

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

ALLAN ROFFE, derivatively on behalf)
of Eagle Rock Energy Partners, L.P.,)
and individually and on behalf of)
all others similarly situated,)

Plaintiff,)

v.)

C.A. No. 5258-VCL)

EAGLE ROCK ENERGY GP, L.P., et al.,)

Defendants,)

-and-)

EAGLE ROCK ENERGY PARTNERS, L.P.,)

Nominal Defendant.)

- - -
Via telephone
New Castle County Courthouse
Wilmington, Delaware
Thursday, April 8, 2010
4:00 p.m.
- - -

BEFORE: HON. J. TRAVIS LASTER, Vice Chancellor.

- - -

TELEPHONE CONFERENCE ON DISCOVERY DISPUTE

- - -

CHANCERY COURT REPORTERS
500 North King Street - Suite 11400
Wilmington, Delaware 19801-3759
(302) 255-0525

1 APPEARANCES:

2 DAVID A. JENKINS, ESQ.
Smith, Katzenstein & Furlow LLP

3 -and-

4 LAWRENCE D. LEVIT, ESQ.
of the New York Bar
Abraham, Fruchter & Twersky LLP
5 for the Plaintiff

6 SRINIVAS M. RAJU, ESQ
Richards, Layton & Finger, P.A.

7 -and-

8 MICHAEL C. HOLMES, ESQ.
of the Texas Bar
Vinson & Elkins LLP
9 for Defendants Eagle Rock Energy GP, L.P.,
Eagle Rock Energy G&P, L.L.C., Joseph A.
10 Mills, and Nominal Defendant Eagle Rock
Energy Partners, L.P.

11 PETER J. WALSH, JR., ESQ.
Potter Anderson & Corroon LLP

12 -and-

13 GERALD L. BRACHT, ESQ.
of the Texas Bar
Andrews Kurth LLP
14 for Defendants Philip B. Smith, William A.
15 Smith and William K. White

16 S. MARK HURD, ESQ
Morris, Nichols, Arsht & Tunnell LLP
17 for Natural Gas Partners VII, L.P.,
Natural Gas Partners VIII, L.P., G.F.W.
18 Energy VII, L.P., GFW VII, L.L.C., G.F.W.
Energy VIII, L.P., GFW VIII, L.L.C.,
19 Kenneth A. Hersh, William J. Quinn
and John A. Weinzierl

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1 THE COURT: This is Travis Laster
2 speaking.

3 MR. JENKINS: Good afternoon, Your
4 Honor. This is David Jenkins, from Smith, Katzenstein
5 & Furlow, counsel for plaintiffs in the Eagle Rock
6 action. I have a group of people on the line along
7 with Bill Dawson, the court reporter. Would Your
8 Honor like a roll call taken?

9 THE COURT: I would, because I have no
10 idea who is on the line other than you, Mr. Jenkins.
11 It would be very helpful.

12 MR. JENKINS: I am here along with my
13 co-counsel, Larry Levit, from the Abraham, Fruchter &
14 Twersky firm, in New York.

15 MR. LEVIT: Good afternoon, Your
16 Honor.

17 THE COURT: Good afternoon.

18 MR. RAJU: This is Srinivas Raju. And
19 I have on the line with me my co-counsel, Michael
20 Holmes, from the Vinson & Elkins firm in Texas. He
21 has been admitted pro hac vice in this matter.

22 MR. WALSH: Your Honor, this is Pete
23 Walsh, on behalf of the members of the conflicts
24 committee. With me on the phone is Gerald Bracht --

1 for the benefit of Mr. Dawson, that is B-R-A-C-H-T --
2 who is lead counsel for the conflicts committee. He
3 is with the Andrews Kurth firm. With Your Honor's
4 permission, Mr. Bracht would speak to the issue on
5 behalf of the conflicts committee.

