

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

CIRCUIT COURT
OF OHIO COUNTY
2013 DEC 30 PM 3 07
CLERK

MOUNTAIN STATE CARBON, LLC,
Plaintiff and Counter-Claim Defendant

v.

BLUESTONE COAL CORPORATION and
BLUESTONE COAL SALES
CORPORATION,
Defendants and Counterclaim Plaintiffs,

Civil Action No.: 08-C-360
Judge Christopher C. Wilkes

AND

SEVERSTAL DEARBORN, INC.,
SNA CARBON, LLC,
SEVERSTAL U.S. HOLDINGS, LLC, and
OAO SEVERSTAL,
Third-Party Defendants.

**ORDER GRANTING IN PART
BLUESTONE'S MOTION TO COMPEL**

This matter comes before the Court this 30th day of December, 2013, pursuant to a Motion to Compel filed by Defendants/Counterclaim Plaintiffs, Bluestone Coal Corporation and Bluestone Coal Sales Corporation (hereafter collectively "Bluestone" or "Defendants"). The Plaintiff and Third Party Defendants, Mountain State Carbon, LLC, Severstal Dearborn, Inc., SNA Carbon, LLC, Severstal U.S. Holdings, LLC ("SUSH"), and OAO Severstal, by counsel, Melissa M. Barr, Esq.; and Defendants, by counsel, Barry D. Hunter, Esq., have fully briefed the issues. 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. Therefore, upon the record and the pertinent legal authorities, the Court rules that the motion is GRANTED IN PART, as more fully explained herein.

Procedural History

This case revolves around an alleged breach of contract between two coal companies.

The Plaintiff alleges that Defendants failed to fully perform under a Coal Supply Agreement (hereinafter "CSA") when coal prices skyrocketed. Bluestone filed a Counterclaim asserting two counts of Breach of Contract: Breach of an April 2008 Agreement and a Breach of Modified or Amended CSA. Additionally, Bluestone named Severstal Dearborn, Inc., SNA Carbon, LLC, SUSH, and OAO Severstal, as third party defendants, alleging that the Plaintiff's affiliates influenced or controlled the Plaintiff's actions in choosing to breach the contract.

OAO Severstal and SUSH, as foreign corporations, moved for dismissal of this claim pursuant to Rule 12(b)(2) for lack of jurisdiction; and pursuant to Rule 12(b)(6) for failure to state a claim. Finding that evidence was needed to determine whether personal jurisdiction exists over the foreign corporations, the Court permitted jurisdictional discovery while it took the motion under advisement.

[T]he determination of personal jurisdiction in this case is a fact-laden inquiry, which implicates the merits of Defendants' alter ego claim. Yet, this issue is not so tied into the merits of the allegations that this Court should postpone the issue until the merits stage. See, *Combs v. Bakker*, 886 F.2d 673, 676 (4th Cir. 1989). Rather, the situation before the Court may require proof of some elements which could ultimately allow for recovery, but not all of the necessary elements. So, the merits and the jurisdiction question are not so intertwined as to require proof of such at trial. Yet, the Court finds that evidence on this issue will be necessary to sort out this fact-laden issue.

Now, after Plaintiff and Third Party Defendants have objected to ongoing discovery requests, Defendants have filed the instant motion to compel. Defendants' Motion concerns

discovery aimed at gathering evidence to establish an alter ego theory and personal jurisdiction over foreign third-party defendants, as well as the ongoing general discovery relating to damages.

Standards for Motions to Compel

Generally, civil discovery is governed by Rules 26 through 37 of the West Virginia Rules of Civil Procedure. These Rules generally provide for broad discovery to unveil evidence which is relevant to the contested issue.

"Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," including discovery which is "reasonably calculated to lead to the discovery of admissible evidence." W. Va. R. Civ. P. 26. Rule 26 also permits a trial court to limit the frequency or extent of use of discovery if it determines that:

(A) The discovery sought is unreasonably cumulative or duplicative or is obtainable from some other source that is more convenient, less burdensome, or less expensive;

(B) The party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(C) The discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

Id. Further, trial courts are "permitted broad discretion in the control and management of discovery." *State ex rel. State Farm Mut. Auto. Ins. Co. v. Marks*, 230 W. Va. 517, 523, 741 S.E.2d 75, 81 (2012).

In regard to discovery responses, Rule 33 provides that "[e]ach interrogatory shall be answered separately and fully in writing under oath, unless it is objected to, in which event the

objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable." W.Va. R. Civ. P. 33 (a). Requests for Production are governed by Rule 34 which 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). When a party fails to fully respond, the requesting party may file a motion to compel in accordance with Rule 37, at which time the trial court weighs the request and objections thereto upon the requirements of Rule 26 and other applicable law.

Discussion and Conclusions of Law

In the case *sub judice*, Defendants' Motion concerns discovery aimed at gathering evidence to establish an alter ego theory and personal jurisdiction over foreign third-party defendants as well as interrogatories and requests relating to damages. The issue at hand is whether Plaintiff and Third Party Defendants should be required to fully or further respond to the challenged discovery.

The Court will consider the following issues, in turn: Defendants' requests regarding items from *Central West Virginia Energy Company, Inc. and A.T. Massey Coal Company, Inc. v. Mountain State Carbon, LLC, SNA Carbon, LLC, Severstal Wheeling, Inc., Severstal North America, Inc. and OAO Severstal* ["*West Virginia Energy Case*"]; Defendants' requests relating to the alter ego claims; Defendants' requests regarding damages; some remaining miscellaneous requests; and finally Plaintiff and Third Party Defendants' procedure of contemporaneously objecting and responding. Upon full discussion and consideration, the Court finds that the requests should be partially compelled.

A. Production of Discovery From *West Virginia Energy Case*

Defendants aver that Plaintiff and Third Party Defendants have failed to fully respond with all information within their reasonable control in response to Request 17 to Third Party Defendants. In Request No. 17 of Defendants' first set of discovery to SNA Carbon and other third party defendants, as well as in Request No. 1 of Defendant's third set of discovery to plaintiff¹, Defendants requested that Plaintiff and Third Party Defendants "[p]roduce all documents produced by Mountain State Carbon, LLC ("Mountain State") or its affiliates in its recently settled lawsuit styled *Mountain State Carbon v. Central West Virginia Energy, et al.*,² ... relating or pertaining to coke production and sales by Mountain State (actual and forecasted/projected) and coal purchases and consumption by Mountain State (actual and forecasted/projected)."

Plaintiff and Third Party Defendants have responded, in part, by challenging the relevance of the *West Virginia Energy* case, given that it involves different parties and different issues, including different contracts. The response also objected to the request because it is overly broad, unduly burdensome, seeks proprietary information protected from discovery.

Defendants' rebuttal memorandum claims that the existing compilations of documents which provide the support for the specific alter ego allegations contained in the complaint against Severstal in the *West Virginia Energy* case are virtually identical to those asserted in certain paragraphs of the second amended counterclaim in the case at bar.

