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December 14, 2016

Donnie Kopp, Clerk
Harrison County Circuit Court
301 E Main Street
Bridgeport, WV 26330

Re: *Riley Natural Gas Company v. Berry Energy, Inc.*
Civil Action No. 16-C-365

Dear Mr. Kopp:

Enclosed for filing, please find the original "Defendant's Motion to Dismiss Riley Natural Gas Company's Complaint for Breach of Contract and Declaratory and Monetary Relief, or in the Alternative to Stay" regarding the above-referenced matter. Please see that this document is placed in the appropriate Court file.

Thank you for your attention to this matter. If you have any questions, please contact me at (304) 345-6555.

Sincerely,

Alisa Montgomery
Paralegal

Enclosure

cc: Judge James A. Matish
Nicholas S. Preservati, Esq.

IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

RILEY NATURAL GAS COMPANY,
A West Virginia corporation,

Plaintiff,

v.

Civil Action No. 16-C-365
Judge James A. Matish

BERRY ENERGY, INC.,

Defendant.

Defendant's Motion to Dismiss Riley Natural Gas Company's Complaint for Breach of Contract and Declaratory and Monetary Relief, or in the Alternative to Stay

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

I. Introduction

On or about September 29, 2016, Plaintiff Riley Natural Gas Company ("Riley") filed its Verified Complaint for Breach of Contract and Declaratory and Monetary Relief ("Complaint") against Defendant Berry Energy, Inc. ("Berry"). The Complaint simply alleges that Riley and Berry were parties to a contract, and that Berry is in breach of that contract. Riley seeks relief in the form of a declaration regarding Berry's contractual obligations, and damages for all losses incurred as a result of Berry's alleged breach.

Defendant now files its motion to dismiss the Complaint under West Virginia Rule of Civil Procedure 13(a), because the claims in the Complaint should have been filed as compulsory counterclaims in an existing action. Specifically, Riley is a defendant and Berry is a plaintiff in the matter of *Adkins Energy, Inc., et al. v. Dominion Transmission, Inc., et al.*, No. 5:16-cv-151, currently pending in the Northern District of West Virginia before the Honorable John Preston Bailey, having been removed from the Circuit Court of Marshall County, West Virginia (hereinafter the "Adkins action"). That action alleges tort, contract and statutory claims arising from the circumstances surrounding the formation and performance of the ***exact same contract*** which Riley alleges has been breached in the present action. Riley's claims in this action thus unquestionably "arise out of the transaction or occurrence that is the subject matter" of Berry's claims in the Adkins action. W. Va. R. Civ. P. 13(a). Riley's claims should therefore have been asserted in that action as compulsory counterclaims. *See State ex rel. Small v. Clawges*, 231 W. Va. 301, 745 S.E.2d 92 (2013).

Defendant therefore asks the Court to dismiss Plaintiff's Complaint. In the alternative, Defendant asks the Court to stay this matter pending disposition of the Adkins action.

II. Background

A. Allegations, Claims and Posture of the Adkins action

On June 8, 2016, plaintiffs Adkins Energy, Inc., Berry and forty other small, independent natural gas producers in West Virginia filed a complaint in the Circuit Court of Marshall County, West Virginia. That pleading was superseded on August 12, 2016, by the First Amended Complaint, which asserts claims against Riley and co-defendant Dominion Field Services, Inc. ("DFS"), for breach of fiduciary duty; breach of contract, including breach of the implied covenant of good faith and fair dealing; fraud; breach of joint venture; unjust enrichment; rescission on the ground of unconscionability; fraudulent inducement; negligence; negligent misrepresentation; and violations of the West Virginia Consumer Credit and Protection Act. (Exh. A, Adkins First Amended Complaint, hereinafter "FAC").[1] The FAC names Joseph Vanzant as an additional defendant under the fraud and unjust enrichment counts, identifies Dominion Transmission, Inc., as having aided and abetted the breaches of fiduciary duty occasioned by DFS and Riley, and alleges a civil conspiracy involving all defendants.

In short, the Adkins plaintiffs allege that, prior to 2008, they sold their gas to DFS and Riley generally in accordance with the terms set forth in short-term contracts, typically extended from month to month pending the execution of a new contract. FAC ¶¶ 80-81. On April 1, 2008, DTI announced plans for the Gateway Project, a substantial infrastructure undertaking that, according to DTI, would permit natural gas from West Virginia to be shipped to Northeast and Mid-Atlantic markets. FAC ¶¶ 84-85. Upon completion of the Project, all shippers were to "have a single Primary Delivery point, the existing interconnection point between Dominion and Texas Eastern at the Oakford [Pennsylvania] Interconnection." FAC ¶ 86. DTI afforded shippers and

[1] The FAC also contained a claim for declaratory judgment of force majeure which plaintiffs have since agreed to non-suit.

marketers a brief period to reserve a prioritized portion of the new capacity, called "firm transportation" through ten-year precedent agreements.

