

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANNE E. MOORE, an individual,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-2056

Judge: Kaufman

H3LLC, a West Virginia limited liability
Company, and MICHAEL HOEFT, in his
Individual capacity and as manager of
H3LLC, and DOES 1 THROUGH 25,

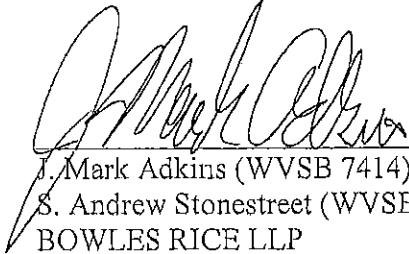
Defendants.

**Motion to Dismiss on Behalf of
Defendant Michael Hoeft**

NOW COMES Defendant Michael Hoeft ("Mr. Hoeft") by counsel, pursuant to Rules 12(b)(3) and 12(b)(6) of the West Virginia Rules of Civil Procedure, respectfully move this Court to dismiss Plaintiff Anne E. Moore's ("Plaintiff") Complaint. At the outset, venue is improper, and the matter must be dismissed under Rule 12(b)(3) of the West Virginia Rules of Civil Procedure. Moreover, Plaintiff cannot establish a breach of contract in Counts I & II of her Complaint against Defendant Hoeft, and, as a result, her related tort claims against this individual Defendant similarly fail.

WHEREFORE, Defendant Michael Hoeft respectfully requests that this Court dismiss Plaintiff's Complaint against him in its entirety.

MICHAEL HOEFT
By Counsel



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**EXHIBIT
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IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANNE E. MOORE, an individual,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-2056

Judge: Kaufman

H3LLC, a West Virginia limited liability
Company, and MICHAEL HOEFT, in his
Individual capacity and as manager of
H3LLC, and DOES 1 THROUGH 25,

Defendants.

**Memorandum of Law in Support of Motion to Dismiss on
Behalf of Defendant Michael Hoeft**

Defendant Michael Hoeft, by counsel, submits the following Memorandum of Law in support of his Motion to Dismiss Plaintiff's Complaint. The Complaint filed by Plaintiff Anne E. Moore seeks relief from Defendants under a breach of contract theory and related tort theories, each of which are tied to an "Oil and Gas Lease Consultation Agreement" ("Agreement") entered into by and between H3 LLC and Plaintiff. Ex. A, at 1. The agreement sets forth an objective to "obtain a Lease effecting the most advantageous available economic terms and provisions for the properties relative to the oil & gas leasing offers within the area on the date of execution of this Agreement." Complaint, ¶ 17. Importantly, the Agreement also states that "Landowner understands that there is no guarantee the objective will be accomplished." Ex. A, at 1. The purpose of the Agreement was to allow H3 LLC to serve as an agent for the potential leasing of Plaintiff's oil and gas rights. Michael Hoeft serves as manager of H3 LLC, but he has not been a party to any agreement with Plaintiff. *See id.*

Despite the fact that H3 LLC and Plaintiff Anne Moore were the only parties to the contract, Plaintiff has asserted breach of contract claims against Mr. Hoeft in his individual capacity, along with related tort claims. *See generally*, Complaint.

First, Kanawha County is not a proper venue under W. Va. Code § 56-1-1, and therefore, this action should be dismissed pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.

Substantively, Plaintiff alleges a breach of written contract claim against Mr. Hoeft, despite the clear fact that Mr. Hoeft was not a party to any written agreement. Complaint, at ¶ 17-19. H3 LLC and Plaintiff are the sole parties to the contract at issue. *Id.* Mr. Hoeft is not mentioned in the contract, and he did not even sign the contract on behalf of H3 LLC. *See* Ex. A. There is complete lack of privity between Mr. Hoeft and Plaintiff.

Moreover, regarding Count II of Plaintiff's Complaint, Plaintiff's assertion that she and Mr. Hoeft entered into a separate, subsequent oral contract is baseless. Complaint, at ¶ 21-23. Instead, even based upon Plaintiff's allegations, it is clear the alleged subsequent communications between Plaintiff and Mr. Hoeft related to the original Agreement by and between H3 LLC and Plaintiff. *Id.* at ¶ 10-13. Plaintiff alleged no additional consideration or additional terms for the alleged oral contract; rather, the terms are identical to her previous (and only) agreement with H3 LLC. *Id.* at ¶ 21-23.