¹ Each third party defendant was served with its own set of discovery, but each was mostly duplicative of the other defendant's. Request no. 17 is the same for each "first set" of discovery to each third party defendant.

² According to the Federal Civil Docket, the correct title of the referenced case is *Central West Virginia Energy Company, Inc. and A.T. Massey Coal Company, Inc. v. Mountain State Carbon, LLC, SNA Carbon, LLC, Severstal Wheeling, Inc., Severstal North America, Inc. and OAO Severstal*, 5:09-cv-0467, United States District Court for the Southern District of West Virginia, Beckley Division

The Court finds that the request information is irrelevant. While actual and forecasted coke production, coke sales, coal purchases, and coal consumption by Mountain State may well be relevant and discoverable, determining what discovery was produced in a previous case is not relevant to the subject matter at hand. A review of the Responses and Objections of Mountain State Carbon, LLC to Defendants' Third Set of Discovery to Plaintiff Mountain State Carbon, LLC reveals that documents to show actual and forecasted coke production, coke sales, coal purchases, and coal consumption by Mountain State were indeed produced, though MSC objected to seeking out and providing the actual productions made in the unrelated case.³

Though discovery is broad in nature, boundaries must be set when it appears that a party is requesting overly broad, unreasonable, or irrelevant discovery. "Discovery is not limited only to admissible evidence but applies to information reasonably calculated to lead to discovery of admissible evidence; nevertheless, information sought must be relevant to issues in case. Rules Civ.Proc., Rule 26(b)(1)." *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). To weigh the relevancy of the sought discovery, the court determines "how substantively the information requested bears on the issues to be tried." *Id.*

Further, the nature of this case is complex: the parties captioned above are direct competitors and much of the requested discovery is proprietary. The fact that some information is proprietary does not shield it from discovery alone. However, courts should be sensitive to the

³ "without waiving the stated objections, documents identifying coke production and sale by Mountain State (actual and forecasted/projected) and coal purchases and consumption by Mountain State (actual and forecasted/projected) were previously provided, and numbered ... (invoice and payment records for 10 vol coal from 2007 through 2011) and ... (reports and communications about coke production business interruption). In addition, see the Mountain State Carbon, LLC 2007 and 2008 Daily Theoretical Production graphs and accompanying data attached hereto... Mountain State Carbon, LLC Lo Vol Inventory Levels for 2007 and 2009 graphs and accompanying data attached... and Mountain State Carbon, LLC's Summary of Coke Production vs. Business Plan..." See also section E herein.

complicated nature of such cases and enforce the proper boundaries of discovery in order to best effectuate a fair and just result

Here, the only evidence of alter ego workings that pertain to the case at bar is the control and dominion over Plaintiff by OAO Severstal and SUSH through and between Severstal Dearborn, SNA Carbon, and Severstal Wheeling. Also, interrelated management between those entities and PBS Coals, Inc. is relevant to the issue of damages. In Request 17, Defendants seek productions made in an unrelated civil action. In the instant case, it is irrelevant how discovery was conducted in the *West Virginia Energy* case. Accordingly, Request 17 to Third Party Defendants⁴ is beyond the scope of discovery, and the objections must be upheld on this ground.

B. Alter Ego Claims

Defendants explain that Bluestone originally served wider discovery regarding its alter ego claims. However, Bluestone has narrowed the scope of some of its requests and currently seeks an order compelling only those requests outlined below.

1. Officers and Directors

In Interrogatories No. 3 and 4 to Third Party Defendants⁵, Bluestone asks that the Plaintiff and Third Party Defendants identify the officers and board members or managers of various subsidiaries of Plaintiff's ultimate parent, OAO Severstal. Plaintiff and Third Party Defendants provided the requested information for some of the subsidiaries and agreed to produce the same information for SUSH, but, according to Defendants, have not done so.

⁴ This includes the duplicative requests throughout the discovery sets.

⁵ The Motion to Compel cites Interrogatories No. 4 and 5 to Third Party Defendants but a review of the Interrogatories reveals that No. 5 is not related to the arguments set forth in section B.1.

Plaintiff and Third Party Defendants have declined to provide this information for other Severstal companies including PBS, which after its acquisition by the Severstal group, replaced Bluestone as MSC's coal supplier.

Plaintiff and Third Party Defendants otherwise objected that the requested information was irrelevant to any of the claims in this action. "Therefore, Bluestone now has the officer and board member or manager information for each of the Third-Party Defendants, who are the only entities who are alleged to be alter egos of MSC by Bluestone."

Bluestone replied that, "[p]ursuant to *Bowers*, Bluestone is entitled to explore the degree to which companies operating under the direct or indirect ownership of OAO Severstal share common management."

The above cited case of *Bowers v. Wurzburg*, 202 W. Va. 43, 501 S.E.2d 479 (1998), set forth factors circuit courts should use when determining whether a child corporation is acting as an alter ego of a parent company and therefore should hold the parent company to the same personal jurisdiction as its subsidiary doing business in West Virginia.

We hold that the following factors must be considered by a circuit court, in addition to any other factors relevant to a particular case, in determining whether to assert personal jurisdiction over the parent company of a subsidiary doing business in West Virginia:

- "(1) Whether the parent corporation owns all or most of the capital stock of the subsidiary;
- "(2) Whether the parent and subsidiary corporations have common directors and officers;
- "(3) Whether the parent corporation finances the subsidiary;
- "(4) Whether the parent corporation subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation;
- "(5) Whether the subsidiary has grossly inadequate capital;

- “(6) Whether the parent corporation pays the salaries and other expenses or losses of the subsidiary;
- “(7) Whether the subsidiary has substantially no business except with the parent corporation or no assets except those conveyed to it by the parent corporation;
- “(8) Whether in the papers of the parent corporation or in the statement of its officers, the subsidiary is described as a department or division of the parent corporation, or its business or financial responsibility is referred to as the parent corporation's own;
- “(9) Whether the parent corporation uses the property of the subsidiary as its own;
- “(10) Whether the directors or executives of the subsidiary do not act independently in the interest of the subsidiary but take their orders from the parent corporation in the latter's interest; and
- “(11) Whether the formal legal requirements of the subsidiary are not observed. [Citation omitted.]”

Id. at 54.

The Defendant seeks to discover if any of the parent and subsidiary corporations have common directors and officers as delineated in the *Bowers* factors. In most situations the scope of the discovery requests should be limited to the corporations within the alleged chain of command. However, the second *Bowers* factor is markedly different from the ten other listed factors. All but the second factor specifically points courts towards examining the relationship between the parent corporation and *the* subsidiary. The second factor deviates from the more narrow scope of examination and asks whether the parent and subsidiary *corporations* have common directors and officers. Because *Bowers* specifically widens the scope of this determinant to multiple subsidiaries, the request found in Interrogatories No. 3 and 4 to Third Party Defendants are relevant and appropriate to compel.