DFS and Riley each undertook to recruit the Adkins plaintiffs for the purpose of acting as their adviser, broker, and intermediary to reserve firm transportation on the Gateway Project. As a condition of their assistance, DFS and Riley obtained confidential business information from those plaintiffs, ostensibly in support of projecting the specific volumes of gas that the gas producers expected to transport daily on DTI's system for a ten-year period, beginning in 2011 or 2012. FAC ¶¶ 96-97. Upon review of the confidential information, DTI, DFS, and Riley ascertained that the Adkins plaintiffs had no reasonable alternative to using DTI in order to transport their gas. *Id.*

The Adkins plaintiffs further allege that DFS and Riley — either through affirmative misrepresentation or purposeful omission — permitted them to incorrectly believe that, among other things: (1) only those that acquired firm transportation rights on the Gateway Project would have access to the Project; (2) only those that had access to the Project would be able to sell their gas; (3) completion of the Project was necessary in order to alleviate future bottleneck issues and ensure the free flow of the Adkins plaintiffs' gas; and (4) all of the Adkins plaintiffs' gas would be shipped to the Oakford Interconnection. FAC ¶ 260.

Through the precedent agreements, DFS and Riley signed contracts with DTI to acquire "firm transportation" space on the gateway. DFS and Riley then shifted their financial obligations under the precedent agreements onto the Adkins plaintiffs through the "Gateway Firm Contracts." The Gateway Firm Contracts required the gas producers to pay a monthly fee to DFS or Riley for ten years for shipment of their gas. Moreover, to gain even that "right,"

plaintiffs were also forced to sign unprecedented ten year contracts to sell their gas to DFS and Riley ("Gas Sales Contracts").

The Gateway Project started transporting natural gas in September 2012. By then, the gas market had undergone dramatic changes and prices had generally plummeted. Riley held Berry and the other Adkins plaintiffs to their projections and made deductions from those plaintiffs' payments corresponding to the full capacity reserved regardless of the amount or value of actual production. The situation has only worsened, such that, today, many of those gas producers are fighting for their survival, as they cannot generate sufficient revenues to cover their deduction commitments to DFS and Riley. The Adkins plaintiffs allege that Riley's and DFS's representations were false. There was no need for the Gateway Project. As evidenced by the fact that gas producers that did not sign similar agreements have had unfettered access to the Gateway through cheap and short-term "interruptible service" contracts, the Gateway Firm Contracts were unnecessary, and the Adkins plaintiffs would not have been locked into the Gas Sales Contracts absent Riley and the other defendants' improper and actionable conduct.

While the 273 paragraph FAC contains far more details than are necessary to recount here, in sum, Berry and the other gas producer plaintiffs allege that they were fraudulently and deceptively induced into unconscionable contracts with Riley and DFS; that Riley and DFS were unjustly enriched by those agreements; and that the Gateway Firm Contracts and Gas Sales Contracts should be declared unenforceable and rescinded.

The Adkins defendants removed the matter to the district court on September 23, 2016. On October 24, 2016, the Adkins plaintiffs moved to remand to the state circuit court. That motion remains pending. In the meantime, the Adkins defendants filed three separate motions to dismiss that action. Riley's motion and supporting exhibits are attached hereto as Exhibit B. The

three exhibits to Riley's motion are exemplars of Gateway Firm Contracts and Gas Sales Contracts with other plaintiffs in the Adkins action. Each of the three Gateway Firm Contracts is set forth on Riley letterhead and dictates terms of quantity; price; term; delivery points; quality measurement and transportation; billing and payment; fixed price contracts; warranty of title; force majeure; assignment; governing law; imbalances; notices; and default and limitation on liability. *Id.* Each of the two exemplar Gas Sale Contracts submitted, which are titled "Exhibit A – Term Sheet," provides details regarding the primary term, delivery point, rate, quantity, and management fee. *Id.*

Briefing on the motions to dismiss in the Adkins action is to be completed on or before December 16, 2016.