Plaintiff's third cause of action, violation of West Virginia Code §39B-1-101 *et seq.* contains no allegations against Mr. Hoeft. *Id.* at ¶ 24-28.

Lastly, Plaintiff's tort claims must be dismissed because they are based on nothing more than the duties established by Plaintiff's Agreement with Defendant H3 LLC. *Id.* at ¶ 29-39. Both Plaintiff's negligence and tortious interference claims are the recasting of a breach of contract claim as tort claims. Under the "gist of the action" doctrine, recovery in tort is barred in the present case.

Argument

I. Applicable Legal Standard

a. Improper Venue

Rule 12(b)(3) of the West Virginia Rules of Civil Procedure states:

Every defense, in law or fact, to a claim for relief in any pleading . . . shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (3) improper venue .

West Virginia Code § 56-1-1 governs the proper venue for actions filed in West Virginia. The relevant portion of the statute provides:

§ 56-1-1. Venue generally.

(a) Any civil action or other proceeding, except where it is otherwise specially provided, may hereafter be brought in the circuit court of any county: (1) Wherein any of the defendants may reside or the cause of action arose . . .

(b) *If a corporation be a defendant, wherein its principal office is or wherein its mayor, president, or other chief officer resides; or if its principal office not be in this state . . . wherein it does business; or if [a West Virginia corporate defendant's] principal office [is] located outside of this state and which has no office of place of business within the State, the circuit court of any county in which the plaintiff resides . . .*

W. Va. Code § 56-1-1 (emphasis added). Under the West Virginia venue statute, venue is proper against a corporate defendant only if: (1) the corporation's principal office is located in that venue; or (2) the corporation's president or chief officer resides in that venue.

b. *Failure to state a claim upon which relief can be granted*

Under Rule 12(b)(6) of the West Virginia Rules of Civil Procedure, a "trial court may dismiss a pleading for failure to state a claim upon which relief can be granted." *Fass v. Newsco Well Serv., Ltd.*, 177 W. Va. 50, 51, 350 S.E.2d 562, 563 (1986). A circuit court should

dismiss a complaint if the plaintiff can prove “no set of facts” on his claims such that he would be entitled to relief. Syl. pt. 3, *Chapman v. Kane Transfer Co.*, 160 W.Va. 530, 236 S.E.2d 207 (1977). In making this assessment, the court must construe the complaint in the light most favorable to the plaintiff, and must take the plaintiff’s factual allegations as true. *Highmark West Virginia, Inc. v. Jamie*, 221 W.Va. 487, 655 S.E.2d 509 (W.Va. 2007). However, to survive a motion to dismiss, “more detail is required than the bald statement that the plaintiff has a valid claim of some type against the defendant.” *Fass v. Newsco Well Serv., Ltd.*, 177 W.Va. 50, 52, 350 S.E.2d 562, 564 (1986). Throughout this analysis, “a trial court is free to ignore legal conclusions, unsupported conclusions, unwarranted inferences and sweeping legal conclusions cast in the form of factual allegations.” Cleckley, Davis & Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure*, § 12(b)(6)[2] at 347 (3d. ed. 2008).

Of note, West Virginia’s “no set of facts” pleading standard, based upon the now-abrogated *Conley v. Gibson*, 355 U.S. 41 (1957), has been called into question by the West Virginia Supreme Court. See *Roth v. DeFeliceCare, Inc.*, 226 W.Va. 214, 700 S.E.2d 183 (2010) (Benjamin, J., dissenting). Therein, Justices Benjamin and Ketchum both recognized the recently heightened pleading standard adopted by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

In applying this more conservative pleading standard, courts should look to the principles articulated in *Twombly* and *Iqbal*. Pursuant to the holdings in these cases, the factual allegations contained in the complaint must “give the defendant fair notice of what the . . . claim is and the grounds upon which it rests” *Twombly*, 550 U.S. at 555 (citation omitted). Although detailed factual allegations in a complaint are not necessary, a plaintiff is obligated to provide “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” *Id.* (internal citations omitted) (emphasis added).