2. Financial Statements and Related Company Contracts

In Requests No. 38-48 to Third Party Defendants, Defendants requested *Bowers* financial information to determine the degree of interrelatedness amongst various companies and included entities such as PBS Coals, Inc., Severstal Trade, Inc., Severstal Investments, LLC, and Severstal Wheeling Holding Company, which are not alleged to be alter ego companies of Plaintiff, MSC.⁶ The Motion avers that Plaintiff initially objected to these requests on the grounds that they sought information that was proprietary, irrelevant, and overly broad in scope. Bluestone thus changed its request to include only the "highest level financial statements for each of the identified entities, for the period 2007-2009, which reflected initial and current capitalization of the companies and their net worth," as well as "accounting documents which reflected any intercompany accounts and transfers between the related companies," and "any agreements or contracts between the related companies." Plaintiff and Third Party Defendants did not modify their objections except that they produced an agreement between MSC and SNA⁷, and agreed to supplement OAO Severstal's response regarding related entity transactions "upon the discovery of relevant information." Plaintiff and Third Party Defendants otherwise limited this response to contracts involving Plaintiff's purchase of lo-vol metallurgical coal.

The reply avers that because OAO Severstal is a public company, its financial reports for the relevant time period can be found on its website, and such information was provided to Bluestone in OAO Severstal's Response to Request No. 45. Further, the reply asserts that this

⁶ The requests referenced by Defendants state as follows (using the requests propounded to Dearborn, first set, as an example): "Produce all year-end and quarterly financial statements, including balance sheets, income statements (P&L), cash flows, and other accounting information reflecting the assets and liabilities, the earnings and losses, the revenues and expenses, and the cash flows of Mountain State (No. 38), Dearborn (No. 39), Severstal Wheeling (No. 40), Dearborn (No. 41- duplicative), Severstal Wheeling Steel Group (No. 42), Severstal Wheeling Holding Company (No. 43), SUSH (No. 44), DAD Severstal (No. 45), Severstal Trade (No. 46), Severstal Investments (No. 47), and PBS (No. 48) for each year/quarter during the period January 2007 through December 2009."

⁷ Owns 50% of MSC and subsidiary of OAO, SUSH, and Dearborn.

Request, issued to each of these parties, far exceeds the scope of the factors contemplated by *Bowers* and the issues in this case in that it (1.) seeks information from parties that are not alleged to be alter egos of MSC, (2.) is not limited to the alleged alter ego relationship with MSC, and (3.) includes four levels of parent/subsidiary relationships, instead of one as contemplated by *Bowers*.

Defendants allege that the SNA / Mountain State contract does not satisfy the request, "because the alter ego inquiry is broader than the transactions at issue in this case, and encompasses the parties' entire manner of conducting business and the degree of interrelatedness and control among the entities." Defendants further contend that Plaintiff and Third Party Defendants have failed to show why they could not reasonably respond and that any proprietary concerns could be addressed by a protective order.

Here, Defendants are seeking relevant information that would tend to show whether the parent corporation finances the Plaintiff subsidiary, subscribes to all the capital stock of the subsidiary or otherwise causes its incorporation, and other financial information that could show that the subsidiary is merely an alter ego of its parent company. However, the Defendant is also seeking irrelevant information when it pursues such information outside of the alleged chain between OAO Severstal and MSC. *Bowers* supports discovery of information which may show an alter ego between the parent company and the subsidiary. 202 W. Va. 43. It appears the Defendants are seeking to discover not only an alter ego as alleged, but a modus operandi for OAO Severstal. A modus operandi theory is not supported by case law and not relevant to the issue of whether OAO Severstal is treating the Plaintiff as an alter ego. Neither is such information reasonably calculated to lead to the discovery of admissible evidence. Accordingly,

the Plaintiff and Third Party Defendants cannot be compelled to produce the sensitive financial information of subsidiaries outside the alleged chain between OAO Severstal and MSC.

Therefore, Plaintiff and Third Party Defendants must produce the highest level financial statements for each of the entities which hold some ownership, interest, or governance of the chain of ownership between OAO Severstal and MSC, for the period 2007-2009⁸, which reflected initial and current capitalization of the companies as well as "accounting documents which reflected any intercompany accounts and transfers between the related companies," and "any agreements or contracts between the related companies."

Additionally, if the Defendants are successful in showing an alter ego relationship between the Plaintiff and OAO Severstal, the relationship of PBS Coals and OAO Severstal may be relevant for determining damages. If Defendants can show that OAO Severstal used both MSC and PBS Coals as alter egos, Defendants may be able to show that MSC incurred substantially less damage than it claims. Thus, such information between OAO Severstal and PBS Coals is discoverable and must be compelled. However, the net worth interrogatory is too far reaching and irrelevant to the *Bowers* factors. Nor is this particular request reasonably calculated to lead to the discovery of admissible evidence.

Further, in this matter, a protective order is inherently inadequate. The parties are direct competitors and clearly each company would desire to protect its proprietary information from the very parties requesting discovery. However, information is not protected from discovery simply because it is proprietary. Therefore, while not a complete solution to this issue, the

⁸ As an example, Severstal Wheeling, Inc. owns 50% of the membership of the Plaintiff, MSC. If Severstal Wheeling is shown to be an alter ego, the alleged chain of command could connect MSC to SUSH and conceivably OAO Severstal. SNA Carbon owns the other 50% of membership of Plaintiff, MSC, and its parent is, Dearborn.

parties may well benefit from a protective order. Accordingly, the parties shall propose any desired protective orders to the Court in accordance with the rulings herein.

3. Descriptions of the Companies' Operations and Organization

The instant Motion incorrectly cites to Interrogatory No. 1 of Defendants' Second Set of Discovery to Plaintiff Mountain State Carbon, LLC. This interrogatory does not request a "general description of the business conducted by a number of the interrelated entities" as the Motion states.⁹ The Plaintiff and Third Party Defendants suggest that Defendants meant to direct the Court to Defendant's second set of discovery directed to SNA, Dearborn, and SUSH, which asked these parties, "If you perform any functions other than to serve as a holding company for Severstal subsidiaries, describe in detail what those are." Defendants' rebuttal memorandum does not contest this correction.

A review of the pertinent interrogatory answers reveals general company descriptions as Defendants admit were produced. "SNA Carbon is a purchaser and seller of coke products from Mountain State Carbon and is an owner of 50% of the membership units of Mountain State Carbon.", "Dearborn is not a holding company. Dearborn owns and operates steelmaking facilities primarily for the automotive, pipe and tubing, construction, appliance, furniture, and strip re-rollers and galvanizer industries," and "SUSH is a holding company for Severstal Dearborn and certain other North American affiliates, not including PBS Coals, Inc." Defendants fail to address with any particularity how the answers listed above were not responsive to the interrogatory inquired. Accordingly this particular discovery request must be denied.

⁹ "Please state the current address for John Davis, who previously served as an officer with Wheeling-Pittsburgh Steel Corporation and, if you do not know Mr. Davis' current address, please provide his last known address."