6 MR. HURD: Mark Hurd, at Morris,
7 Nichols, for the other defendants.

8 THE COURT: All right. Good afternoon
9 everyone.

10 Mr. Jenkins, I have your letter. So I
11 understand your position, and at least as I perceive
12 it, the issue is the computers and e-mails of the
13 chair of the committee and the other committee member.
14 So if there is something else that you want to put on
15 the agenda, let me know. Otherwise, I think the best
16 route would be for Mr. Walsh's co-counsel to let me
17 know what is so unduly burdensome about what you,
18 Mr. Jenkins, have proposed.

19 MR. JENKINS: There is one slight
20 change to what I requested, Your Honor. Since the
21 time of my letter Monday evening, the conflicts
22 committee will be producing the e-mails of one of the
23 other committee members, but not the chair of the
24 committee. We still have that request.

1 THE COURT: Okay.

2 MR. BRACHT: Your Honor, thank you.

3 This is Jerry Bracht. Let me, I guess, bring you up
4 to date, if I may, concerning the status of where we
5 are at this point. We have produced probably in
6 excess of 3,000 pages of documents, and with more to
7 come. We have arranged for the depositions of three
8 witnesses, including two third-party witnesses, that
9 are not parties to the case and had not been
10 subpoenaed yet, and are doing this voluntarily and in
11 cooperation with our request for their cooperation.

12 THE COURT: I assume those are your
13 bankers?

14 MR. BRACHT: Yes, Your Honor.

15 Lazard -- a representative of Lazard and a
16 representative of a company called Madison Williams.
17 And then the conflicts committee deposition has also
18 been scheduled, and it -- right now, at least, these
19 depositions are scheduled for next week.

20 On the e-mail issue, I think it's --
21 I'm not sure that it's entirely been set before you,
22 in terms of what the circumstances are.

23 The conflicts committee consisted of
24 three members of the Eagle Rock board of directors.

1 They were formed as a committee when this transaction
2 was -- first came to fruition, because it was an
3 interested-party transaction. They met with my law
4 firm, lawyers in my law firm, and their own financial
5 advisors and were -- acted in a truly independent
6 fashion. The e-mails in question were circulated
7 among the three of them. I have -- two of the three
8 were using their business computers and were foldering
9 the Eagle Rock e-mails into a separate folder, if you
10 will. I'm not computer literate, per se. And it
11 turned out that those -- that collection of e-mails
12 was easily accessed, because they were all in one
13 spot. And I have -- I have -- in the process, I spent
14 all day yesterday reviewing one set of those e-mails.
15 They are numerous, as you can imagine. And those
16 e-mails that are -- we are producing from one of the
17 members is on its way to Mr. Levit, and he will have
18 those tomorrow.

19 I am receiving the second conflict
20 committee member's e-mails tomorrow. I will review
21 those and hopefully have those to Mr. Levit by
22 Saturday. The e-mails that I have seen, Your Honor,
23 always, almost to -- I mean contain -- are copied to
24 all three members. I have talked to Phil Smith, who

1 is the third member, and his situation is much
2 different. He is located in Tulsa, Oklahoma. His
3 computer and his e-mails with respect to this deal are
4 on his personal computer. They are interspersed with
5 his personal e-mails, his other business e-mails, and
6 he estimates that he receives about 150 e-mails a day.

7 This transaction, if you will, or the
8 deliberations of the committee, took place -- started
9 in about July of 2009 and continue, as this
10 transaction is still pending. That, obviously,
11 encompasses a great deal of e-mails; many, if not
12 most, of which would not be responsive or productive
13 of anything.

14 My reasoning and my reluctance to go
15 down that route is that Mr. Smith tells me that he did
16 not receive anything any different than the other
17 members of the committee, and that everything that he
18 had with respect to the Eagle Rock transaction or the
19 Eagle Rock e-mails would have been shared with the
20 other members of the committee. So in essence, Your
21 Honor, we have and are producing e-mails that were
22 received by and sent by Mr. Phil Smith. The only
23 thing we haven't done, and which I think is
24 unnecessary and would be time -- would cost money and

1 would take up a lot of time, is to search his 150-
2 e-mail-a-day personal computer to find e-mails that,
3 by all accounts, are already going to be produced.