B. Allegations and Claims in the Present Action

Riley filed the present action on October 7, 2016. The Complaint alleges generally that Berry is "contractually liable and responsible to [Riley][2] for all costs, charges, surcharges, deductions, and fees for firm transportation capacity on [DTI's] Appalachia Gateway Pipeline Expansion Project incurred by [Riley] on behalf of Berry irrespective of whether [Riley], on behalf of Berry, uses DTI Gateway capacity because of Berry's failure to tender its gas to [Riley]." Compl. ¶ 2. It specifically alleges that Berry "contracted with [Riley]" to provide a service requiring Berry to "bear the cost of transporting their natural gas on pipelines on a firm or interruptible basis to desired physical points located on pipeline systems." Compl. ¶ 10. Further, Berry is alleged to have "contracted with [Riley] to acquire firm pipeline transportation capacity, on its behalf, on DTI Gateway as a monthly cost and obligation, in order for the producers' gas to be received and transported by DTI." *Id.*

[2] Riley refers to itself as "RNG" in the present Complaint, but as "Riley" in its briefing in the Adkins action; Defendant will refer to it as Riley for consistency's sake.

Like the Adkins action, the Complaint in the present action contains allegations about DTI's construction of the pipeline, the open season DTI conducted in April 2008, and the precedent agreement Riley and DTI entered into. Compl. ¶¶ 11-14. But the crux of the Complaint is the "Agreement" between Riley and Berry. *See* Compl. ¶¶ 15-22; Agreement attached to Compl. as Exhibit 1. The "Agreement" described in the Complaint contains or references both a Gateway Firm Contract and a Gas Sale Contract attached as an "Exhibit," which are each the same form contracts that form the basis of Berry's and the other plaintiffs' allegations in the FAC, and which Riley submitted as exemplar contracts in support of its motion to dismiss the Adkins action. Specifically, the Gateway Firm Contract Riley sent to Berry dictates terms of quantity; price; term; delivery points; quality measurement and transportation; billing and payment; fixed price contracts; warranty of title; force majeure; assignment; governing law; imbalances; notices; and default and limitation on liability. The Gas Sale Contract then sets forth the terms regarding the primary term, delivery point, price, quantity, and management fee.

Riley alleges that, pursuant to the Agreement, Berry is responsible and liable to Riley for all charges of any kind, including DTI Gateway Charges, "irrespective of whether Berry actually tenders natural gas to [Riley] for purchase and sale at the Delivery Point(s) pursuant to the Agreement." Compl. ¶¶ 17-22. Riley brings claims for breach of contract and declaratory and monetary relief, all arising from its allegation that Berry has wrongfully refused to reimburse Riley for all DTI Gateway Charges incurred by Riley on Berry's behalf. Compl. ¶¶ 23-38.

III. Argument

A. This case should be dismissed because it involves only claims that should have been filed as compulsory counterclaims in the Adkins action

i. Riley's claims here are compulsory counterclaims in the Adkins action

West Virginia Rule of Civil Procedure 13(a) sets forth the standards for compulsory counterclaims and states, in pertinent part, as follows:

> A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, ***if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim*** and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

W. Va. R. Civ. P. 13(a) (emphasis added). A counterclaim arises out of the same transaction or occurrence "if there is a logical relationship between the claim and the counterclaim." *State ex rel. Strickland v. Daniels,* 173 W. Va. 576, 583, 318 S.E.2d 627, 633 (1984) (tort claim arising from eviction was compulsory counterclaim in action for unlawful detainer even though tenant's claim sounded in tort and landlord's claim was contractual).

It is well settled that claims arising out of the same contractual relationship governing the existing suit are compulsory counterclaims. *See State ex rel. W. Va. Truck Stops, Inc. v. McHugh,* 160 W. Va. 294, 233 S.E.2d 729 (1977) (counterclaim asserting that contractor, who had brought action to enforce mechanic's lien, had breached the contract in connection with which the lien was asserted was mandatory); *see also Vaughan v. Recall Total Info. Mgmt., Inc.,* 217 Fed. App'x. 211, 223 (4th Cir. 2007) (counterclaim to recover alleged overpayments was compulsory when both original breach of contract action and counterclaim involved accurate calculation of earnout); *Umbro Intern., Inc. v. Japan Prof. Football League,* No. 6:97-2366-13, 1997 WL 33378853, at fn. 5 (D.S.C. Oct. 2, 1997) (claim that asserts damages under same contract plaintiff claims has been breached is a compulsory counterclaim); 6 Charles Alan Wright &

Arthur R. Miller, Federal Practice & Procedure § 1410.1 (3d ed. 2016) (courts consistently hold that in breach-of-contract actions, a claim by defendant for payments due is a compulsory counterclaim under the corollary federal rule) (citing, *inter alia, Princess Fair Blouse, Inc. v. Viking Sprinkler Co.*, 186 F. Supp. 1 (M.D.N.C. 1960); *Ford Motor Co., Ltd. v. M/S Maria Gorthon*, 397 F. Supp. 1332 (D. Md. 1975)).