Bluestone also complains that OAO Severstal has inadequately answered Interrogatory No. 2 of its first set of discovery to OAO Severstal, which requests the identity of each owner of PBS and the owner of those entities on up to parent company OAO Severstal from August 2008 through the end of 2009. OAO Severstal objected based upon relevance but did give limited information regarding PBS's ownership.¹⁰ "PBS, Inc. was owned by Mincorp, Inc. In addition, there was one additional USA entity, three Canadian entities, one entity from the Netherlands, and one entity from Russia before OAO Severstal appears in the corporate structure for PBS Coals, Inc."

These two interrogatories may be relevant to the issue of damages if the Defendants are successful in proving that OAO Severstal acts as the alter ego of Plaintiff, MSC. Further, OAO Severstal's answer fails to fully answer the question asked as required by Rule 33 of the West Virginia Rules of Civil Procedure. Accordingly, the interrogatory is appropriate to compel.

Similarly, Bluestone complains that OAO Severstal has inadequately answered Request No. 52 of its first set of discovery to OAO Severstal. In Request No. 52, Bluestone asks OAO Severstal for "all charts and other documents relating or pertaining to the corporate organization, hierarchy, structure, and ownership of the Severstal corporate family during 2008 and 2009 from OAO Severstal down to the level of Mountain State Carbon, LLC and PBS Coals, Inc."

OAO Severstal has neither provided any corporate documents reflecting their ownership structure nor have they stated that such documents do not exist. Instead, OAO Severstal objected to the request in that it was overly broad and irrelevant to the scope of discovery.

¹⁰ See section E

As it pertains to the alleged chain of management of MSC, Request No. 52 is relevant to the issue of jurisdiction and damages. As it pertains to PBS, No. 52 may be relevant to the issue of damages if the Defendants are successful in proving that OAO Severstal acts as the alter ego of Plaintiff. The corporate organization, hierarchy, structure, and ownership of the Severstal companies is relevant as it pertains to the relationship between the parties and PBS Coals. This relevance, however, does not extend beyond that alleged chain of command into all subsidiaries at the "level of" MSC and PBS. Accordingly, the Plaintiff and Third Party Defendants shall be compelled to produce any charts in the possession of OAO Severstal demonstrating the corporate organization, hierarchy, structure, and ownership of the Severstal corporate family during 2008 and 2009 between OAO Severstal and MSC, as well as such hierarchy between OAO Severstal and PBS Coals.

4. Plaintiff's Customers

To determine whether the Plaintiff has substantially no business except with its parent corporation, Bluestone's motion states that it has requested information and documents identifying all of the Plaintiff's customers during the relevant period as well as the terms upon which these sales took place, i.e., at cost or otherwise.¹¹

The Plaintiff and Third Party Defendants reply memorandum objects on the ground that the customer list is extremely proprietary and that Bluestone's discovery requests seek a "completely open book for MSC's entire business when the issue in this case is the breach of one contract. Therefore, there should be limits to what is requested..." Plaintiff and Third Party Defendants continue that MSC has produced monthly business reports for 2007, which identify

¹¹ Interrogatories No. 9, 10, and 12 of Defendants' fourth set of discovery to Plaintiffs, and duplicate Interrogatories No. 11 and 13 to Third Party Defendants.

its customers, as well as a Coke Supply Agreement with Wheeling Pittsburgh Steel Corporation¹² and the Coke Supply Agreement with SNA, which set forth terms for coke sales to management members dating back to 2005.

Contested interrogatories 9 and 10 ask Plaintiff and Third Party Defendants to identify each customer, excluding other operations owned by its parent/affiliates, from August 2008 to December 2009 and the percentage of MSC's revenues made up by sales to unaffiliated customers. Interrogatory No. 12 seeks the margins of each of those sales and all documents relating or pertaining to the identity of those customers, the amount of that mark-up, and the amount and period of those sales.

Interrogatories No. 9 and 10 mirror the seventh and ninth *Bowers* factors and are accordingly partially relevant. Interrogatory No. 12 is likewise partially relevant as it could unveil terms upon which sales took place and thus demonstrate the use of MSC as a conduit to procure merchandise or services for a related entity as an indicator of an alter ego status. *Laya v. Erin Homes, Inc.*, 177 W. Va. 343, 352 S.E.2d 93 (1986). However the information sought is also highly sensitive due to its proprietary nature and the relevance of the sought information and the complexity of the case must be weighed.

Just as in *State ex rel. Arrow Concrete Co. v. Hill*, this proprietary information is elicited by a direct business competitor. 194 W. Va. 239, 247, 460 S.E.2d 54, 62 (1995). In *Arrow*, an antitrust and unfair trade practices action, the plaintiff requested income tax returns, pricing policy, price lists, and how the prices were determined, including the use, time periods, application and conditions of discounts, escalation clauses, formula, multipliers, adjustments and

¹² The agreement transferred to its successors, Esmark, Severstal Wheeling, RG Steel.

labor and material indices. *Id.* The plaintiff also sought quarterly gross and net sales records of domestic and foreign sales and a list of customers and the amount of each purchase by each customer among other sensitive information. *Id.*

After reviewing the discovery requests, the *Arrow* trial court found, and the West Virginia Supreme Court of Appeals subsequently upheld, that the information sought was reasonably calculated to lead to the discovery of admissible evidence because the very nature of an antitrust /unfair trade practices action involves the discovery of how a business conducts itself. The Court opined that "the fact that business trade secrets are being discovered does not make the information being sought less relevant." The Court followed that because the discovery was not oppressive on its face and "the defendants, unlike State Farm in *Stephens, supra*, ha[d] failed to demonstrate how the discovery [was] oppressive and unduly burdensome," the trial court did not err in compelling the discovery. *Id.*

Here too, the information sought is proprietary. However much of the interrogatories are also relevant to determining if the Plaintiff is being treated as an alter ego of its parent companies. The Plaintiff and Third Party Defendants have failed to brief any objections of undue burden. Therefore an analysis of whether the discovery is burdensome in light of the issues at stake in the litigation is unnecessary, leaving only an examination of the relevance of the contested interrogatories.

The percentage of MSC's revenues made up by sales to unaffiliated customers is relevant and discoverable as it may unveil evidence in line with the seventh and ninth *Bowers* factors. However, the actual identities of each customer are beyond the scope of relevance. Likewise, the amount of mark-up for coke or other products sold to OAO Severstal affiliated companies during

the applicable period is relevant to determining if the Plaintiff was used as a conduit to procure merchandise or services for a related entity as an indicator of an alter ego status. However, a request for each and every document relating or pertaining to the information responsive to such sales is beyond the scope of relevant discovery and not reasonably calculated to lead to the discovery of admissible evidence. Therefore, the Plaintiff and Third Party Defendants are compelled to produce the percentage of MSC's revenues made up by sales to unaffiliated customers but may redact the identity of such customers. Plaintiff and Third Party Defendants are compelled to produce the amount of mark-up for coke or other products sold to OAO Severstal affiliated companies during the applicable period.