Further, the complaint must “plausibly show an entitlement to relief.” *Glassman v. Arlington County, Virginia*, 628 F.3d 140, 145 (4th Cir. 2010) (citing *Twombly*, 550 U.S. at 557) (emphasis added). According to the United States Court of Appeals for the Fourth Circuit, the “plausibility standard” requires that a plaintiff:

demonstrate more than ‘a sheer possibility that a defendant has acted unlawfully.’ It requires the plaintiff to articulate facts, when accepted as true, that ‘show’ that the plaintiff has stated a claim entitling him to relief, i.e., the ‘plausibility of ‘entitlement to relief.’

Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009) (quoting *Twombly*, 550 U.S. at 557). “Determining whether a complaint states [on its face] a plausible claim for relief [which can survive a motion to dismiss] will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience *and common sense*.” *Iqbal*, 556 U.S. at 679 (emphasis added).

In ruling on a motion to dismiss under Rule 12(b), a court may consider, in addition to the pleadings, documents annexed to the complaint, and other materials fairly incorporated within it. *Forshey v. Jackson*, 671 S.E.2d 748 (W. Va. 2008). Even when a document is not incorporated by reference, a “court may nevertheless consider it [in a 12(b)(6) motion] where the complaint relies heavily upon its terms and effect, which renders the document integral to the complaint.” *Id.* (quoting *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 152-53 (2d Cir. 2002)).

In the present matter, the Complaint relies heavily upon the terms and effect of the “Oil and Gas Lease Consultation Agreement” by and between H3 LLC and Plaintiff. Accordingly, the Court may consider the document – attached hereto as Exhibit A – in this Rule 12(b)(6) motion, “without converting it to a Rule 56 motion for summary judgment.” *Id.*

II. Kanawha County is not a proper venue for the present civil action, and thus, the instant matter should be dismissed pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.

Plaintiff filed suit in Kanawha County, and paragraph 5 of her Complaint alleges that the “[j]urisdiction and venue exist before this Court pursuant to West Virginia Code § 56-1-1.” Complaint, ¶ 5. Applying the pertinent facts, as set forth by Plaintiff in the Complaint, Kanawha County is not a proper venue in this matter.

Under the West Virginia “general” venue statute, venue is determined as follows:

(a) Any civil action or other proceeding, except where it is otherwise specifically provided, may hereafter be brought in the circuit court of any county:

(1) Wherein any of the defendants may reside of the cause of action arose, . . . ; or

(2) If a corporation be a defendant, wherein its principal office is or wherein its mayor, president, or other chief officer resides . . .

W. Va. Code § 56-1-1.

The Supreme Court of Appeals of West Virginia recently addressed the venue issue in a case involving a breach of contract. *State ex rel. Thornhill Group, Inc. v. King*, 759 S.E.2d 795 (W. Va. 2014). Therein, a former employee asserted a breach of contract claim against his former employer, filing suit in Kanawha County, West Virginia. *Id.* In finding that venue was improper, the Court first analyzed the residency requirements in W. Va. Code § 56-1-1(a)(1), (2), by considering the residences of the individual defendant and president of the corporate defendant. After determining that neither residences were located in Kanawha County, the Court turned to the “alternate basis for determining venue that must be considered: where the cause of action arose.” *Id.* at 799.

The Court held that “the place where a cause of action arises in a breach of contract claim for purposes of venue selection based on the tripartite aspects of a contractual claim (formation, breach, and damages) was not impacted by the repeal of West Virginia Code § 56-1-1[.]” and thus, the analysis remains. *Id.* at 801. Although “the place of the contract’s formation may sometimes govern where venue lies[,] . . . the situs of the breach of a contract will be the obvious location in which to institute to an action to recover for that breach.” *Id.* at 802 (citing *Wetzel County Savings & Loan*, 195 S.E.2d 732, 736 (W. Va. 1973)); *see also Russell v. Pineview Realty, Inc.*, 165 W.Va. 822, 824–25, 272 S.E.2d 241, 242–43 (1980) (examining contractual terms to conclude that Kanawha County was place of breach and, correspondingly, proper situs of venue).

