has learned beforehand what evidence MarkWest intends to present at trial, allowing JFA to respond to MarkWest's evidence at trial. This provides the jury with the best opportunity to hear and evaluate all of the relevant evidence, and thus increases the chances of a fair verdict. *See Graham*, 214 W. Va. 178.

24. For all of these reasons, the Court finds the instant motion must be denied.

CONCLUSION

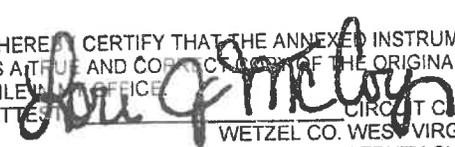
WHEREFORE, it is hereby **ORDERED** and **ADJUDGED** that Defendant J.F. Allen Company's Motion to Strike Plaintiff's Expert's New and Alternative Theory of Damages must be **DENIED**. The Court notes the objections of the parties to any adverse ruling herein.

The Clerk is directed to enter this Order as of the date first hereinabove appearing, and send attested copies to all counsel of record, as well as to the Business Court Central Office at Business Court Division, 380 West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

ENTERED this 27 day of February 2020.



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 THIS OFFICE.
ATTEST:  CIRCUIT CLERK
WETZEL CO. WEST VIRGINIA
BY: _____ DEPUTY CLERK