5. Existing Compilations of the Requested Documents

Defendants complain that Plaintiff and Third Party Defendants refuse to produce excerpts from transcripts of coal price arbitrations with Massey/Central West Virginia Energy during 2008-2009 or other documents used or exchanged in discovery in those proceedings, relating to allegations contained in Bluestone's First Amended Counterclaim.

Plaintiff and Third Party Defendants object to the request for production because, *inter alia*, the request is outside the relevant scope of discovery and subject to a mutual confidentiality provision. Consequently, Plaintiff replies, MSC is barred from producing anything from the arbitration without consent of Massey/Central.

As discussed in section A herein, determining what was said in negotiations or produced in a previous case is not relevant to the subject matter at hand. Though discovery is broad in nature, boundaries must be set when it appears that a party is requesting overly broad, unreasonable, or irrelevant discovery. Here, excerpts from the transcripts of an arbitration in an

unrelated case are not relevant or material to the case at bar and are not reasonably calculated to lead to the discovery of admissible evidence. Accordingly, the objection is sustained.

C. Requests Regarding Damages

Defendants aver that "because the CSA was a requirements contract, Bluestone's liability, if any, should be limited by the amount of coal required by Plaintiff in order to produce coke for its customers' steel plants." Accordingly, documents reflecting "Plaintiff's coke production and its sales to its parents and affiliates, as well as documents reflecting the coke consumption and steel production of those affiliates, all relate to this issue." Further, Defendants request information aimed at exploring the differences between PBS's cover CSA and contracts with unaffiliated customers to measure any benefit the Severstal group of companies may have received from the cover CSA. "[T]he Plaintiff and [Third Party] Defendants' motive for terminating the CSA may have had more to do with the purchase of PBS and the collapse of the market than with any actions of Bluestone. If so, Bluestone cannot be held responsible for damages that it did not cause." Memorandum in Support of Defendants' Motion to Compel at page 14.

Plaintiff and Third Party Defendants agree that Bluestone is entitled to discovery on damages but objects to the breadth and scope of those requests. Plaintiff MSC states that it has provided all documentation relied upon by its expert in its report on damages and as such, the Plaintiff and Third Party Defendants have fully responded. Further, MSC acknowledges that coal supply agreements for cover are relevant and has produced those contracts, however disagrees that Defendant is entitled to "explore the benefit" that Severstal companies may have received from the transaction over and above the contract price.

This section revolves around the conflicting measure of damages. Defendants request this Court compel discovery regarding the description of damages, existing compilations of documents relating to damages, documents related to the termination of the CSA, the relationship between plaintiff and its alleged cover supplier and newly acquired affiliate, PBS Coals, Inc., the impact of Bluestone's breach, and documents relating to Bluestone's performance.

1. Description of Damages

Defendants complain that Plaintiff hasn't adequately responded to Interrogatory 3 of Defendant's Fourth Set of Discovery to Plaintiff, which requests "a computation of each category of damages claimed by you, and for each such category of damages state, in detail, the basis for such computation, including in that statement the amount of coal, the price of the coal, the time period, and the alleged breach upon which such computation is based, and identify all documents relating or pertaining to the information responsive to this Interrogatory and/or upon which your computations are based."

Plaintiff and Third Party Defendants counter that they have already produced an expert report and supporting documentation. In rebuttal, Defendants aver that MSC is being too selective in answering the requests and has withheld documents which are obviously related to damages. The Rebuttal gives an example wherein a produced contract provides that it is controlled by a letter attachment which has not been produced despite two-follow up requests from Bluestone. Defendants also point to other unproduced documents, such as terminations with two coal brokers for the purchase of PBS coal that pre-dated MSC's termination of the Bluestone CSA which may shed light on whether the "carry over" coal should be included in the damages.

Plaintiff and Third Party Defendants have failed to fully respond to Interrogatory 3 of Defendant's Fourth Set of Discovery to Plaintiff and should be compelled to the extent they have not fully answered.

2. Existing Compilations of Documents Relating to Damages

The referenced requests call for all documents produced by MSC or its affiliates in its recently settled lawsuit *Mountain State Carbon v. Central West Virginia Energy, et al.*, relating to coke production and sales as well as coal purchases and consumption (both actual and projected) by MSC. Again, this information is outside the scope of discoverable evidence. Here, as in section A and B(5), determining how discovery was conducted in an unrelated case is not relevant to the subject matter at hand. Here, a party is requesting overly broad, irrelevant discovery and as such, a further response to Request No. 1 of the Third Set of Discovery to Plaintiff and Request No. 17 to Third Party Defendants will not be compelled.

3. Documents Related to the Termination of the CSA

a. Communications regarding the decision to terminate

According to Bluestone, after first wholly objecting to discovery Request No. 12 and 13 of Defendants' Fourth Set of Discovery to Plaintiff and Request No. 18, 19, 20, and 21 of Defendants' Third Set of Discovery to Plaintiff and their duplicates¹³, Plaintiff and Third Party Defendants have now produced communications involving Plaintiff, SNA, and Dearborn. Further, Plaintiff and Third Party Defendants have responded that SUSH and OAO Severstal do

¹³ Request No. 12, Fourth Set of Discovery to Plaintiff (communications); Request No. 32 to Third Party Defendants (same); Request No. 13, Fourth Set of Discovery to Plaintiff (minutes); Request No. 33 to Third Party Defendants (same); Request No. 18, Third Set of Discovery to Plaintiff (communications involving OAO Severstal); Request No. 32 to Third Party Defendants (same); Request No. 19, Third Set of Discovery to Plaintiff (minutes of OAO Severstal); Request No. 33 to Third Party Defendants (same); Request No. 20, Third Set of Discovery to Plaintiff (communications involving Severstal Dearborn); Request No. 21, Third Set of Discovery to Plaintiff (minutes of Severstal Dearborn)

not have any communications responsive to the above listed requests. With regard to minutes, Defendants represent that Plaintiff and Third Party Defendants have stated that SUSH and Dearborn's minutes are "not responsive to this request," and that SNA Carbon, LLC and OAO Severstal have no responsive minutes.

Defendants, however, complain that Plaintiff and Third Party Defendants should be required to clearly state whether SUSH and Dearborn have any business records relating to this topic. Plaintiff and Third Party Defendants reply that the requests are too wide in breadth due to the inclusion of six non-parties. Specifically, Plaintiff and Third Party Defendants point to Request No. 12 of Defendants' Forth Set of Discovery to Plaintiff, which calls for "all communications, transactions and/or agreements" from 2007-2009 in which any entity within Severstal companies was a party relating to the termination of the MSC CSA with Bluestone.