In *Thornhill*, plaintiff argued that he accepted an offer of employment in Kanawha County over the telephone, and thus, the cause of action arose in Kanawha County. *Id.* at 802. The Court disagreed and found that because “his claim was predicated on the alleged breach of contract[,] . . . what is relevant is where the breach of contract ensued not where the contact was accepted.” *Id.* Moreover, the Court noted that “the record is devoid of any evidence in support of [the trial court’s] finding” that plaintiff had accepted the offer in Kanawha County; the complaint “fail[ed] to refer to where the oral contract was formed” and “no supporting evidence” had been submitted on this issue. *Id.* Consequently, the Court held that the cause of action did not arise in Kanawha County, and therefore, it was not a proper venue. *Id.* at 803.

In the present case, the Kanawha County does not meet the residency requirement for Michael Hoeft or the corporate defendant H3 LLC. Additionally, the cause of action did not arise in Kanawha County.

The first step in the analysis involves determining where the individual defendant resides, or “if a corporation be a defendant,” determining the location of its principal office and where its chief officer resides. Here, Michael Hoeft is the solely named individual defendant, and he is also the chief officer of H3 LLC. As Plaintiff alleges, he is “a resident of Mason County, West Virginia[,]” not Kanawha County. Complaint, at ¶ 3. Additionally, the corporate defendant, H3 LLC, “is a limited liability company with its principal place of business in Cabell County, West Virginia.” *Id.* at ¶ 2. By the plain language of the statute, Kanawha County is not a proper venue for the individual or corporate defendant: (1) Michael Hoeft (individual defendant and chief officer of H3 LLC) does not reside in Kanawha County; and (2) H3 LLC’s principal office is not located in Kanawha County.

The final consideration involves a determination of “where the cause of action arose.” *Thornhill*, 759 S.E.2d at 799. Like in *Thornhill*, in determining where the cause of action arose in a breach of contract case, “what is relevant is where the breach of contract ensued.” *Id.* at 802. Here, Plaintiff seemingly alleges that the breach of contract occurred either at the office of H3 LLC or near the location of her real property. Complaint, at ¶¶ 9-15, 1. More clear, “the record is devoid of any evidence” or allegations that Plaintiff accepted the offer in Kanawha County or, most pertinent, that Defendants breached a contract in Kanawha County.

No such allegations exist, and accordingly, Plaintiff cannot establish that the cause of action arose in Kanawha County.

Indeed, Plaintiff's only allegation relating to Kanawha County is that H3 LLC does business there, which is not a consideration under the venue statute. Complaint, at ¶ 2. Moreover, upon information and belief, Plaintiff is not even a resident of Kanawha County and the property that is the subject matter of the contract is located in Barbour County, which further separates this cause of action from Plaintiff's proposed venue. *See Thornhill*, 759 S.E.2d at 801-02 (holding that "the place of plaintiff's residency has no independent bearing on where an action may be maintained"). In sum, Plaintiff has not alleged any facts that indicate the cause of action arose in Kanawha County, and in fact, no facts exists that create any relevant nexus to Kanawha County. Accordingly, the cause of action did not arise in Kanawha County.

Therefore, Kanawha County is not a proper venue under W. Va. Code § 56-1-1: (1) the individual defendant, Michael Hoeft, resides in Mason County, not Kanawha County; (2) H3 LLC's principal office is located in Cabell County, not Kanawha County; (3) H3 LLC's chief officer resides in Mason County, not Kanawha County; and (4) the cause of action did not arise in Kanawha County. Accordingly, this action must be dismissed, in whole, pursuant to Rule 12(b)(3) of the West Virginia Rules of Civil Procedure.

III. Michael Hoeft was not a party to a contract with Plaintiff, and thus, he cannot be liable for the breach of contract claims.

"In West Virginia, the elements of breach of contract are: (1) a contract exists between the parties; (2) a defendant failed to comply with a term in the contract; and (3) damage arose from the breach." *Choice Hotels Int'l, Inc. v. Fisher*, No. 2:13-cv-23, 2014 WL 795046 at *5 (N.D. W. Va. Feb. 27, 2014) (emphasis added). An individual cannot be liable for breach of contract unless he is a party to that contract.