Here, both the Adkins action and the present suit will require a court to analyze the formation of and each party's performance under the Gateway Firm Contract and Gas Sales Contract, and determine whether those contracts are unconscionable or enforceable. There is not only a logical relationship between the claims in the two suits; they will involve the very same evidence and arguments. As such, Riley's claims arise out of the transaction or occurrence that is the subject matter of Berry's claims in the Adkins action, and are compulsory counterclaims in that suit. *See Peter Farrell Supercars, Inc. v. Monson*, 82 Fed. App'x. 293, 298 (4th Cir. 2003) (affirming finding that claim alleging poor work on automobile was compulsory counterclaim in suit for statements made in response to that work); *Banner Indus. of New York, Inc. v. Sansom*, 830 F. Supp. 325 (S.D. W. Va. 1993) (dismissing claims for defamation arising from letter charging corporations with making deliberate misrepresentations during business transactions upon finding complaint constituted a compulsory counterclaim that should have been asserted in pending circuit court action involving fraud and breach of contract action).

ii. Compulsory counterclaims must be plead in an existing action rather than initiating a new action in a new forum.

The purpose of the West Virginia Rules of Civil Procedure is to "secure the just, speedy, and inexpensive determination of every action." W. Va. R. Civ. P. 1. Similarly, the reason for compelling a litigant to interpose compulsory counterclaims is to enable the court to settle all related claims in one action, providing judicial economy and finality. *See Painter v. Harvey*, 863

F.2d 329, 333 (4th Cir. 1988) (compulsory counterclaim rule avoids burden of multiple trials with corresponding duplication of evidence and drain on limited judicial resources, and prevents relitigation of the same set of facts); *State ex rel. Small v. Clawges*, 231 W. Va. 301, 745 S.E.2d 92 (2013) (finding plaintiffs' claims should have been raised as a compulsory counterclaim in earlier federal court proceedings and were therefore barred by *res judicata* in subsequent state court suit). As the United States Supreme Court said of the corollary federal rule, Rule 13(a) "was designed to prevent multiplicity of actions and to achieve resolution in a single lawsuit of all disputes arising out of common matters." *Southern Const. Co. v. Pickard,* 371 U.S. 57, 60 (1962) (noting further that the Rule "was particularly directed against one who failed to assert a counterclaim in one action and then instituted a second action in which that counterclaim became the basis of the complaint").

According to Wright, Miller & Kane, "Ideally, once a court becomes aware that an action on its docket involves a claim that should be a compulsory counterclaim in another pending federal suit it will stay its own proceeding or will dismiss the claim with leave to plead it in the prior action." 6 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 1418, at 142-43. Defendant asks the Court to dismiss Riley's claims here, without prejudice to refile them as counterclaims in the Adkins action.[3] Although there does not appear to be West Virginia law on point, it is well established in the Fourth Circuit and elsewhere, under the "first to file rule," that when two courts have concurrent jurisdiction, "the court which first has possession of the subject must decide it." *Byerson v. Equifax Info. Servs., LLC*, 467 F. Supp. 2d 627, 635 (E.D. Va. 2006); *see also Learning Network, Inc. v. Discovery Communications, Inc.*, 11 Fed.Appx. 297, 300–01 (4th Cir. 2001) ("the Fourth Circuit has recognized the 'first to file' rule of the

[3] In suggesting this course, Defendant does not waive and expressly reserves all rights to defend itself against any counterclaims that may be filed in the Adkins action.

Second Circuit, giving priority to the first suit absent showing of a balance of convenience in favor of the second"); *Pfizer Inc. v. Mylan Inc.*, No. 1:15-cv-4, 2015 WL 3903386, at *2 (N.D. W. Va. Apr. 24, 2015) ("When two courts have concurrent jurisdiction in substantially identical cases, the court hearing the second-filed action generally defers to the court hearing the first-filed action"); *Ramsey Group, Inc. v. EGS Int'l, Inc.*, 208 F.R.D. 559, 564 (W.D.N.C. 2002) ("first filed rule should be followed"); *see also U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.*, 920 F.2d 487, 488 (8th Cir. 1990) (describing the first to file rule as "well-established"); *Church of Scientology of Cal. v. United States Dep't of Defense*, 611 F.2d 738, 750 (9th Cir. 1979) (noting that the first-to-file rule "should not be disregarded lightly").