4 I obviously can't represent to the
5 Court that that is in fact the case, but I have been
6 told that by Mr. Smith. I have reviewed e-mails of
7 committee members already that show that all three
8 members are uniformly copied on correspondence like
9 this, and I have no reason to believe that going
10 through the process of searching Mr. Smith's computer
11 would yield any further results.

12 We have cooperated a great deal with
13 Mr. Levit in terms of doing voluntary and in-good-
14 faith production of documents from other parties,
15 giving depositions. We have presented and produced
16 all of the presentation materials that the bankers
17 have given. We have produced all of the minutes of
18 the conflicts committee meetings, and we are producing
19 more. I think we have done plenty to let Mr. Levit
20 take his confirmatory discovery.

21 THE COURT: Am I correct that you have
22 been relying on, for the other two committee members,
23 what they self-selected to put in their transaction
24 files, in terms of what you obtained and produced?

1 MR. BRACHT: That's correct, Your
2 Honor. I was told that they uniformly would put all
3 of their Eagle Rock e-mails into that folder. I have
4 not checked, and I don't know whether that is true or
5 whether that is accurate. I believe they are telling
6 the truth, but I don't know if that is accurate.

7 THE COURT: Then here is my ruling.
8 This is not satisfactory. I have criticized
9 plaintiffs for just going through the motions on
10 confirmatory discovery. And I understand that the
11 defendants are eager to have plaintiffs just go
12 through the motions on confirmatory discovery, because
13 at that point all the parties are aligned; you have
14 got a deal; nobody wants to look too hard at anything.
15 It's like getting between a real estate broker and his
16 fee when a house is about to be sold.

17 But confirmatory discovery, although
18 it has evolved into something that is not really
19 discovery at all, is discovery. And so the idea that
20 you are doing this out of the goodness of your heart
21 is not well-founded, and it's not well-founded in two
22 respects: First, it's not well-founded because this
23 is discovery that is in support of a settlement that
24 benefits your clients. And if you don't want to

1 comply with discovery, I can tell you right now I will
2 just reject the settlement, and we can have a real
3 short conversation now. We can take this off, in
4 terms of the hearing, and just move forward with the
5 case. The second thing is these plaintiffs, if they
6 want -- I don't know whether they have been doing this
7 in e-mail requests or written requests, or whatever,
8 but it's certainly clear that if they wanted to put a
9 formal request on, I would enforce it.

10 Now, they are doing what they should
11 be doing. From what you have described to me, you are
12 not doing what you should be doing. First of all, you
13 do not rely on a defendant to search their own e-mail
14 system. Okay? There needs to be a lawyer who goes
15 and makes sure the collection is done properly. So
16 both as to the two directors who already have produced
17 -- we don't rely on people who are defendants to
18 decide what documents are responsive, at least not in
19 this Court. And you certainly need to put somebody on
20 a plane to go out and see Mr. Smith.

21 3,000 pages of documents, that is
22 nothing. All right? And in terms of these folks
23 telling you, "Well, we have given you the stuff," or,
24 "We put everything in e-mail," I can't tell you how

1 many times I got those types of wonderful
2 representations from my client, everything from "You
3 know, Mr. Laster, these directors never take anything
4 out of the board meetings. We remind them every time,
5 'No notes, no -- don't take anything with you
6 whatsoever,'" and then you have got that from the
7 general counsel. You are told, "You have no reason
8 not to believe your general counsel." And then, you
9 know what? When you actually call those directors,
10 they have been taking stuff with them all the time.
11 And what do you know? They actually have a Redwell of
12 stuff. It happens. It happens all the time. And
13 what is, you know, clear from our discovery case law,
14 particularly Chancellor Chandler's opinions, is it's
15 not acceptable when you are collecting discovery, you
16 know, just to do what you are doing.