Here, the sole parties to the contract at issue – "Oil and Gas Lease Consultation Agreement" – are Plaintiff and H3 LLC. *See* Ex. A. Michael Hoeft is not a party to the contract, and in fact, he is not mentioned in the contract. Plaintiff acknowledges the same in her Complaint: "Defendant H3 LLC offer[ed] to contract with the Plaintiff . . ." Complaint, at ¶ 17. Mr. Hoeft did not sign the contract on behalf of H3 LLC. His only nexus to the contract is his

management role at H3 LLC. However, Mr. Hoeft, individually, was not a party, and accordingly, the lack of privity between Plaintiff and Mr. Hoeft should result in a dismissal of the breach of contract claims against Michael Hoeft.

Count II of the Complaint alleges that "Defendant, Michael E. Hoeft, entered into an oral contract with Plaintiff" whereby he would "review the lease and to pursue it if it seemed to be advantageous" Complaint, at ¶ 21. Plaintiff's suggestion that Mr. Hoeft individually entered into a separate agreement is baseless.

First, even when viewing Plaintiff's allegations as true, it is clear that these allegations refer to the "Oil and Gas Lease Consultation Agreement" between H3 LLC and Plaintiff, not a new oral contract between Mr. Hoeft and Plaintiff. See Complaint, at ¶ 9-13. Plaintiff alleges that after she executed and "returned [the contract] to H3 LLC[,] she "heard nothing from H3 LLC" from August 2013 to June 2014. Complaint, at ¶ 10. According to the complaint, she sent a letter to H3 LLC because she was dissatisfied that it had not secured an oil and gas lease for her property, pursuant to the objective set forth in the "Oil and Gas Lease Consultation Agreement." Complaint, at ¶ 10.

Upon receipt of her letter, a representative of H3 LLC, Mr. Hoeft, contacted Plaintiff regarding the status of H3 LLC's consultation relating to Plaintiff's property. Although Plaintiff alleges – via boilerplate, legal conclusory language – that she and Mr. Hoeft entered into an "oral contract" during this conversation (Complaint, at ¶ 21), she explained that "Mr. Hoeft personally promised the Plaintiff to evaluate the lease and protect the Plaintiff's interests pursuant to the contact and power of attorney." Complaint, at ¶ 13. By her own admission, this follow up conversation with Mr. Hoeft relates to the "Oil and Gas Lease Consultation Agreement" between H3 LLC and Plaintiff, not a new oral contract between Mr. Hoeft and Plaintiff.

Moreover, Plaintiff alleges no additional consideration or additional terms for the allegedly new oral contract. She alleges the identical amount of damages as for the alleged breach of the written contract: \$57,357 (the amount of rent of the 10 year lease), again evincing the fact that the conversation was a follow up of the previous Agreement between H3 LLC and Plaintiff.

Despite attempting to characterize Mr. Hoeft's alleged communication as a new oral contact, even when viewing the complaint in the light most favorable to Plaintiff, the allegations show that she is referring to a communication with Michael Hoeft, where he communicated as a representative of H3 LLC. The parties did not enter into a new oral contact; rather, according to Plaintiff, "Mr. Hoeft personally promised the Plaintiff to evaluate the lease and protect the Plaintiff's interests pursuant to the [preexisting] contact and power of attorney." Complaint, at ¶ 13.

Therefore, this Court should dismiss all breach of contract claims against Michael Hoeft.

IV. Plaintiff's third cause of action, Violation of W. Va. Code § 39B-1-101 *et. seq*, contains no allegations directed toward Mr. Hoeft.

Although the subheading of Plaintiff's Third Cause of Action contains "Michael E. Hoeft," no allegations are made against Mr. Hoeft therein. Paragraph 26 alleges that "Defendant, H3 LLC, owed to the Plaintiff various duties" Paragraph 27 alleges that "Defendant, H3 LLC, breached its duties to the Plaintiff" And paragraph 28 requests damages under West Virginia Code § 39-1-117.