The requests for production at issue are relevant to the allegations in this case but overly broad to the extent that they seek documents and communications outside the control of the parties. Otherwise, all communications, transactions, agreements, and minutes which concern the termination of the MSC CSA with Bluestone are relevant and within the scope of reasonable discovery. Accordingly, this Court will compel the Severstal companies to clearly state whether SUSH and Dearborn have any communications, transactions, agreements, or minutes relating to this topic, and to produce any such documents of any OAO Severstal subsidiary that are in the parties' possession, custody, or control. Information sought from non-parties that is not accessible to the named parties must be sought through the power of subpoena.

b. The Acquisition of a Metallurgical Coal Producer

The instant Motion to Compel asserts that any intentions of the OAO Severstal family to acquire a metallurgical coal supplier, either Bluestone or a competitor of Bluestone, bear on the magnitude of damages Plaintiff may claim as a result of the alleged breach of the CSA between MSC and Bluestone. If the Plaintiff, or OAO Severstal under the alter ego theory, "intended to replace Bluestone in any event, then Bluestone's alleged breach could not have resulted in the damages which Plaintiff claims." The Defendants assert that MSC committed to repair the tram when the Plaintiff and Third Party Defendants expected to acquire Bluestone and that only upon its decision to acquire a competitor did MSC terminate the CSA at issue. Further, Defendants aver that the circumstances under which Plaintiff replaced Bluestone as a supplier, including the terms under which it began to obtain replacement coal from PBS, relate directly to the Plaintiff's claimed damages in this case. If Plaintiff paid PBS a higher than market price or contracted with PBS on a non-arms' length basis, then this information would likely impact the valuation of the alleged replacement contract for damages purposes. Under this alter ego theory, Defendants seek evidence of a desire to benefit PBS by providing it an outlet for its production, thus providing a motivation for termination of the MSC and Bluestone CSA.

The contested discovery requests all minutes of Board of Managers/Board of Directors meetings of any entity within the Severstal family of companies during the relevant period relating to prospective or actual purchases by any Severstal entity of a metallurgical coal producer, as well as all communications, transactions and/or agreements to which any entity within the Severstal family of companies was a party, relating or pertaining to such prospective

or actual purchases.¹⁴ Plaintiff and Third Party Defendants object to the requests on the basis of relevance and breadth of scope.

Here, Defendants have demonstrated why the requested discovery is relevant. Again, however, the parties cannot be compelled to produce documents and communications outside the control of the parties. Further, it appears that the replacement of the MSC/Bluestone CSA was limited to lo-vol coal.¹⁵ As such, it is appropriate to limit the discovery to documents relating to purchases of lo-vol metallurgical coal producers. Accordingly, all minutes, communications, transactions and/or agreements concerning prospective or actual purchases by any Severstal entity of a lo-vol metallurgical coal producer within the parties' possession, custody, or control are relevant and within the scope of reasonable discovery. Plaintiff and Third Party Defendants must be directed to supplement their answers accordingly.

4. The Relationship Between Plaintiff and Its Alleged Cover Supplier and Newly Acquired Affiliate, PBS Coals, Inc.

Continuing on with the theory that MSC was motivated to terminate the Bluestone CSA by a desire to cover with an affiliate at a higher cost due to an alter ego relationship with its parent company, Defendants request this Court compel discovery relating to a failure to mitigate.

Defendants aver that Bluestone must first examine the Plaintiff's coal requirements, its sales of coke, and the use of that coke in the manufacture of steel by its affiliate in order to determine whether the PBS contract actually qualifies as cover. However, Defendants fail to

¹⁴ Requests No. 16 and 17 of the Fourth Set of Discovery to Plaintiff (Request Nos. 36 and 37 to Third Party Defendants); Request No. 9, Third Set of Discovery to Plaintiff (Request No. 25 to Third Party Defendants); Request No. 11, Second Set of Discovery to Plaintiff (Request No. 11 to Third Party Defendants); Request No. 12, Second Set of Discovery to Plaintiff (Request No. 12 to Third Party Defendants)

¹⁵ Defendants did not contradict this objection in their rebuttal memorandum.

inform the Court which interrogatories or requests for production of documents Plaintiff allegedly failed to fully answer.

Likewise, Defendants argue that they are entitled to inquire into PBS's costs of production data, for the purpose of inquiring into whether it improperly favored PBS. Again, Defendants fail to inform the Court which discovery was allegedly unanswered. However, Plaintiff and Third Party Defendants have set forth Requests No. 7 of Defendants fourth set of discovery to Plaintiff as an example of such discovery sought by Defendants.

Please produce annual income statements and other documents reflecting the production costs for PBS Coals for the years 2009 - 2012 by mine and preparation plant, showing tons produced and production costs detail, both in dollars and dollars per ton, including:

- a. Tons sold and produced
- b. Revenues
- c. Direct mining costs
 - i. Labor
 - ii. Materials
 - iii. Supplies
 - iv. Diesel fuel
 - v. Power
 - vi. Contract services
- d. Transportation
- e. Sales related costs
 - i. Royalties
 - ii. Black lung tax
 - iii. Federal reclamation fee
 - iv. State taxes
- f. General & administrative costs
- g. Capital related costs
 - i. Depreciation
 - ii. Depletion
 - iii. Amortization
- h. Asset retirement obligation
- i. Coal inventory adjustment

Plaintiff and Third Party Defendants object to Requests relating to PBS's financial performance and other contracts because it is irrelevant to the issues in the case at hand and beyond the scope of permissible discovery. As it pertains to request No. 7 above, the requested information goes beyond the boundaries of discovery in that it seeks irrelevant detailed proprietary information of a non-party.

To weigh the relevancy of the sought discovery, a court must determine "how substantively the information requested bears on the issues to be tried." *State Farm Mut. Auto. Ins. Co. v. Stephens*, 188 W. Va. 622, 425 S.E.2d 577 (1992). Here, Defendants aver that such information will demonstrate that PBS received an unfair advantage in the cover contract and that MSC served as a ready customer during a time of decline, allowing PBS to maintain its capacity and lowering its production costs per ton.

This net is cast too wide. A comparison of MSC's other cover options is relevant evidence to determine the issue of mitigated damages. Even the negotiations between PBS and MSC are relevant to the issues to be tried, but specific financial details about the inner workings of PBS are too broad and irrelevant to this defense. Further, the information sought is highly proprietary information of a non-party and does not substantially weigh on the issues to be tried. Accordingly, a response to Request No. 7 cannot be compelled. Otherwise, Defendants have failed to provide the Court with sufficient instruction regarding any other discovery requests pertaining to PBS's costs of production data.

Defendants also seek discovery of the price and terms of PBS's other contracts as a "second means to determine whether PBS received favorable treatment in the MSC transaction or whether Plaintiff had the option to pursue other contracts with terms more favorable to

Plaintiff." Defendants cite "Request No. 3 of Defendant's to Plaintiff; Requests No. 55 and 56 to Third Party Defendants" but a review of the underlying discovery documents produced to this Court reveal that none of the third requests of any set of the Defendant's Discovery requests to Plaintiffs nor any of the fifty-fifth or fifty-sixty requests to any Third Party Defendant relate to PBS. Consequently no relief can be provided on these issues.