17 I mean, the real question in my mind
18 is whether at this point it's enough to do the
19 production the way it should have been done in the
20 first place, or whether there needs to be some
21 additional steps taken to actually image these drives
22 and do some searching to make sure that things haven't
23 been lost since what should have been done in the
24 first place hasn't been done.

1 So the question for me would be, one,
2 how fast can you do this right? And that means not
3 only the e-mails from Mr. Smith. As I say, somebody
4 should have been on a plane a long time ago to go
5 through his e-mails. And if he chose to use his
6 personal computer, well, that was his bad choice. All
7 right? And if he has it mixed in other stuff that he
8 gets, 150 e-mails a day, or whatever, that was his bad
9 choice. That makes it all the more essential that a
10 lawyer get on a plane, and go and sit down with
11 Mr. Smith, and go through his e-mail and make sure
12 that what is produced is -- what is responsive is
13 appropriately produced.

14 And whoever it is better check his
15 auto-delete settings, and they had better find out if
16 these things have been auto-deleting every 30 days or
17 60 days or 90 days, and they better think through, as
18 somebody properly should have done, whether there
19 needs to be some type of, again, image and forensic
20 check, to make sure that something hasn't been lost in
21 what sounds to me to be a lackadaisical,
22 unsatisfactory process.

23 Now, in terms of timing going forward,
24 you know, my expectation that this could be done in 30

1 days was based on the assumption that there had been
2 appropriate litigation holds put in place when this
3 action was filed, that there would be responsive
4 efforts made by the defendants to get this stuff done.
5 So I'm not faulting the plaintiffs for this. And if
6 this has to take another couple of weeks, even 30
7 days, to get this done right, let's get it done right.

8 But the idea that somebody -- the idea
9 that you could, in discovery, say, "Oh, well, you
10 know, we are just going to give you two of the guys.
11 We know they are all decision makers and talking among
12 themselves, but we are just going to give you two of
13 them," not acceptable.

14 Have I made myself clear?

15 MR. BRACHT: You have, Your Honor.

16 THE COURT: Anyone have any questions
17 about how we are going to proceed?

18 MR. JENKINS: None from plaintiffs,
19 Your Honor.

20 THE COURT: Hearing none from the
21 defendants, I don't think I have seen any type of
22 schedule for this case yet, so I don't think there is
23 any need to have a modified order. If there is, I
24 will let counsel determine among themselves what to

1 do.

2 Mr. Jenkins, I assume that your fees
3 in connection with this letter, and your time, has
4 been so inconsequential as to not make it worthwhile
5 for me to shift. If I am wrong about that, you are
6 free to make an application. But given that all you
7 did was put in a letter, I assume it's not necessary
8 under these circumstances.

9 MR. JENKINS: I agree, Your Honor.

10 THE COURT: All right. Then that --
11 everybody, I thank you for getting on the phone. I
12 appreciate your time. Please keep me posted about how
13 things are going. Have a good day.

14 (Recess at 4:16 p.m.)

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1 CERTIFICATE

2 I, WILLIAM J. DAWSON, Official Court Reporter
3 of the Chancery Court, State of Delaware, do hereby
4 certify that the foregoing pages numbered 3 through 14
5 contain a true and correct transcription of the
6 proceedings as stenographically reported by me at the
7 hearing in the above cause before the Vice Chancellor
8 of the State of Delaware, on the date therein
9 indicated.

10 IN WITNESS WHEREOF I have hereunto set my hand
11 at Wilmington, this 9th day of April, 2010.

12
13
14 /s/William J. Dawson
15 Official Court Reporter
16 of the Chancery Court
State of Delaware

17 Certification Number: 187-PS
18 Expiration: Permanent
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