

FILED

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

JOSEPH M. RUCKI

KRP MARCELLUS I, LLC,
RIVERCREST ROYALTIES II, LLC,
DIVERSIFIED ROX MINERALS, LLC,
BRD ROYALTY HOLDINGS, LLC and
AMON G. CARTER FOUNDATION,
collectively known as KIMBELL GROUP,

Plaintiffs,

vs.

CIVIL ACTION NO.: 18-C-215

Presiding: Judge Michael D. Lorensen

Resolution: Judge Christopher C. Wilkes

CHEVRON U.S.A. INC.,
a Pennsylvania corporation,
TH EXPLORATION, LLC,
a Texas limited liability company, and
DOE CORPORATION 1-20,

Defendants.

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S
MOTION FOR PROTECTIVE ORDER

This matter came before the Court this 8th day of October 2020 upon Defendant TH Exploration, LLC's Motion for Protective Order. 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. This matter surrounds the causes of action alleged in the Amended Complaint filed March 4, 2019, alleging causes of action for breach of contract, tort, and declaratory judgment related to certain oil and gas conveyances covering approximately 53,000 acres in

Marshall County, West Virginia. *See* Am. Compl. Plaintiffs have alleged in the Amended Complaint claims that TH Exploration, LLC has failed to recognize and pay an overriding royalty interest (“ORRI”) on certain oil and gas leases that TH Exploration, LLC obtained by assignment from Chevron, U.S.A. Inc. *Id.*; *see also* Def’s Mot., p. 3.

2. On August 28, 2020, Plaintiffs KRP Marcellus I, LLC, Rivercrest Royalties Holdings II, LLC, Diversified Rox Minerals, LLC, BRD Royalty Holdings, LLC, Amon G. Carter Foundation, and the Kimbell Art Foundation (hereinafter “Plaintiffs”) served notices of deposition of Michael Radler, Evan Radler, and David Kalish. *See* Def’s Mot., p. 1; *see also* Def’s Mot., Exs. A-C. Michael Radler is identified as the President and Chief Executive Officer of Tug Hill Operating, LLC; Evan Radler was identified as having served as the Chief Operating Officer of Tug Hill Operating, LLC; and David Kalish was identified as Senior Vice-President – Land for TH Exploration, LLC. *Id.* at 2. The parties do not appear to dispute that these positions constitute those of high-ranking corporate officers.

3. On September 1, 2020, Defendant TH Exploration, LLC (hereinafter “Defendant” or “TH”) filed Objections to the notices of depositions of Michael Radler, Evan Radler, and David Kalish. *Id.* at 1-2.

4. On a prior day, TH Exploration, LLC filed TH Exploration, LLC’s Motion for Protective Order, seeking to preclude the depositions of Michael Radler, Evan Radler, and David Kalish, pursuant to the apex deposition rule. *See* Def’s Mot., p. 1, 2. TH contemporaneously submitted Affidavits of Michael Radler, Evan Radler, and David Kalish indicating they each do not have personal knowledge of the facts of the claims involved in the instant civil action. *Id.* at 3; *see also Id.* Exs. D-F.

5. Thereafter, Plaintiffs filed Plaintiffs' Response to TH's Motion for Protective Order and Motion to Compel Depositions, arguing the apex deposition does not apply to a company as small as TH Exploration, LLC, and that Michael Radler, Evan Radler, and David Kalish have sufficient personal knowledge to overcome the apex deposition rule. *See* Pls' Resp., p. 2-4. Consequently, Plaintiffs seek a denial of the instant motion, and also move to compel the depositions of Michael Radler, Evan Radler, and David Kalish for the same reasons. *Id.* at 9.

6. Finally, Defendant filed TH Exploration, LLC's Reply in Support of Motion for Protective Order, arguing there is no size limitation to the apex deposition rule and reiterating that Plaintiffs did not satisfy their burden of demonstrating that Michael Radler, Evan Radler, and David Kalish have sufficient personal knowledge discoverable information. *See* Reply, p. 1, 5.

7. The Court now finds the instant Motion and Joinder are ripe for adjudication.

CONCLUSIONS OF LAW

Generally, Rule 30 of the West Virginia Rules of Civil Procedure provides that: "After commencement of the action, any party may take the testimony of any person, including a party, by deposition upon oral examination". W. Va. R. Civ. P. 30(a).

With regard to high-ranking corporate officials, the West Virginia Supreme Court of Appeals has held as follows:

"When a party seeks to depose a high-ranking corporate official and that official (or the corporation) files a motion for protective order to prohibit the deposition accompanied by the official's affidavit denying any knowledge of relevant facts, the circuit court should first determine whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information. If the party seeking the deposition cannot show that the official has any unique or personal knowledge of discoverable information, the circuit court should grant the motion for protective order and first require the party seeking the

deposition to attempt to obtain the discovery through less intrusive methods. Depending upon the circumstances of the particular case, these methods could include the depositions of lower level corporate employees, as well as interrogatories and requests for production of documents directed to the corporation. After making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate. If the party seeking the deposition makes this showing, the circuit court should modify or vacate the protective order as appropriate. As with any deponent, the circuit court retains discretion to restrict the duration, scope and location of the deposition. If the party seeking the deposition fails to make this showing, the trial court should leave the protective order in place."