Defendants complain that Plaintiff and Third Party Defendants have failed to produce information requested by Request No. 4 of Defendants' third set of discovery to Plaintiff (Request No. 20 to Third Party Defendants), which requests information during the relevant period regarding Plaintiffs' solicitations for the purchase of lo-vol metallurgical coal or offers to the Plaintiff for such sales and any evaluations by Plaintiff of those alternative lo-vol supply sources. Plaintiff and Third Party Defendants do not respond to this allegation in their reply. A review of the underlying discovery reveals that the Plaintiff's and Third Party Defendants' failed to fully respond to this relevant and reasonable discovery request. Accordingly, the objections found within the Responses to Discovery are overruled and the Plaintiff and Third Party Defendants are directed answer the discovery requests fully.

Defendants also complain that Plaintiff and Third Party Defendants have failed to confirm that the production of a draft CSA between Plaintiff and PBS, a series of purchase orders between the two, and the Plaintiff's meeting minutes regarding PBS are "all the communications within its possession regarding PBS." Further, Defendant complain of Third Party Defendants' response, that OAO Severstal, SNA, Dearborn and SUSH have no responsive documents because the requests are for all communications and minutes within the group of Severstal related companies to the extent that the Third Party Defendants can access them.

Again, Defendants fail to specifically demonstrate which discovery requests it wishes the Court to compel but the Plaintiff and Third Party Defendants have set forth Requests No. 8 and 14 of Defendants fourth set of discovery to Plaintiff as an example of such discovery sought by Defendants. Defendants do not make any correction or clarify the matter in their rebuttal memorandum. Request No. 8 states,

Please produce all communications regarding the negotiation and administration of the sales between PBS and Mountain State, including the negotiation of the price and terms of the sales contracts and annual prices." Request No. 14 states, "Please produce all communications, transactions and/or agreements to which any entity within the Severstal family of companies during the period January 1, 2007, through December 31, 2009, including but not limited to PBS Coals, OAO Severstal, Severstal Investments, LLC, Severstal Trade, Severstal U.S. Holdings, LLC, Severstal Dearborn, LLC (f/k/a Severstal Dearborn Inc.), SNA Carbon LLC, Mountain State Carbon, LLC, Severstal Wheeling Holdings Company, Severstal Wheeling Steel Group, Inc. and Severstal Wheeling, Inc., was a party, whether internal to those entities or with any affiliated or unaffiliated party, relating or pertaining to Mountain State's contract to buy coal from PBS Coals.

Plaintiff and Third Party Defendants represent that MSC has provided all information necessary for Bluestone to calculate MSC's losses as it pertains to replacement coal from PBS, directly or indirectly. "MSC has provide[d] the draft CSA from 2009 between MSC and PBS; the 2011 and 2012 CSAs between MSC and PBS; the purchase orders, invoices, vendor payments, and shipping records for all lo-vol coal purchased directly from PBS; and even the purchase orders, invoices, vendor payments, and shipping for all lo-vol coal purchased indirectly from PBS via Crown Coal & Coke and Jack Ham Enterprises."

Request No. 14 states:

Please produce all communications, transactions and/or agreements to which any entity within the Severstal family of companies during the period January 1, 2007, through December 31, 2009, including but not limited to PBS Coals, OAO Severstal, Severstal Investments, LLC, Severstal Trade, Severstal U.S. Holdings, LLC, Severstal Dearborn, LLC (f/k/a Severstal Dearborn Inc.), SNA Carbon LLC, Mountain State Carbon, LLC, Severstal Wheeling Holdings Company, Severstal Wheeling Steel Group, Inc. and Severstal Wheeling, Inc., was a party, whether internal to those entities or with any affiliated or unaffiliated party, relating or pertaining to Mountain State's contract to buy coal from PBS Coals.

Requests No. 8 and 14 of Defendants fourth set of discovery to Plaintiff are relevant and within the scope of discoverable information. While the provided documents may offer an opportunity to calculate MSC's losses, it is not the only information relevant to such calculation and Defendants are entitled to a full response to the requested discovery to the extent that Plaintiff and Third Party Defendants can access those documents. Accordingly, Plaintiff and Third Party Defendants must be compelled to supplement their responses accordingly.

5. The Impact of Bluestone's Alleged Breach

In this case, Plaintiff has asserted that Bluestone's alleged breach and failure to make deliveries under the CSA had a negative impact on the coke production and the steel production of affiliates who were customers during the relevant time. In order to test this allegation Bluestone requested documents and reports relating to pig iron production, steel production, coke consumption, and/or coke purchases, both actual and forecasted, by MSC's unit holders from January 2007 to present¹⁶ as well as documents reflecting sales by Plaintiff during this same period.¹⁷

¹⁶ Request No. 7, Third Set of Discovery to Plaintiff (Request No. 23 to Third Party Defendants).

¹⁷ Request No. 8, Third Set of Discovery to Plaintiff (Request No. 24 to Third Party Defendants).

According to the memoranda, OAO Severstal, SUSH, and Dearborn have stated that they have no documents responsive to this request. Plaintiff and the remaining Third Party Defendants, SNA and Wheeling Pittsburgh Steel Corporation, have responded by saying that they will soon produce the coke purchase orders by SNA Carbon for the period from 2007 through 2010 and 2011 through 2012. Further, the parties represent that Third Party Defendants have already produced the respective coke supply agreements and the Wheeling Pittsburgh Steel Corporation coke purchase order for 2007. Lastly, the Plaintiff and Third Party Defendants contend that SNA has no documents pertaining to pig iron production, steel production, or coke consumption. Plaintiff and Third Party Defendants do not object to the instant requests but rather aver that they have fully responded and that there is nothing to compel.

However, Plaintiff and Third Party Defendants do not address whether Wheeling Pittsburgh Steel Corporation has any documents pertaining to pig iron production, steel production, or coke consumption. Nor does the reply address the lack of 2008-present for Wheeling Pittsburgh Steel Corp purchase orders. Further, it appears that Plaintiff and Third Party Defendants have failed to address Plaintiff's actual and planned coke production, coal consumption, and coal purchases. It appears that the Plaintiff and Third Party Defendants have only produced a small portion of the information requested in Requests no. 7 and 8 of Defendants' Third set of Discovery to Plaintiff (Requests No. 23 and 24 to Third Party Defendants). Defendants are entitled to a full response to the requested discovery to the extent that Plaintiff and Third Party Defendants can access those documents. Accordingly, Plaintiff and Third Party Defendants are ordered to supplement their responses accordingly.

6. Documents relating to Bluestone's performance

Defendants complain that Plaintiff and Third Party Defendants have failed to fully respond to Request No. 10 of Defendants' Second Set of Discovery to Plaintiff (Request No. 10 to Third Party Defendants) or Request No. 16 of Defendants' Second Set of Discovery to Plaintiff (Request No. 16 to Third Party Defendants). The discovery requests seek production of all communications among Mountain State and its affiliates, parents and/or subsidiaries, or between this group and any third parties, relating or pertaining to projections by Mountain State as to future coal production and/or deliveries by Bluestone under the CSA or to Bluestone's performance under the CSA or any actual or alleged production problems encountered by Bluestone. Defendants admit that Plaintiff has produced a chart reflecting Plaintiff's purchases from Bluestone and a set of documents relating to communications between MSC and Bluestone but objects to Plaintiff and Third Party Defendants limiting their response to communications directly involving Plaintiff and Bluestone.