No allegations – factual or otherwise – are directed at Mr. Hoeft as it relates to H3 LLC's alleged violation of W. Va. Code § 39B-1-101 *et. seq*. Plaintiff has set forth no set of facts that show he is entitled to relief from this Defendant, and accordingly, this cause of action should be dismissed.

V. Plaintiff's tort claims are based solely on the duties established in the contract by and between Plaintiff and H3 LLC, and thus, they are barred by the "gist of the action" doctrine.

The Supreme Court of Appeals of West Virginia ("West Virginia Court") has recently criticized litigants for attempting to bootstrap tort theories onto a breach of contract theory. In *Gaddy Engineering Co. v. Bowles Rice McDavid Graff & Love, LLP*, the West Virginia Court stated, "[Gaddy's] fraud claims were clearly contract claims disguised as tort claims as the source of the alleged breach of duties was the alleged [contract] and not the larger social policies embodied by the law of torts." *Gaddy*, 231 W.Va. at 586, 746 S.E.2d at 577. The

same is plainly true here – each of Plaintiff’s tort theories should be dismissed because they are based on nothing more than duties established in Plaintiff’s Agreement with Defendant H3 LLC. Further, Plaintiff’s tort claims lack critical elements for establishing prima facie cases. Accordingly, each of Plaintiff’s tort theories should be dismissed as to Defendant Michael Hoeft.

a. Plaintiff’s negligence claim sounds in contract, and therefore, it cannot stand against this Defendant.

Plaintiff’s fourth cause of action, based on a negligence theory, alleges that “Michael E. Hoeft[] owed a common law duty of care to the Plaintiff when [he] undertook to represent [Plaintiff’s] interests to review the proposed lease, advise her thereon, and/or negotiate better terms.” Complaint, at ¶ 31. Further, Plaintiff alleges that “Defendants, H3 LLC and Michael E. Hoeft, individually, breached their duties to the Plaintiff, directly and proximately causing damage to the Plaintiff . . .” *Id.* at ¶ 32. These brief negligence allegations against Mr. Hoeft merely duplicate Plaintiff’s breach of contract claims.

The *Gaddy* Court explained that “[i]n seeking to prevent the recasting of a contract claim as a tort claim, courts often apply the ‘gist of the action doctrine.’” *Gaddy*, 231 W.Va. at 586, 746 S.E.2d at 577. Under this doctrine, recovery in tort is barred when any of the following factors is demonstrated:

(1) where liability arises solely from the contractual relationship between the parties; (2) when the alleged duties breached were grounded in the contract itself; (3) where any liability stems from the contract; and (4) when the tort claim essentially duplicates the breach of contract claim or where the success of the tort claim is dependent upon the success of the of the breach of contract claim.

Id. (quoting *Star v. Rosenthal*, 884 F. Supp. 2d 319, 328-29 (E.D. Pa. 2012)). Here, although Defendant is only required to show one, multiple factors can be demonstrated and Plaintiff’s negligence claim should be barred.

As shown above, Plaintiff’s articulation of the duty owed by Mr. Hoeft mirrors the duty at issue in the breach of contract claim: Defendants’ representation of Plaintiff’s mineral interest in relation to oil and gas leasing offers. As Plaintiff explains, the duty arose when Defendants “undertook to represent her interests” as they relate to the potential lease of her

property. Complaint, at ¶ 31. By the plain language of Plaintiff's Complaint, the duty stems from the contractual representation. Thus, the alleged duties were grounded in the contract itself.

Moreover, Plaintiff's negligence claim would not arise in the absence of the contractual relationship. *See Backwater Props., LLC v. Range Resources-Appalachia, LLC*, No. 1:10CV103, 2011 WL 1706521 at *6 (N.D. W. Va. 2011) (recognizing that "[u]nder the 'gist of the action' doctrine, a tort claim arising from a breach of contract may be pursued only if the action in tort would arise independent of the existence of the contract"). Here, no negligence claim would arise independent of the existence of the "Oil and Gas Lease Consultation Agreement," and therefore, the "gist of the action" doctrine applies.

Lastly, the negligence claim "essentially duplicates the breach of contract claim." Plaintiff fails to include any additional facts that indicate Defendants breached obligations other than those she alleges were owed in the contract. *See* Complaint, at ¶ 32.