There is no reason to permit the duplicity of litigation that Riley's suit creates, when only one court need direct its energy to the interpretation of the agreements between these parties. To do so would directly contravene the purpose of the compulsory counterclaim rule and reward Riley's forum shopping. Accordingly, dismissal of Riley's claims with leave to replead them as compulsory counterclaims in the Adkins action is the most efficient course. *See Beach Mart, Inc. v. L&L Wings, Inc.*, No. 2:11-cv-00044, 2015 WL 7302509, at *4 (E.D.N.C. Feb. 18, 2015) (dismissing claims without prejudice to refile as counterclaims upon finding claims should have been brought as compulsory counterclaims); *Aaron Fine Arts v. O'Brien*, 244 F.R.D. 294, 297 (D. Md. 2007) (dismissing claims that should have been filed as counterclaims in earlier filed suit).

B. In the Alternative, the Court Should Stay the Case until the Adkins action is Resolved

Should the Court decline to dismiss Riley's claims outright, Defendant asks the Court to stay this matter until the Adkins action is terminated. West Virginia Code § 56-6-10 provides that:

> Whenever it shall be made to appear to any court, or to the judge thereof in vacation, that a stay of proceedings in a case therein pending should be had until the decision of some other action, suit or proceeding in the same or another court, such court or judge shall make an order staying proceedings therein, upon such terms as may be prescribed in the order. But no application for such stay shall be entertained in vacation until reasonable notice thereof has been served upon the opposite party.

W. Va. Code § 56-6-10; *see also Starcher v. United Fuel Gas Co.*, 113 W. Va. 397, 168 S.E. 383 (1933). "A stay of proceedings in a suit provided by W. Va. Code § 56-6-10 (1923) rests in the sound discretion of the court. To warrant the stay it must be essential to justice, and it must be that the judgment of decree by the other court will have legal operation and effect in the suit in which the stay is asked, and settle the matter of controversy in it." Syl. pt. 3, *State ex rel. N. River Ins. Co. v. Chafin*, 233 W. Va. 289, 758 S.E.2d 109 (2014) (quoting syl. pt. 4, *Dunfee v. Childs*, 59 W. Va. 225, 53 S.E. 209 (1906); syl. pt. 2, *State ex rel. Piper v. Sanders*, 228 W. Va. 792, 724 S.E.2d 763 (2012)).

Here, a stay is essential to justice, and resolution of the Adkins action will settle the matter in controversy here because it will definitively adjudicate the issues surrounding the formation and performance of the agreements between these parties. Defendant therefore asks that the Court stay this matter pending resolution of the claims in the Adkins action, should it not be inclined to dismiss the claims altogether. A stay would allow the Adkins court – whether it be the Circuit Court should the remand motion be granted or the federal district court should it be denied – to rule on the pending motions to dismiss and, should they be granted, preserve Riley's right to bring its own claims here. In similar circumstances, federal courts reluctant to dismiss claims in a second filed action often stay the second case. *See Pfizer Inc. v. Mylan Inc.*, No. 1:15-cv-4, 2015 WL 3903386 (N.D. W. Va. Apr. 24, 2015) (staying second filed suit upon finding first-to-file rule applicable); *Ace Property & Cas. Ins. Co. v. Specialty Logging, LLC*, No. 1:14-

cv-00944, 2015 WL 1422181 (D.S.C. Mar. 27, 2015) (staying second filed case presenting compulsory counterclaims, pending resolution of motions in first filed suit).

IV. Conclusion

Riley has filed claims arising out of the same contract that forms the basis of another pending action between these same parties. Defendant therefore asks that the Court dismiss these claims under Rule 13(a) because they are compulsory counterclaims in the Adkins action; or, in the alternative, stay this action pending resolution of the Adkins action.

Respectfully submitted,

Defendant
By Counsel.

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IN THE CIRCUIT COURT OF HARRISON COUNTY, WEST VIRGINIA

RILEY NATURAL GAS COMPANY,
A West Virginia corporation,

Plaintiff,

v.

Civil Action No. 16-C-365
Judge James A. Matish

BERRY ENERGY, INC.,

Defendant.

Certificate of Service

The undersigned hereby certifies that a true copy of the **Defendant's Motion to Dismiss Riley Natural Gas Company's Complaint for Breach of Contract and Declaratory and Monetary Relief, or in the Alternative to Stay** has been served via mail to the following, on this the 14th day of December, 2016:

Nicholas S. Preservati (WVSB # 8050)
SPILMAN THOMAS BATTLE, PLLC
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Counsel for Plaintiff

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