In their reply, Plaintiff and Third Party Defendants allege that Plaintiff has provided the requested documentation and that SNA, Dearborn, SUSH, and OAO Severstal do not have documents responsive to this request. Accordingly, Plaintiff and Third Party Defendants contend, there is nothing to compel in the instant matter. Defendants fail to offer any contradiction in their rebuttal memorandum. Accordingly, this Court must find that Plaintiff and Third Party Defendants have fully responded to Request No. 10 of Defendants' Second Set of Discovery to Plaintiff (Request No. 10 to Third Party Defendants) or Request No. 16 of Defendants' Second Set of Discovery to Plaintiff (Request No. 16 to Third Party Defendants).

D. Additional Requests

1. Requests Relating to Severstal Trade

Bluestone complains that MSC has failed to answer Interrogatory No. 14 and Request No. 52 of Defendants' discovery to OAO Severstal and Request No. 52 relating to Severstal Trade. Interrogatory 14 simply requests the "jurisdictions in which Severstal Trade is incorporated/organized and/or authorized to do business, and please state the address of its principal place of business." Request 52 requests "all charts and other documents relating or pertaining to the corporate organization, hierarchy, structure, and ownership of the Severstal corporate family during 2008 and 2009 from OAO Severstal down to the level of Mountain State Carbon, LLC and PBS Coals, Inc." As to Request No. 52, this Court refers to its findings in Section B3 above. As to Interrogatory 14, Defendants allege that Severstal Trade may have a role in Plaintiff's management; accordingly, the information is relevant and discoverable. Plaintiff and Third Party Defendants must be compelled to supplement their response to Interrogatory 14 accordingly.¹⁸

2. Requests Relating to Identified Document

In Request No. 15 to the Third Party Defendants, Defendants requested that Plaintiff and Third Party Defendants "produce all documents relating to authorization from Severstal to Boyce Graybeal & Sayre to do the detailed engineering as set forth in the 8/8/08 email ..."

The response to this request objected on the grounds that the response mischaracterized the content of the referenced document, stating that it assumed "facts which are not correct, i.e. that there was any authorization for engineering work to be done." OAO Severstal stated it had no documents responsive to this request. Defendants do not offer any rebuttal to this contention and

¹⁸ Plaintiff and Third Party Defendants argue against an order compelling a response to Request 46, however, Defendants motion does not request any action on this Request. As such, this Court will not address the corresponding argument.

review of the contested Request and Response shows that OAO Severstal has fully responded to the request.

3. Interrogatories Relating to Claims and Defenses

In Interrogatories No. 5 and 6 of Defendant's Fourth Set of Discovery to Plaintiff, Bluestone asked that Plaintiff provide a detailed description of the basis for its defenses to the claims raised by the First Amended Third Party and Third Party Claim. Plaintiff objected on the grounds that a subsequent claim had been filed and in its reply represented the MSC will supplement its discovery responses after the filing of its pleading responsive to the Defendants' Second Amended Counterclaim and Third Party Claim.

MSC was not obligated to respond to discovery related to a "dead" pleading because at the time it responded to Defendants' fourth set of discovery the twenty paragraphs in Defendants' Second Amended Counterclaim and Third Party Claim were irrelevant. As such, requesting follow up information on MSC's denials was beyond the scope of discovery. Consequently, Plaintiff cannot be compelled to further respond on this ground.

4. Basis for Denials of Requests to Admit

Defendants complain that MSC did not sufficiently respond to Request to Admit No. 5, 8, and 9 of the Fourth Set of Discovery to Plaintiff. A review of the underlying contested discovery reveals that these requests for admissions were answered appropriately in accordance with Rule 36 of the West Virginia Rule of Civil Procedure. The Plaintiff denied each of the requests and Defendants are not entitled to any additional information which is not requested by discovery. Accordingly, this Court cannot compel a response on this ground.

E. Plaintiff's Responses Which Both Object and Respond

While Plaintiff and Third Party Defendants have purported to answer certain Requests, they have also asserted various relevancy and breadth objections to these Requests, answering "without waiving the stated objection." Such responses are not authorized by the Rules of Civil Procedure and accordingly do not preserve any objections. Answers of this nature may be sanctioned under Rule 37 of the West Virginia Rules of Civil Procedure.

While Plaintiff and Third Party Defendants are not required to further respond to Requests No. 4, 5, 6, 7 8, and 59, the parties must give a full response to Request No. 57 because the response is misleading due to a vague promise to "appropriately supplement" the response, a list of boilerplate objections, and a reference to previously provided documents. Further, the objections contained in the discovery response are erroneous. The Court finds that the "contracts for the purchase of coal by Mountain State in effect for the period of August 2008 to present" are relevant to damages, a full answer is hereby compelled for Request No. 57.

Accordingly, the Court GRANTS IN PART Defendants' Motion to Compel, consistent with the rulings made herein. The Court notes that the discovery compelled herein appears to be readily available and accordingly requires it be produced by January 15, 2014. The Court notes the objections and exceptions of the parties to any adverse ruling herein.

Therefore, it is hereby ADJUDGED and ORDERED that the Motion is GRANTED as follows:

1. Plaintiff and Third Party Defendants' objections to the respective discovery requests are hereby OVERRULED consistent with the opinion herein;

2. Plaintiff and Third Party Defendants' shall fully answer the delineated discovery interrogatories and requests as directed, by serving responses upon the Defendant by 5:00 p.m. on January 15, 2014;
3. The parties shall draft an agreed protective order to be submitted to the Court electronically within 10 calendar days from the entry of this Order. If no agreement can be reached, each party may submit proposed protective orders within 15 calendar days from the entry of this Order. Proposed orders shall be sent to the Judge's chambers and submitted electronically in MS Word format to Kevin.Watson@courts.wv.gov, with a copy to the court file;
4. Plaintiff and Third Party Defendants are hereby GIVEN NOTICE that failure to comply with this Order Compelling Discovery may result in the full range of sanctions under Rule 37 of the West Virginia Rules of Civil Procedure;
and
5. The parties shall proceed with this case pursuant to the West Virginia Rules of Civil Procedure, all other applicable law, and any scheduling orders entered by this Court.

The Court directs the Circuit Clerk to distribute attested copies of this order to the following parties and counsel of record:

***Counsel for Plaintiff and
Third Party Defendants:***

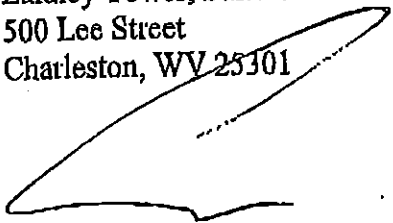
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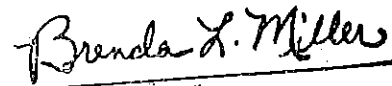
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CHRISTOPHER C. WILKES,
CIRCUIT JUDGE
BUSINESS COURT DIVISION

A copy, Teste:


Circuit Clerk