Syl. Pt. 3, *State ex rel. Massachusetts Mut. Life Ins. Co. v. Sanders*, 228 W.Va. 749, 724 S.E.2d 353 (2012).

TH Exploration, LLC's Motion for Protective Order seeks to preclude the depositions of Michael Radler, Evan Radler, and David Kalish, pursuant to the apex deposition rule. *See* Def's Mot., p. 1, 2. The individuals will be taken up in turn.

Michael Radler

First, the Court considers that TH Exploration, LLC's Motion for Protective Order seeks to preclude the deposition of Michael Radler pursuant to the apex deposition rule. Michael Radler is identified as the President and Chief Executive Officer of Tug Hill Operating, LLC. *See* Def's Mot., p. 2. TH submitted an Affidavit of Michael Radler indicating he does not have "unique or personal knowledge of discoverable information" pertaining to Plaintiffs' claims. *Id.*, Ex. D. Thus, the Court must "determine whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information". *See Sanders*, Syl. Pt. 3.

The party seeking the deposition, Plaintiffs, on the other hand, argue Michael Radler has first-hand knowledge of issues central to this case. *See* Pl's Resp., p. 5. Specifically, Plaintiffs allege Michael Radler was, in his role of CEO of Tug Hill Operating, LLC, as well as COO of Chief Exploration¹, was directly involved in the sale of many of the subject properties at the heart of this civil action. *Id.* The Court notes that TH admits that have alleged in the Amended Complaint claims that TH Exploration, LLC has failed to recognize and pay an overriding royalty interest ("ORRI") on certain oil and gas leases that TH Exploration, LLC obtained by assignment from Chevron, U.S.A. Inc. *See* Def's Mot., p. 3. Additionally, Plaintiffs allege that Michael Radler specifically reviewed press releases and disclosures relating to the sale of the property at issue in this matter to Chevron. *See* Pl's Resp., p. 5.

Further, Plaintiffs have proffered that Michael Radler reviewed and made decisions on the allocated values of the development areas which are at issue in this matter. *Id.* at 5-6. Plaintiffs also proffered that Michael Radler personally reviewed agreements with Chevron and got Chevron's approval on those documents. *Id.* at 6. Evidence was proffered to the Court indicating that Michael Radler was the one who signed documents closing dates on those transactions. *Id.*

With regard to Michael Radler's two capacities, the Court considers his positions of CEO of Tug Hill Operating, LLC, as well as COO of Chief Exploration. TH argues that Michael Radler's experience in his position at Chief was too remote in time to be relevant to the issues in this civil action. *See* Def's Mot., p. 4. However, Plaintiffs have proffered evidence of the relevance of Michael Radler's positions at Chief and Tug Hill Operating, LLC. *See* Pl's Resp., p. 6. Plaintiffs proffered that Michael Radler was responsible for selling many of the properties

¹ The Court notes TH refers to this entity as Chief Oil & Gas LLC in its motion and Reply.

at issue with ORRI's to Chevron while in his position with Chief. *Id.* Further, Plaintiffs proffered that Michael Radler then was responsible for buying many of the same properties from Chevron, with ORRI's that Plaintiffs contend were "freshly scrubbed" from the properties, while he was in his position at Tug Hill Operating, LLC. *Id.* at 6-7. Additionally, Plaintiffs proffer that Plaintiffs have produced numerous emails in his matter which show that Michael Radler has personal knowledge as to the properties at issue in his roles at both companies. The Court finds that his testimony would likely be directly relevant to the heart of this case – whether or not the ORRI's were wrongfully unpaid and unrecognized.

Further, the Court notes it finds there is no requirement in Rule 30 that would require Plaintiffs to issue a party notice to Michael Radler to discuss Tug Hill Operating, LLC or Defendant TH Exploration, LLC, but require a separate subpoena to have him discuss issues to Chief Exploration.

For all of these reasons, and considering the proffered evidence, the Court finds that Plaintiffs have demonstrated that Michael Radler does have sufficient first-hand knowledge of the matters described in the Amended Complaint, in contravention of his Affidavit. Accordingly, the Court finds his deposition should not be precluded by the apex deposition rule and should be permitted. Therefore, the instant motion for protective order is denied as to Michael Radler.

Evan Radler

Next, the Court considers that TH Exploration, LLC's Motion for Protective Order seeks to preclude the deposition of Evan Radler pursuant to the apex deposition rule. Evan Radler is identified as having served as the Chief Operating Officer of Tug Hill Operating, LLC. *See* Def's Mot., p. 2. TH submitted an Affidavit of Evan Radler indicating he does not have "unique

or personal knowledge of discoverable information” pertaining to Plaintiffs’ claims. *Id.*, Ex. E. Thus, the Court must “determine whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information”. *See Sanders*, Syl. Pt. 3.