Therefore, Plaintiff can assert no independent "negligence" cause of action against this Defendant, as it is clearly barred by the "gist of the action" doctrine. Accordingly, the Court should dismiss this claim against Defendant Michael Hoeft.

b. Plaintiff's tortious interference mirrors her breach of contract claim, and therefore, it cannot stand.

The same legal reasoning applies to Plaintiff's final claim, tortious interference with a prospective business relationship. Factually, Plaintiff alleges that "Defendants, H3 LLC and Michael E. Hoeft, as manager of H3 LLC and individually, intentionally interfered with Plaintiff's prospective lease by promising to advised [sic] her or negotiate better terms and then, not once, but twice, ignoring the lease . . . and by doing nothing." Complaint, at ¶ 35.

The facts surrounding the alleged tortious interference relate directly to the contractual relationship between the parties (H3 LLC and Plaintiff). Essentially, Plaintiff alleges that the Defendants' failure to perform their contractual obligations resulted in an interference of the prospective business relationship of Plaintiff and a lessee.

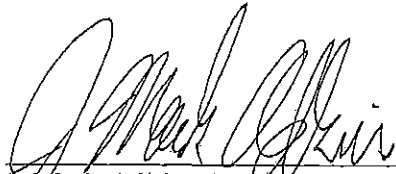
For the reasons articulated by the *Gaddy* Court, Plaintiff must be barred from the tortious interference claim, as it is duplicative of her breach of contract claims. The claims for

relief are identical under both theories: Plaintiff claims that Defendants failed to perform as its agent in securing an oil and gas lease, thus causing Plaintiff to lose leasing opportunities. The tortious interference cause of action adds no new substantive allegations; rather, it directly hinges on whether the Defendants performed their obligations under the contract. Accordingly, Plaintiff can assert no independent tortious interference cause of action, and this claim should be dismissed.

Conclusion

WHEREFORE, for the foregoing reasons, Defendant Michael Hoeft respectfully moves this Court to issue an order dismissing Plaintiff's Complaint in its entirety against him.

MICHAEL HOEFT
By Counsel



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Oil and Gas Lease Consultation Agreement

The purpose of this Oil & Gas Lease Consultation Agreement ("Agreement") is to acknowledge that I, Landowner, have requested that H3 LLC, (Consultant) a West Virginia limited liability company, negotiate an Oil & Gas Lease Agreement ("Lease") for the property(ies) listed below. The Objective is to obtain a Lease effecting the most advantageous available economic terms and provisions for the properties relative to the oil & gas leasing offers within the area on the date of execution of this Agreement. Landowner understands that there is no guarantee the objective will be accomplished.

Landowner understands and agrees that Consultant will be its exclusive agent for the leasing of its oil and gas rights for the term of this agreement and will manage correspondence and negotiations on behalf of Landowner for the objective listed above until one of the following dates is reached:

- (1) Twelve (12) months from the date of execution of this Agreement, OR
- (2) The date on which a lease is executed by Landowner.

Landowner agrees that Consultant's fee shall be determined and payable as follows:

- (1) If Landowner executes a Lease negotiated by Consultant on the property(ies) listed below, Landowner will pay a consulting fee to Consultant in an amount equal to six percent (6.0%) of any paid-up bonus and/or up-front payment to be paid to Landowner under the Oil & Gas Lease, which fee will be due and payable from Landowner within 5 days of Landowner's receipt of said paid-up bonus payment and/or up-front payment;
- (2) Further, should Landowner choose to not execute a Lease that Consultant has negotiated with an Oil & Gas Company, but executes an oil and gas lease with said oil and gas company within 12 months thereafter, Landowner must pay Consultant 6.0% of the paid-up bonus and/or any up-front payment received by Landowner from said oil and gas company in consideration for executing said lease within 5 days of Landowner's receipt of said paid-up bonus payment and/or up-front payment.

Landowner understands that the execution of any oil and gas lease agreement negotiated by Consultant is within the discretion of the Landowner. Further, Landowner understands that Consultant may retain any and all legal counsel to assist in any aspect of the negotiation process and that Consultant is responsible for paying all legal fees incurred as a result thereof. Landowner assumes full responsibility and liability for an oil and gas Lease that Landowner executes.