The party seeking the deposition, Plaintiffs, on the other hand, argue Evan Radler, has first-hand knowledge of issues central to this case, wherein it argued that all three instant corporate officials had first-hand knowledge. *See* Pl’s Resp., p. 5. However, a review of Plaintiffs’ Response reveals Plaintiffs did not include any specific averments or proffer any evidence detailing what first-hand knowledge Evan Radler specifically has, unlike the Response’s averments with regard to Michael Radler and David Kalish. The Court agrees with TH’s averment in its Reply that “[w]ith respect to Evan Radler, [Plaintiffs] provided no justification and identified no ‘unique or personal knowledge of discoverable information’ to overcome the burden of the apex deposition rule”. *See* Reply, p. 4.

The Court finds Plaintiffs have not met their burden of showing of personal knowledge on the part of Evan Radler and his deposition should be precluded at this time. Therefore, the instant motion for protective order is granted as to Evan Radler. The Court, however, is cognizant of the *Sanders* direction that the Court “should modify or vacate the protective order as appropriate” if “[a]fter making a good faith effort to obtain the discovery through less intrusive methods, the party seeking the deposition may attempt to show (1) that there is a reasonable indication that the official's deposition is calculated to lead to the discovery of admissible evidence, and (2) that the less intrusive methods of discovery are unsatisfactory, insufficient or inadequate”. *Sanders*, Syl. Pt. 3.

David Kalish

Finally, the Court considers that TH Exploration, LLC's Motion for Protective Order seeks to preclude the deposition of David Kalish pursuant to the apex deposition rule. David Kalish was identified as Senior Vice-President – Land for TH Exploration, LLC. *See* Def's Mot., p. 2. TH submitted an Affidavit of David Kalish indicating he does not have "unique or personal knowledge of discoverable information" pertaining to Plaintiffs' claims. *Id.*, Ex. F. Thus, the Court must "determine whether the party seeking the deposition has demonstrated that the official has any unique or personal knowledge of discoverable information". *See Sanders*, Syl. Pt. 3.

The party seeking the deposition, Plaintiffs, on the other hand, argue Mr. Kalish has first-hand knowledge of issues central to this case. *See* Pl's Resp., p. 5. Specifically, Plaintiffs allege that Mr. Kalish executed the assignment between Chevron and TH in 2016, which is at the heart of this litigation. *Id.* at 7. Indeed, Mr. Kalish is a high-ranking official in the specific area of land, as he is Senior Vice-President – Land for TH Exploration, LLC, and the 2016 Chevron/TH Assignment constitutes an extremely significant *land* acquisition encompassing approximately 900 acres. *See* Def's Mot., p. 2; *see also* Pl's Resp., p. 7. Further, Plaintiffs proffered that Plaintiffs have produced "relevant land transaction documents Kalish signed". *See* Pl's Resp., p. 8.

The Court finds Plaintiffs have met their burden of demonstrating Mr. Kalish would have personal knowledge regarding a critical part of this case, the 2016 Chevron/TH Assignment. Accordingly, the Court finds his deposition should not be precluded by the apex deposition rule and should be permitted. Therefore, the instant motion for protective order is denied as to David Kalish.

Finally, the Court addresses the Trial Court Order discussed by the parties. *See Jordan v. Ohio Valley Med. Ctr.*, 2016 WL 11041041 (W. Va. Feb. 6, 2016). While a Trial Court Order is generally not controlling, the Court reviewed this trial court order and underlying motion referenced by TH in its Reply², and states that the instant case is differentiated from *Jordan* wherein in *Jordan*, the hospital Vice-President of Quality and Risk Management signed verifications on discovery responses, and here, evidence has been proffered indicating Michael Radler and Mr. Kalish have much more in-depth knowledge and involvement, and therefore, personal knowledge, into underlying documents and circumstances that appear to go to the heart of the instant civil action. *Id.*

Additionally, because the Court has resolved this matter by analyzing the personal knowledge of Michael Radler, Evan Radler, and David Kalish, the Court declines to analyze the argument proffered by Plaintiffs regarding size limitations on the corporate entities subject to the apex deposition rule. *See* Pl's Resp., p. 2-4.

Accordingly, the instant Motion for Protective Order must be GRANTED IN PART AND DENIED IN PART. The Motion for Protective Order is denied as to Michael Radler, denied as to Evan Radler, and denied as to David Kalish for the reasons stated herein.

CONCLUSION

The Court does hereby ADJUDGE and ORDER Defendant TH Exploration, LLC's Motion for Protective Order is hereby GRANTED IN PART AND DENIED IN PART.

The Court notes the objections and exceptions of the parties to any adverse ruling herein. The Court directs the Circuit Clerk to distribute attested copies of this order to all counsel of

² See Reply, p. 4.

record, and to the Business Court Central Office at West Virginia Business Court Division, 380
West South Street, Suite 2100, Martinsburg, West Virginia, 25401.

Enter: October 8, 2020



JUDGE MICHAEL D. LORENSEN
JUDGE OF THE WEST VIRGINIA
BUSINESS COURT DIVISION