Initials of Landowner(s)

Am



Disclaimer: The services provided by Consultant are limited to oil and gas leasing negotiations, correspondence, and research which both parties understand is not legal advice. Landowner may and should direct any questions as to the legal consequences and ramifications of executing any oil & gas lease to Landowner's attorney.

Landowner acknowledges and agrees that in order to obtain the most favorable lease terms it is often helpful to join together with similarly situated Landowners. By executing this Agreement, Landowner acknowledges that H3 may form a group of similar minded Landowners or enter into negotiation agreements with other Landowner groups. This agreement acts as a limited power of attorney to allow H3 LLC to enter into such limited negotiation contracts as needed to effect the best terms for the Landowner. This limited power of attorney does not allow H3 LLC to enter into a lease for the Landowner nor does it allow H3 to encumber more than the 6% commission agreement previously stated herein above. Landowner understands and agrees that the costs for Consultant's services are as set forth hereinabove. The property listed below is to be represented by H3 LLC and H3 LLC as my Consultant is my exclusive leasing agent for the same, pursuant to the terms of this Agreement. Landowner understands that Consultant will present acceptable negotiated offers to the Landowner which may be accepted by the Landowner at his discretion.

Initials of Landowner(s)

AGM

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANNE E. MOORE, an individual,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-2056

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H3LLC, a West Virginia limited liability
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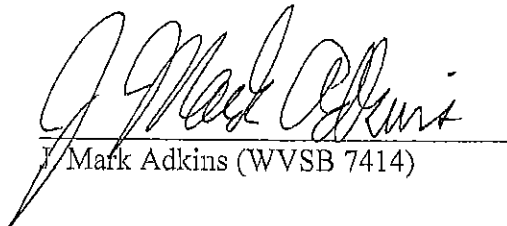
Defendants.

Certificate of Service

I, J. Mark Adkins, do hereby certify that I have caused copies of the hereto
attached *Motion to Dismiss on Behalf of Michael Hoeft* and *Memorandum of Law in Support
of Motion to Dismiss on Behalf of Michael Hoeft* to be served upon the following by placing
the same in the regular United States Mail, postage prepaid:

Mark F. Underwood, Esquire
Underwood Law Offices
923 Third Avenue
Huntington, WV 25701
Counsel for Plaintiff

on this 21st day of December, 2015.


J. Mark Adkins (WVSB 7414)

IN THE CIRCUIT COURT OF KANAWHA COUNTY, WEST VIRGINIA

ANNE E. MOORE, an individual,

Plaintiff,

v.

CIVIL ACTION NO. 15-C-2056

Judge: Kaufman

H3LLC, a West Virginia limited liability
Company, and MICHAEL HOEFT, in his
Individual capacity and as manager of
H3LLC, and DOES 1 THROUGH 25,

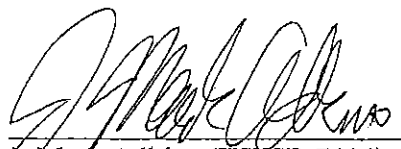
Defendants.

**Motion to Dismiss on Behalf of
Defendant H3 LLC**

NOW COMES Defendant H3 LLC ("H3") by counsel, pursuant to Rules 12(b)(3) and 12(b)(6) of the West Virginia Rules of Civil Procedure, respectfully moves this Court to dismiss Plaintiff Anne E. Moore's ("Plaintiff") Complaint. At the outset, venue is improper, and the matter must be dismissed under Rule 12(b)(3) of the West Virginia Rules of Civil Procedure. Moreover, Plaintiff cannot establish a breach of contract in Counts I & II of her Complaint against H3, and, as a result, her related tort claims against this Defendant similarly fail.

WHEREFORE, Defendant H3 LLC respectfully requests that this Court dismiss Plaintiff's Complaint in its entirety.

H3 LLC
By Counsel



J. Mark Adkins (WVSB 7414)
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Telephone: (304) 347-1100
Facsimile: (304) 347-1756

**EXHIBIT
D**